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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.,

Petitioner and Appellant,

vs.

DIGNITY HEALTH,

Respondent.

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

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

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

In Business & Professions Code section 809.2, subdivision (b), the Legislature articulated the requirements for hearing officers in physician peer review proceedings at privately owned hospitals. A hearing officer—who "has no part in the decisionmaking process"[1]—"shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote."[2] The "direct financial benefit from the outcome" standard is derived directly from "the common law fair procedure doctrine that preceded" the statute.[3] Section 809.2(b) is one part of a "comprehensive statutory scheme for the licensure of California physicians"[4] that "establishes minimum protections for physicians subject to adverse action in the peer review system."[5] Under this statutory standard, a hearing officer who might be hired for future work at the same or another hospital but would not gain a direct financial benefit from the outcome of the hearing does not have disqualifying financial bias. That was true of the hearing officer here, and his service as hearing officer did not deprive Sundar Natarajan, M.D. of fair procedure.

Natarajan's physician peers determined he was

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[1] *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 1271.
[2] Bus. & Prof. Code, § 809.2(b). Undesignated statutory references are to the Business & Professions Code.
[3] *El-Attar v. Hollywood Presbyterian Med. Ctr.* (2013) 56 Cal.4th 976, 988.
[4] *Mileikowsky*, 45 Cal.4th at 1267.
[5] *Id.* at 1268.

endangering patients at St. Joseph's Medical Center, and the St. Joseph's Medical Staff's Medical Executive Committee (MEC) recommended terminating his hospital privileges and medical staff membership. The decision-maker physician panel (Judicial Review Committee, or JRC)—with a hearing officer appointed to make evidentiary and other rulings—agreed, after 19 evidentiary trial-type sessions. The 10,000-page administrative record contained copious substantial evidence demonstrating persistent, uncorrected deficiencies in Natarajan's practice that "created a patient peril" at St. Joseph's.[6] The JRC issued a 36-page recommendation detailing the evidence of the problems with Natarajan's hospital practice. Following Natarajan's internal appeal, the St. Joseph's Hospital Community Board upheld the recommendation in a 30-page decision rejecting Natarajan's argument that the hearing officer was impermissibly biased, and terminated Natarajan's privileges and membership. The superior court made detailed foundational factual findings in a statement of decision—requested by Natarajan, including specifically for foundational facts underlying his unfair hearing claim (8-CT-2194-2196)—and independently determined the hearing was fair. The Court of Appeal affirmed.

Natarajan did not challenge the substantial evidence supporting the action against him. Nor did he assign error to any superior court finding in the statement of decision. Those administrative and judicial findings are therefore binding.[7]

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[6] Administrative Record ("PAR") PAR00210.

[7] *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443;

Instead, he argued the non-decision-maker hearing officer had an impermissible financial bias in favor of St. Joseph's.

Natarajan essentially concedes the statutory "direct financial benefit from the outcome" standard was not met. His brief does not discuss the controlling statute until page 63. Rather, he wants to jettison the statutory standard for a far broader disqualification rule, articulated in a case unrelated to physician peer review or non-decision-makers. In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, the Court held that an administrative *judge* hired by a government entity on an ad hoc basis to *decide* administrative cases had an impermissible financial bias because the same county might hire her for future work, giving her an incentive to rule for the county. Natarajan relies on *Haas* to speculate that because Dignity Health, the corporate owner of St. Joseph's and multiple other hospitals, *might* hire the hearing officer for future work at *other* hospitals, the hearing officer had a disqualifying motivation to cause Natarajan's peer physicians to rule against him.

Haas, however, is inapposite in the physician peer review setting for a host of reasons, including:

• peer review hearing officer financial bias is subject to a governing statutory standard; there was no governing statute in *Haas*;

• peer review hearing officers do *not adjudicate* the matters and are prohibited from doing so,[8] unlike the judge in *Haas* who

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Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 69-70.

[8] *Mileikowsky*, 45 Cal.4th at 1271.

decided the case before her;

• *Haas* was based on constitutional due process rules inapplicable to private hospitals, where "the controlling concept ... is fair procedure and not due process" and "whatever fair procedure rights [a physician] has arise from [the peer review statutes] and not from the due process clauses of the state and federal Constitutions";[9]

• the *Haas* judge's prospects for future employment were not speculative because the county testified it *intended* to hire her again; here, the hearing officer was *contractually ineligible* for future work at St. Joseph's for three years, a restriction *Haas* itself noted would "eliminate the risk of bias"[10]; and

• the *Haas* standard is unworkable in the physician peer review context, as it could require automatic disqualification of any hearing officer qualified to perform such work—thus quickly depleting the small pool of qualified candidates and delaying hearings while physicians who have been determined to threaten patient safety continue to practice in the hospital.

Natarajan relies on the single case applying *Haas* in the physician peer review context, *Yaqub v. Salinas Valley Memorial Healthcare System* (2005) 122 Cal.App.4th 474. *Yaqub*—which has never been applied in any published decision—failed to recognize the distinguishing features of *Haas* and overlooked the controlling hearing officer bias statute. The Opinion here

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[9] *Kaiser Found. Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 102 (citation omitted); *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278.

[10] *Haas*, 27 Cal.4th at 1037, fn. 22.

correctly "consider[ed] *Yaqub* to be a deviation from the strong current of precedent and therefore a 'derelict on the waters of the law' ...."[11]

In the physician peer review context, a speculative possibility of future employment at another hospital—whether or not owned by the same corporate entity—is not a "direct" financial benefit gained from the outcome—the required statutory standard. There is no support in the law for this extreme expansion of *Haas* Natarajan urges, even if *Haas* applied. A hearing officer supposedly motivated to favor a hospital to impress other hospital medical staffs for future work would have just as much motive to impress unrelated hospitals as affiliated ones, meaning the incentive to favor a hospital in a peer review hearing exists in every case and always requires disqualification. In *Haas*, the county was the *single source* of any potential future work.

Finally, as Natarajan never challenged the substantial evidence and findings against him, his procedural fairness arguments amount to harmless error. He never explains how the result would have been different had the hearing officer been precluded from working again for any Dignity Health-affiliated hospital. This Court has explained that in physician peer review matters, "a deviation from the mandated procedures is not 'prejudicial,' and thus does not warrant relief, unless the

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[11] *Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, 391 (citation omitted).

deviation is material."[12] Any claimed procedural error is not material where the substantive outcome—the conclusion that Natarajan's termination was reasonable and warranted—is supported by unchallenged substantial evidence.

Natarajan failed to meet the controlling standard articulated by the Legislature for requiring disqualification of a physician peer review hearing officer for purported financial bias.

II. STATEMENT OF THE CASE

A. Dr. Natarajan and St. Joseph's.

St. Joseph's is a general acute-care hospital in Stockton, California.[13] St. Joseph's was owned by Dignity Health, which owns 39 hospitals across California, Nevada, and Arizona.[14] Each hospital, including St. Joseph's, is separately licensed by state regulators and assigned its own Medicare provider number.[15] Under Dignity Health's corporate Bylaws, authority for hospital policies and procedures and medical staff matters is delegated to a Hospital Community Board at each hospital. (8-CT-2051-2052 ¶¶ 11.1, 11.3.[16]) St. Joseph's' Hospital Community

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[12] *El-Attar*, 56 Cal.4th at 991.

[13] <https://www.dignityhealth.org/central-california/locations/stjosephs-stockton>

[14] <https://www.dignityhealth.org/about-us/our-organization/mission-vision-and-values>

[15] <https://oshpd.ca.gov/facility-finder/>; <https://data.medicare.gov/Hospital-Compare/Hospital-General-Information/xubh-q36u/data>

[16] See Motion for Judicial Notice (MJN) 142-143. The Court of Appeal denied judicial notice of these Bylaws, stating "[t]he court generally does not take judicial notice of evidence that was not before the trial court." (MJN 179.) In fact, the Bylaws were

Board (HCB) is responsible for operations at St. Joseph's. (PAR01575 ¶ 1.2.B.)

Every licensed California hospital "shall have an organized medical staff responsible to the governing body for the adequacy and quality of the care rendered to patients" in the hospital. (Cal. Code Regs., tit. 22 § 70703(a).) A hospital's medical staff is an *independent and self-governing* body that exercises control over its own peer review. (§§ 2282(c), 2282.5; Cal. Code Regs., tit. 22, § 70701(a)(1)(D), (F).) At St. Joseph's, physician peer review is governed by the Bylaws of the St. Joseph's Medical Staff as well as California's statutory physician peer review scheme. (PAR01575; § 809 et seq.)

B. Natarajan's conduct justifying the recommendation to terminate his membership and privileges.

Natarajan is a hospitalist.[17] He joined the St. Joseph's Medical Staff in 2007. (PAR03750.) By 2011, the Medical Staff had concerns about Natarajan's practice, including his deficient medical recordkeeping practices, excessive length of patient stays, and misuse of consultants. (PAR00955-01004; PAR01013-43.) The Medical Staff's Bylaws set forth specific requirements for complete, timely submission of medical records. (PAR01669-

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submitted to the superior court, which denied judicial notice without explanation. (8-CT-2188.)

[17] A hospitalist is a physician with "core expertise to manage the clinical problems of the acutely ill hospitalized patient concentrating very specifically on prompt, complete attention to all patient care needs" including "safe transitioning of patient care within the hospital ... but also back from the hospital back into the community ...." (PAR02491:21-02492:8; PAR01705.)

1670 ¶¶ 8.1-8.2.) For hospitalists, the need for prompt record completion is especially pressing; hospitalists have responsibility for their patients only while they are hospitalized, and other doctors who take over need timely information to assess patients' status and care. (PAR02506:12-02508:3.) The Medical Staff repeatedly suspended and fined Natarajan for medical records deficiencies and warned him about his persistent substandard medical recordkeeping. Natarajan repeatedly acknowledged the problem. (PAR00972-974.)

But Natarajan did not change. Instead, he undertook to game the system by correcting thousands of medical record deficiencies hours before the deadline for suspension. On April 18, 2013, facing suspension because of mounting deficient records, Natarajan "completed" over 1,000 records between 3:49 a.m. and 10:04 a.m. On May 2, 2013, he completed another 750 deficiencies over six hours. On July 9-10, 2013, with a notice of suspension due to issue the next day, Natarajan made 3,292 entries over 33 hours. (PAR09448; PAR00191.)

A formal investigation into Natarajan's medical recordkeeping concluded:

> Dr. Natarajan has consistently failed to meet the Medical Staff's basic standards and requirements, and we believe that the deficiencies in his practice are non-remediable. This is because, as demonstrated by the facts, he cannot reasonably be expected to make the necessary improvements in his performance on a sustained basis, even if he were to be subjected to formal probation and close monitoring for a period of time. History has shown that any apparent improvements will not be genuine, nor will they continue after the special scrutiny subsides. Therefore, we recommend that his Medical Staff membership and clinical privileges be revoked.

(PAR00194-195 [citation omitted].)

Following several meetings to discuss the concerns, the MEC voted to recommend that Natarajan's Medical Staff membership be revoked and his privileges terminated. (PAR01386.) Natarajan received a Notice of Charges identifying six deficiencies in his practice justifying termination. (PAR00911.)

C. The hearing officer.

Natarajan requested a hearing to challenge the MEC's recommendation. (PAR00216.)

In physician peer review hearings, the factfinder is the JRC, "a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate." (§ 809.2(a); PAR01616 ¶ 9.4.D.) The JRC's role is to "resolve[] any conflicts in the evidence, determine[] its sufficiency, and determine[] the reasonableness of the recommended disciplinary action." (*Mileikowsky,* 45 Cal.4th at 1269.) Per the St. Joseph's Medical Staff Bylaws, a five-physician JRC was empaneled. (PAR02445:7-11.) Natarajan conducted voir dire. His challenges to each member were denied and he did not pursue them on appeal.[18]

"If a hearing officer is selected to preside at a hearing held

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[18] Thus, Natarajan's criticisms of the hearing officer's rulings on the challenges are irrelevant. (*Infra* fn. 44.)

before a panel, the hearing officer shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote." (§ 809.2(b).) The role of hearing officer is limited: he "has no part in the decisionmaking process and no authority to prevent the reviewing panel from reviewing the recommendation." (*Mileikowsky*, 45 Cal.4th at 1271.) The St. Joseph's Medical Staff Bylaws specifically describe the hearing officer's role:

> The hearing officer shall endeavor to assure that all participants in the hearing have a reasonable opportunity to be heard and to present relevant oral and documentary evidence in an efficient and expeditious manner, and that proper decorum is maintained. The hearing officer shall be entitled to determine the order of or the procedure for presenting evidence and argument during the hearing and shall have the authority and discretion to make all rulings on questions which pertain to matters of law, procedure or the admissibility of evidence that are raised prior to, during, or after the hearing.… The hearing officer should participate in the deliberations of the hearing committee and be a legal advisor to it, but the hearing officer shall not be entitled to vote.

(PAR01616-1617 ¶ 9.4E.)

A Dignity Health attorney contacted Robert Singer, an experienced peer review hearing officer, inquiring about his availability to serve as hearing officer for a hearing at St. Joseph's. (PAR00238-239.) Singer was subsequently contacted by a representative of St. Joseph's to confirm he was asked to serve. (PAR00240-241.) Under the Medical Staff Bylaws, the Medical Staff delegated its authority to appoint a hearing officer to St. Joseph's' president, and several weeks after the initial contact, the president appointed Singer. (PAR00238-241; PAR01616-17 ¶ 9.4.E.) Singer entered into an engagement letter

with Dignity Health. (Augmented Administrative Record ("AAR") 53.) The parties then expressly agreed Singer was prohibited from serving again as a hearing officer at St. Joseph's for three years. (PAR00248.) This restriction was documented in emails. (AAR60-61.) Dignity Health provided administrative billing support for St. Joseph's and paid Singer for his work on the Natarajan matter. (PAR00244-245, 266.)

Natarajan's counsel conducted voir dire of Singer. (PAR00220-296.) Singer responded to questions regarding his engagement by St. Joseph's for Natarajan's proceeding, work he had performed for other hospitals affiliated with Dignity Health, and income from that work. He explained his understanding that the St. Joseph's Medical Staff had hired him and that he was performing work for that entity, with limited administrative involvement of Dignity Health. (PAR00242-244.) He explained "it would be my position that if I were accepted and move forward as a hearing officer in this particular proceeding, that I would consider myself ineligible for participation on behalf of the facility for a three-year period absent a stipulation or mutual consent on the part of the attorneys who might handle the matter—any matter at St. Joseph's of Stockton ...." (PAR00248.)

Singer testified the medical staffs at different Dignity Health-affiliated hospitals also had engaged him as a hearing officer for past and pending peer review hearings. (PAR00262-266.) Singer explained he had served as a hearing officer with the same frequency for peer review hearings at Sutter Health hospitals over a 13-year period and "somewhat less" for hearings

at Kaiser hospitals. (PAR00268.)

Singer testified that the nature of his hearing officer work means he is "necessarily thrown into contact with people in the same arena …." (PAR00271.) Thus, he had known the MEC's attorney, Harry Shulman, for approximately 35 years, and had lunch with him "three or four times," mostly at "professional organizations." (PAR00270.) Singer went to Shulman's home once, 30 years prior, and they met for lunch once 20 years earlier. (PAR00270-271.)

Natarajan challenged Singer's appointment, arguing Singer should disqualify himself based on appearance of financial bias. Natarajan argued that, despite the three-year prohibition on Singer's employment at St. Joseph's, the possibility of service at other Dignity Health hospitals provided Singer with an impermissible temptation to favor the St. Joseph's Medical Staff in Natarajan's proceeding.

The statute and the St. Joseph's Medical Staff Bylaws provide "[c]hallenges to the impartiality of any member or hearing officer shall be ruled on by the presiding officer, who shall be the hearing officer if one has been selected." (§ 809.2(c); PAR01616-1617 ¶ 9.4.E.) Singer reviewed the entire record, considered substantial argument on the issue of his purported bias (PAR00278-291), and denied the request to disqualify himself, finding "I am satisfied that a factual showing has not been made, and there is no legal justification for a decision of disqualification under the circumstances." (PAR00290.)

D. The JRC hearing.

The JRC proceeding was conducted in 19 evidentiary sessions over eight months. Fourteen witnesses testified and 1,650 pages of exhibits were admitted. (PAR00182.) On June 4, 2015, the JRC issued a 36-page written recommendation with detailed findings supporting five of the six charges. (PAR09426-9461.) Natarajan has never challenged any of the JRC's findings.

Natarajan appealed the recommendation to the HCB, raising only a challenge to the hearing's fairness based on Singer's purported financial bias. Following briefing and a hearing, the HCB on October 24, 2015 issued its ruling adopting the JRC's recommendation as its final decision. The HCB explained:

> our thorough review of the record in this matter has not revealed, in our opinion, any substantive evidence of bias on the part of Mr. Singer. The hearing transcript of over one thousand pages reveals that Mr. Singer, an experienced hearing officer, was patient, even-handed in his rulings and that his decisions evidenced a careful analysis of the facts and proper application of the law. The question then becomes whether this multi-year peer review process by the medical staff should be reversed because of a strained application of the *Haas* and *Yaqub* principles. We do not come to that conclusion.

(PAR00204.) Effective November 11, 2015, Natarajan's Medical Staff membership was terminated. (PAR00182-212.)

E. The petition.

Natarajan petitioned the superior court for a writ of administrative mandamus to review the HCB's decision. (1-CT-1.) He did not argue the factual findings were unsupported by

substantial evidence.[19] The court allowed him to augment the administrative record with Singer's deposition testimony and documents. (2-CT-372.) The court considered extensive briefing, issued a detailed tentative ruling, heard oral argument, and (at Natarajan's request) issued a statement of decision affirming the HCB. (8-CT-2188; 9-CT-2513.) The statement of decision included numerous key findings on foundational facts supporting the court's independent conclusion that Singer was not impermissibly biased, including:

- the Medical Staff delegated to St. Joseph's its responsibility under its Bylaws for appointing hearing officers, and Singer was appointed "[p]ursuant to" that delegation (9-CT-2515:11-14; 9-CT-2516:7-10);
- Singer was and has always been appointed and hired as hearing officer by the medical staffs of the hospitals where he has served, "regardless of the accounting practices of the hospital's parent company" (9-CT-2515:20-23);
- "There is no evidence that Dignity Health is the entity that chooses hearing officers for the other medical staffs of the hospitals it owns, or even that Dignity Health would be the entity 'signing the paychecks' if Mr. Singer were selected again by another medical staff of another hospital Dignity Health owns." (9-CT-2517:18-22.)

Natarajan appealed, arguing only that the hearing was

[19] The unchallenged factual findings are final and binding. (*Johnson*, 24 Cal.4th at 69-70.) Nonetheless, Natarajan repeatedly and misleadingly refers to contrary "facts," such as his own excellence as a physician. (OBOM 16-17.)

unfair, never contending any superior court factual finding was unsupported by substantial evidence. The Court of Appeal affirmed, and published the Opinion on November 20, 2019. The Opinion held Natarajan failed to show the supposed speculative possibility of Singer's future employment at other Dignity Health hospitals established the "direct financial benefit from the outcome" to require disqualification.

III. STANDARD OF REVIEW

The Court reviews de novo the superior court's legal conclusion that Natarajan's hearing was fair. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442.) The Court reviews "foundational matters of fact" underlying that conclusion for substantial evidence—but Natarajan did not and still does not challenge those findings or the evidentiary support for them. (*Id.* at 1443 [quoting *Lewin v. St. Joseph Hosp. of Orange* (1978) 82 Cal.App.3d 368, 387].) Here, the superior court concluded in a detailed statement of decision that, "[b]ased on substantial evidence in the record, Mr. Singer did not stand to gain a 'direct financial benefit from the outcome' of the hearing under Section 809.2(b). Thus, his service as hearing officer does not violate fair procedure." (9-CT-2520:15-17.) "In administrative mandamus, where the trial court has properly exercised its independent judgment, the trial court's factual determinations are *conclusive on appeal* if supported by substantial evidence." (*Rosenblit*, 231 Cal.App.3d at 1443 [emphasis added].)

Here, under well-established rules, Natarajan waived any challenge that the conclusive findings—in the statement of

decision he requested—are not supported by substantial evidence. Where "the court filed a statement of decision and [appellant] does not contend the evidence is insufficient to support the trial court's findings, we are bound by the court's factual findings set forth in the statement." (*Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1612; *id.*, fn. 5 ["Further, we presume the record contains sufficient evidence to sustain each finding of fact."].) As one court explained:

> Since [appellant] is not challenging the sufficiency of the evidence, we will accept the facts the trial court found in its statement of decision and determine whether those factual findings support the judgment as a matter of law. In doing so, we keep in mind that where a statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the trial court's determination. We also keep in mind the well-settled principle that "'[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown....'"

(*City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1322-1323 [citations omitted; emphasis in original].)

Natarajan seeks to use the statement of decision procedure as a one-way street that he is free to ignore because he did not like what the court found in that document. But an appellant cannot ask for a statement of decision and then ignore it by claiming that the issue summons purely de novo review detached from the underlying facts that have been conclusively decided against him.

IV. ARGUMENT

A. Physician peer review.

"Hospitals in this state have a dual structure, consisting of an administrative governing body, which oversees the operations of the hospital, and a medical staff, which provides medical services and is generally responsible for ensuring that its members provide adequate medical care to patients at the hospital." (*El-Attar*, 56 Cal.4th at 983.) "[T]he 'primary purpose of the peer review process' codified in [section 809 et seq.] 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."'" (*Id.* at 988 [citations omitted]; § 809(a)(6); *id.,* § 809.05(d) ["A governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care."].)

Natarajan largely disregards this "primary purpose," focusing instead on physicians' procedural rights. However, "[a] physician's right to pursue his livelihood free from arbitrary exclusionary practices must be *balanced* against other competing interests: the interest of members of the public in receiving quality medical care, and the duty of the hospital to its patients to provide competent staff physicians. Consequently, disciplinary procedures involving physicians have developed *primarily from a protective* rather than a punitive purpose." (*Rhee v. El Camino Hosp. Dist.* (1988) 201 Cal.App.3d 477, 489 [emphasis added; citation omitted]; *Medical Staff of Sharp Memorial Hospital v.*

Superior Court (2004) 121 Cal.App.4th 173, 181-182 ["[T]he overriding goal[] of the state-mandated peer review process is protection of the public and ... while important, physicians' due process rights are subordinate to the needs of public safety."].)

California's statutory scheme "establishes minimum protections for physicians subject to adverse action in the peer review system." (*Mileikowsky*, 45 Cal.4th at 1268.) Medical staff bylaws must provide at least the hearing procedures comporting with section 809 et seq. (§ 809(a)(8).) Section 809.2(a) requires that the medical staff's "peer review body"—not the hospital or its corporate owner—determines how a peer review hearing will be conducted, including whether it will be before an arbitrator or a peer review panel with a hearing officer. The medical staff, a self-governing body, may delegate some of its responsibilities, including to hospital administration. (§ 809(b); *El-Attar*, 56 Cal.4th at 989.)

Physician peer review at private hospitals requires that physicians receive "fair procedure," not "due process": In a "private institution[], whatever fair procedure rights [a physician] has arise from section 809 et seq. and not from the due process clauses of the state and federal Constitutions." (*Kaiser*, 128 Cal.App.4th at 102; *Powell v. Bear Valley Community Hospital* (2018) 22 Cal.App.5th 263, 274 [same].) Private hospitals must provide only "rudimentary procedural and substantive fairness." (*Ezekial*, 20 Cal.3d at 278; *Ascherman v. Saint Francis Mem'l Hosp.* (1975) 45 Cal.App.3d 507, 511 [peer review decisions "must be rendered pursuant to minimal requisites of fair procedures

required by established common law principles"].) "Fair procedure" in this context consists of "adequate notice of the administrative action proposed or taken by the group or institution, and a reasonable opportunity to be heard." (*Tiholiz v. Northridge Hosp. Foundation* (1984) 151 Cal.App.3d 1197, 1202.) This Court has explained:

> The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial ... nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an [affected party] to present his position. As such, this court should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising a method which provides an [affected party] adequate notice of the "charges" against him and a reasonable opportunity to respond.

(*Pinsker v. Pacific Coast Soc'y of Orthodontists* (1974) 12 Cal.3d 541, 555-556 (*Pinsker II*); *Anton v. San Antonio Commun. Hosp.* (1977) 19 Cal.3d 802, 829.)

B. The statute sets the standard for disqualifying a hearing officer for financial bias.

1. The Legislature has declared the standard for hearing officer financial bias.

An impartial decision-maker is a key requirement of fair procedure. (*El-Attar*, 56 Cal.4th at 988.) A hearing officer appointed to preside over a peer review hearing is not a decision-maker: the hearing officer "shall not be entitled to vote" (§ 809.2(b)) and "has no part in the decisionmaking process ...." (*Mileikowsky*, 45 Cal.4th at 1271; *infra* Part IV.B.4.)[20]

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[20] Except for *Yaqub* (Part IV.C.2.d, *infra*), the cases cited herein

Nonetheless, the hearing officer will be disqualified for impermissible financial conflict of interest, and the Legislature has defined the applicable standard: a hearing officer "shall gain no direct financial benefit from the outcome" of the proceeding. (§ 809.2(b).)

The private hospital context implicates no constitutional due process concerns (*infra* Part IV.B.3), so it is the Legislature's prerogative to identify and define the circumstances requiring disqualification. (*Natarajan*, 42 Cal.App.5th at 391 ["Absent the more exacting established constrictions of constitutional due process in the context of pecuniary interest, the Legislature can frame the criteria for impartiality of an adjudicator as it wishes for purposes of the fair procedure a private entity must provide ..."]; *Haas*, 27 Cal.4th at 1033 [where the Constitution is not implicated, it is "appropriate[]" to determine adjudicator bias "by reference to state statutes and regulations"]; *Andrews v. Agricultural Labor Rel. Board* (1981) 28 Cal.3d 781, 793, fn. 5 [observing "[i]n California, these situations [where the probability of actual bias is so great as to require disqualification of a decision-maker] are codified .... 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"].)[21] Natarajan has never

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and in Natarajan's brief discuss financial bias of *decision-makers.* (Cf. *Powell*, 22 Cal.App.5th at 280-281 [rejecting charge that hearing officer improperly acted as advocate].)

[21] Natarajan argues the financial bias standard for physician peer review hearing officers should be the same as those applicable to

claimed the Legislature violated the Constitution when it enacted the section 809.2(b) standard, which would be the logical extension of his argument.

This Court has framed the question here as whether hearing officers may be disqualified for "appearance of bias" or only "actual bias." The Legislature's "direct financial benefit from the outcome" standard is consistent with longstanding law in the peer review context that only (i) *actual* bias or (ii) a "'*practical probability*' of unfairness"—*i.e.*, facts showing the probability of bias is too high to be tolerable—disqualifies a hearing officer from serving in a peer review hearing. (*Rhee*, 201 Cal.App.3d at 492 [emphasis added; citation omitted].) The "gain no direct financial benefit from the outcome" standard encompasses both actual bias and a narrow, limited, and specific "appearance of bias" that the Legislature determined was appropriate for these circumstances.[22]

Natarajan incorrectly argues the Opinion imposed an

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judges and private arbitrators—but the Legislature has created specific statutes for those scenarios as well (Code Civ. Proc., §§ 170-170.9, 1281.9), which differ from the peer review standard. Moreover, the judge and arbitrator standards apply to *decision-makers*, which a physician peer review hearing officer is not. (See *infra* Part IV.B.4.)

[22] Natarajan argues *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1115, incorrectly stated California law by saying actual bias is required to show an unfair hearing. (*Ibid.* [citing *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549]; OBOM 41-42.) *Weinberg* did not involve alleged pecuniary conflict, and thus reiterated the common-law rule. *Weinberg* also did not cite section 809.2(b); the alleged bias was of the appeal review board,

"actual bias" standard, but that misreads the holding. The Opinion construed section 809.2(b)'s standard as requiring "demonstrated unacceptable *risk* of bias as the result of a tangible interest (as opposed to an expectancy) …."[23] (*Natarajan*, 42 Cal.App.5th at 391 [emphasis added].) This is consistent with the rule that alleged "prejudice must be ... sufficient to impair the judge's impartiality so that it appears *probable* that a fair trial cannot be held" (*Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 911 [citation omitted; emphasis added]) and the rule that a "mere" appearance of bias is insufficient, absent a factual showing to establish a "demonstrated unacceptable risk of bias." (*Andrews*, 28 Cal.3d at 792 ["the threshold determination [whether facts demonstrate bias] ... has never been satisfied by an allegation of the mere appearance of bias"]; *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (2009) 62 Cal.App.4th 1123, 1142 ["bias in an administrative context can never be implied, and the mere suggestion or appearance of bias is not sufficient"].) Even *Haas* agreed that in questions of non-financial bias, adjudicators "have in effect been afforded a presumption of impartiality." (*Haas*, 27 Cal.4th at 1025.)

A particular set of facts may show "the probability or likelihood of the existence of actual bias is so great that

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not the hearing officer or adjudicatory panel.

[23] The Opinion contrasted the constitutional due process standard of "appearance of a reasonable likelihood of possible bias" with the fair procedure standard requiring a showing of facts supporting a reasonable likelihood of bias. (*Natarajan*, 42 Cal.App.5th at 390 & fn. 11.) There is nothing misleading, confusing, or cryptic about footnote 11. (OBOM 57.)

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." (*Andrews*, 28 Cal.3d at 792, 793, fn. 5.) In section 809.2(b), the Legislature established that only facts showing a peer review hearing officer would gain a direct financial benefit from the outcome support disqualification.

Thus, under section 809.2(b), a physician cannot disqualify a hearing officer for financial bias absent proof of facts demonstrating the hearing officer would "gain [a] direct financial benefit from the outcome." "Gain" means "to acquire or get possession of usually by industry, merit, or craft" or "to cause to be obtained or given"; "direct" means "stemming immediately from a source."[24] The Legislature's use of "gain" and "direct" strongly suggests the Legislature intended and understood that a disqualifying financial benefit is *immediate* and *actual*, derived *directly* by the particular hearing officer from the outcome of the hearing at issue, not an indirect and speculative future benefit that an "average" (*Haas*, 27 Cal.4th at 1032) hearing officer might anticipate somewhere down the road.

Proof of direct financial benefit from the outcome requires disqualification of a hearing officer under section 809.2(b). A physician may challenge a hearing officer as biased for some other reason under subdivision (c). The hearing officer decides such a challenge, and disqualification cannot be based on mere

[24] <https://www.merriam-webster.com/dictionary/gain>; <https://www.merriam-webster.com/dictionary/direct>

appearance or suggestion of bias. (*Rhee*, 201 Cal.App.3d at 492; *Hongsathavij*, 62 Cal.App.4th at 1142.) If subdivision (c) permitted disqualification for mere appearance of bias, it would render subdivision (b)'s "direct financial benefit from the outcome" standard superfluous. (*Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 15 [rejecting broad interpretation of statutory provision that would render superfluous a more specific provision].)[25]

Natarajan implicitly concedes Singer gained no direct financial benefit from the outcome as required by the statute, by not discussing section 809.2(b) until page 63 of his brief. Instead, he urges a broader blanket disqualification standard based on common law and/or the Constitution that would eliminate any hearing officer who *might potentially* be hired for future work at an affiliated hospital. No authority supports that result.[26] The

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[25] In 2009, the California Medical Association (CMA), which sponsored the original legislation (*infra* Part IV.B.2.a), sponsored Assembly Bill No. 120, including provisions relating to hearing officers. CMA explained "[t]he bill ... guarantees fairness in panel hearings by specifying the qualifications and powers of hearing officers" and by "requir[ing] that hearing officers be free from conflicts of interest and sufficiently qualified to lead these quasi-judicial hearings." (MJN 122.) The proposed legislation would have added to section 809.2(b) a requirement that hearing officers "shall disclose all actual and potential conflicts of interest within the last five years reasonably known to the hearing officer." (MJN 92.) The bill did not become law. (MJN 64.) The Court of Appeal denied Dignity Health's motion for judicial notice of legislative history excerpts from this bill and Senate Bill No. 1211, stating they "are not necessary to resolution of the issues before the Court." (MJN 182.)

[26] There is nothing inherently inadequate about limiting

Legislature could have stated Natarajan's black-and-white disqualification rule in the statute, providing that a hearing officer must agree not to accept future work from affiliated hospitals to pass the no-direct-financial-benefit requirement to serve. Rather than mandating disqualification of hearing officers without restrictions on future work, the Legislature provided a statutory procedure to evaluate possible hearing officer financial bias through voir dire, and it even gave the hearing officer the authority to rule on challenges to his own impartiality.

Natarajan argues Dignity Health's interpretation of section 809.2(b) would require disqualification only where the hearing officer is a direct competitor of the physician, *i.e.*, virtually never, because hearing officers are attorneys who do not compete with physicians. This assumes too much. The statute does not require a hearing officer to be an attorney (although CMA's Model Bylaw does, MJN 166). The statute is broad enough to encompass physicians, who might meet the "direct financial benefit" standard if, for example, they compete with the litigant doctor.

2. The statutory standard is fully consistent with common-law fair procedure.

In enacting section 809 et seq., the Legislature codified and "supplanted" common-law procedure. (*Natarajan*, 42 Cal.App.5th

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disqualifying hearing officer financial bias to direct financial benefit from the outcome. The Health Care Quality Improvement Act (HCQIA), the federal peer review law, states minimum procedural standards that are "deemed" adequate for fair peer review hearings. (42 U.S.C. § 11112(b).) Under HCQIA, a hearing officer may serve unless he or she is "in direct economic competition with the physician involved," a more limited

at 389.) The Opinion correctly concluded it was unnecessary to decide whether the statute "fully superseded" the common law. (*Ibid.*) The statutory rule on financial bias is entirely consistent with the pre-existing common law from which it was derived, as discussed *infra.* (*Hackethal v. California Medical Ass'n* (1982) 138 Cal.App.3d 435, 443; *Applebaum v. Board of Directors of Barton Memorial Hospital* (1980) 104 Cal.App.3d 648, 657.)

a. Section 809.2(b) codified and replaced common-law rules regarding hearing officer bias.

Until 1989, only the common law of fair procedure governed physician peer review at private, non-governmental hospitals. (*Ezekial*, 20 Cal.3d at 278; *Tiholiz*, 151 Cal.App.3d at 1202.)

In 1989, CMA, which represents the interests of physicians, sponsored legislation intended partly to codify and clarify minimum fair procedure requirements to ensure peer review hearings were fair to physicians.[27] A legislative report on Senate Bill No. 1211 noted "CMA argues strongly that these procedures [in the statute] will prevent abuse of the peer review process .... " (MJN 53.) CMA argued "SB 1211 would *establish minimum guidelines* which would make for a more certain, defined process

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standard. (*Id.* § 11112(b)(3)(A)(ii).)

[27] Section 809.2(b) originally did not include the "direct financial benefit from the outcome" language. (MJN 34.) That language surfaced in an amendment (MJN 43), which would have been superfluous if the standard under subdivision (c) were open-ended. (*Doe v. Saenz* (2006) 140 Cal.App.4th 960, 985-986 [amendment to statute to add categories of exempt crimes would have been unnecessary if unamended statute already included those crimes].)

of peer review, encouraging information to be fully and fairly aired." (MJN 60 [emphasis added].) CMA requested, *and got*, the "direct financial benefit from the outcome" standard to address its concerns that the peer review process be fair to physicians.[28]

In enacting section 809, the Legislature codified the fair procedure principles applicable to physician peer review at private hospitals. (*Mileikowsky*, 45 Cal.4th at 1267.) Section 809 effectively replaced certain open-ended and generic common-law requirements of "fair procedure" with *specific minimum* procedures required in all private hospital peer review proceedings. (Michael Asimow et al., Cal. Practice Guide: Administrative Law (Rutter Grp. 2019) § 12:65 ["Detailed statutes have supplanted the common law right to fair procedure for physicians and other health care professionals subjected to adverse action through private hospital peer review"]; *Mileikowsky*, 45 Cal.4th at 1268 [in section 809 et seq., the Legislature "*establishe[d]* minimum protections for physicians subject to adverse action in the peer review system"] [emphasis added].) The statute is "part of a *comprehensive* statutory scheme for the licensure of California physicians ...." (*Id.* at 1267 [emphasis added].) Thus, the statute "*defines* what constitutes minimum due process requirements for the review process" and it "mandat[es] strict compliance with the procedures outlined." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th

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[28] CMA's Model Bylaws include the identical standard. (MJN 167.)

607, 622 [emphasis added]).

Natarajan disagrees that the statute *supplanted* common law. (OBOM 52-55.) But the statutory scheme is "comprehensive" (*Mileikowsky*, 45 Cal.4th at 1267), covering the entire subject of peer review hearing officers' bias and explicitly setting forth the required minimum qualifications. As the statute "establishes" and "defines" the "comprehensive" "minimum" requirements, there is no room for other sources, including old or new common-law cases, to heighten or lower any of those minimum legislative requirements. Where the statute imposes a specific procedure, requirements in excess of the statutory minimum come not from the common law, but from the medical staff bylaws of the particular hospital, which may provide additional or more protective procedures. (§ 809.6(a) ["The parties are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with" the specific procedures mandated by the code]; *El-Attar*, 56 Cal.4th at 988.)

Natarajan argues that *El-Attar* shows the statute did not supplant common law, because the Court held the common-law harmless error doctrine applies to peer review under section 809, which does not mention the subject. (OBOM 52-55.) Applying a common-law rule where the statute is silent does not impose a rule different from what the statute plainly says. (*El-Attar*, 56 Cal.4th at 991.)[29]

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[29] In *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, the Court rejected the hospital's argument that the common-

b. The statutory standard is derived from and fully consistent with pre-existing common-law fair procedure.

Whether section 809.2 supplanted the common-law bias standard ultimately is irrelevant. Not only did no case (until *Yaqub* in 2004) purport to state a common-law disqualifying bias standard for peer review hearing officers, but the statutory standard is virtually identical to that articulated in the common law for decision-makers. (*Natarajan*, 42 Cal.App.5th at 391 [noting "the statutory restatement of the principles of fair procedure"].) It also is identical to the language in section 809.2(a). Although applicable to two discrete types of participants in peer review hearings, the meaning of the virtually identically worded standard is presumptively the same. (*In re A.N.* (2020) 9 Cal.5th 343, 363 ["[W]hen the same word appears in different places within a statutory scheme, courts generally presume the Legislature intended the word to have the same meaning each time it is used."] [citation omitted].)

The Legislature's choice of the words "direct financial benefit from the outcome" indicates a deliberate effort to incorporate the existing common-law standard into the statute. The legislative history of section 809[30] cites *Hackethal*, 138 Cal.App.3d 435, a physician disciplinary case involving a private organization decided under common-law fair procedure.

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law exhaustion requirement still applied after the Legislature amended Health & Saf. Code, section 1278.5. (*Fahlen*, 58 Cal.4th at 683.)

[30] MJN Ex. 1 is a disk containing searchable versions of the legislative histories of Sen. Bill No. 1211 and Assem. Bill No. 120.

Hackethal did not involve financial bias. Rather, the physician claimed his hearing did not meet fair procedure standards in other respects. (*Id.* at 443-445.)

The court specifically noted the common-law requirement that "[b]iased decisionmakers are impermissible and the probability of unfairness is to be avoided." (*Id.* at 442.) It explained:

> Disqualification should occur if there is actual bias. *Disqualification may also be necessary if a situation exists under which human experience teaches that the probability of actual bias is too high to be constitutionally tolerable.*[31] [¶] *Categories have been identified where the probability of actual bias by a panel member is too high.* Those categories include: (1) a member has ***a direct pecuniary interest in the outcome*** ...

(*Id.* at 443 [emphasis added].)[32] Other common-law cases existing at the time state the same standard. (See, e.g., *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 529 [citing *Hackethal*].)

As "financial" means "pecuniary," the Legislature likely intended section 809.2 to codify the established standard for financial bias articulated in *Hackethal*, cited in the legislative

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[31] Despite the word "constitutionally," *Hackethal* repeatedly noted private organizations apply fair procedure, not constitutional due process. (*Id.* at 441-442; *infra* Part IV.B.3.)

[32] These categories demonstrate the very limited scope of the common-law "appearance of bias" standard. The others are: "(2) a member has been the target of personal abuse or criticism from the person before him; (3) a member is enmeshed in other matters involving the person whose rights he is determining; (4) a member may have prejudged the case because of a prior participation as an accuser, investigator, fact finder or initial decisionmaker." (*Ibid.*)

history. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060 ["if a term known to the common law has not otherwise been defined by statute, it is assumed that the common law meaning was intended"].)

Natarajan relies on *Applebaum*, on which *Hackethal* also relied. Like *Hackethal*, *Applebaum* involved a private organization but did not involve a financial bias claim.[33] Its sole statement relating to financial bias is again consistent with the standard the Legislature would later choose for the statute: "The factor most often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members." (*Applebaum*, 104 Cal.App.3d at 657.) As authority, *Applebaum* cited *American Motor Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983, a constitutional due process case invalidating the decision of a legislatively mandated review board due to the "economic stake in every franchise termination case that comes before" the decision-maker state agency board members. *American Motor Sales* in turn relied on constitutional due process cases referencing a pecuniary benefit standard phrased in terms of directness or substantiality. (*Tumey v. Ohio* (1927) 273 U.S. 510 [mayor/judge received additional payment for each case in which he found the defendant guilty]; *Ward v. Village of Monroeville* (1972) 409 U.S.

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[33] The procedural unfairness in *Applebaum* arose from the overlapping functions of persons involved in investigating the doctor's conduct and deciding his case. In section 809.2(a), addressing bias of members of JRC adjudicatory panels, the Legislature prohibited the overlapping functions that led to the

57 [mayor/judge's town received additional revenues from fines he levied]; *Gibson v. Berryhill* (1973) 411 U.S. 564 [board had financial stake in disputes involving license revocation of board members' competitors].)[34] To the extent these constitutional cases applied something less stringent than a "direct" financial benefit standard, the Legislature presumably considered and rejected their formulations for the non-constitutional context of the statute by choosing the word "direct."[35] (*People v. Yartz* (2005) 37 Cal.4th 529, 538 ["The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence,

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unfairness in *Applebaum*.

[34] See also *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 884, which Natarajan cites as a "more recent[]" application of *Tumey*. (OBOM 29.) *Caperton* also involved a government entity—a state appellate court—subject to due process standards, as well as a direct financial interest, where a party before the court had made massive contributions to the election campaign of one justice. (Cf. *Today's Fresh Start v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 217 [applying *Tumey* and finding no due process violation where adjudicators would obtain no personal financial benefit].)

[35] Natarajan argues the court should have looked to common-law standards in *post*-1989 case law to inform its interpretation of the earlier-enacted statute. (OBOM 58-59.) However, post-enactment standards cannot shed light on what the Legislature intended the statute to mean. Neither *Fahlen* nor *El-Attar* relied on post-enactment cases to interpret a statute. *El-Attar* cited cases illustrating how the Court has applied the harmless error rule under common-law fair procedure, observing the statute had not modified that rule. (*El-Attar*, 56 Cal.4th at 990-991.) In *Fahlen*, the Court reviewed its own analyses of other statutes to analogize to the statute at issue. (*Fahlen*, 58 Cal.4th at 676-678.) The Opinion here cited post-1989 cases not to show what the statute means, but to show what the common-law standard requires. (*Natarajan*, 42 Cal.App.5th at 390, fn. 11.)

and to have enacted or amended a statute in light thereof."] [citation omitted].)

3. Constitutional "due process" standards do not apply to private hospitals.

Natarajan is wrong to argue constitutional due process principles should govern the analysis of whether a peer review hearing officer at a private hospital has a disqualifying financial conflict of interest.

First, this Court has made clear that private hospitals are *not governed* by the constitutional doctrine of due process. (*Pinsker II*, 12 Cal.3d at 550, fn. 7; *Miller v. Eisenhower Med. Ctr.* (1980) 27 Cal.3d 614, 627, fn. 13 ["of course, we by no means declare that ... 'rules for staff admission applicable to public hospitals apply equally to private hospitals'"]; see also *Kaiser*, 128 Cal.App.4th at 102; *Powell*, 22 Cal.App.5th at 274.)

Second, this Court has made clear that the distinction between due process and fair procedure in this context is meaningful. (*Pinsker II*, 12 Cal.3d at 550, fn. 7 ["[i]t is *important* to note that the legal duties imposed on defendant organizations arise from the common law rather than from the Constitution as such"] [emphasis added]; see also *Anton v. San Antonio Commun. Hosp.* (1982) 132 Cal.App.3d 638, 653-654 ["in concluding that hospital staff membership decisions of private hospitals must be rendered pursuant to minimal requisites of fair procedure required by established common law principles, our high court has been *meticulously consistent* in pointing out that the requirement does not derive from the constitutional guarantees of due process of law but, rather, from established common law

principles of fairness"] [citations and internal quotation marks omitted; emphasis added]; *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 317 ["The right of fair procedure ... *should not be confused* with constitutional 'due process.'"] [emphasis added].)

Natarajan cites cases saying "[t]he distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual[.]" (OBOM 48 [citing, e.g., *Applebaum*, 104 Cal.App.3d at 657].) But this Court has not characterized the difference as merely a nonsubstantive matter of "origin," explaining that "in describing defendant [private] associations' obligations, the 'due process' concept is *applicable only in its broadest, nonconstitutional connotation*." (*Pinsker II*, 12 Cal.3d at 550, fn. 7 [emphasis added; citation omitted].)

Third, equating due process with fair procedure would render superfluous the Legislature's express directive that section 809 et seq. *not* apply to peer review of physicians at California's *public* hospitals, where "due process of law" applies.[36] (§ 809.7; *Kaiser*, 128 Cal.App.4th at 102, fn. 15 [citing section 809.7 and distinguishing between the process required at private and government-owned hospitals].)[37]

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[36] Courts do not "construe statutory provisions so as to render them superfluous." (*Imperial Merchant Servs. v. Hunt* (2009) 47 Cal.4th 381, 390 [citation omitted].)

[37] Natarajan dismisses *Kaiser* an exhaustion case (OBOM 48-49) but that court analyzed a "due process exception" to exhaustion. (*Kaiser*, 128 Cal.App.4th at 101.) Natarajan's counsel conceded *Kaiser*'s relevance to the issue here, having petitioned for review of *Kaiser* on the ground it conflicted with *Yaqub*. (2005 WL

Fourth, similarly, interpreting constitutional due process and fair procedure requirements concerning hearing officer financial bias to be identical would render section 809.2(b) superfluous. A "direct financial benefit from the outcome" would fall within the broader constitutional requirements, obviating any need for the Legislature to enact a statute articulating only one sliver of a larger set of applicable financial bias standards.

Fifth, due process applies only to *state action*. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7(a).) Private hospitals are not state actors subject to the Constitution or to federal claims under 28 U.S.C. § 1983. (*Julian v. Mission Commun. Hosp.* (2017) 11 Cal.App.5th 360, 396; *Gill*, 199 Cal.App.3d at 903 ["federal cases … have held that actions of a private hospital in medical staff proceedings … are not sufficiently involved with the state or federal governmental authority to qualify as 'state action' that is subject to the procedural due process requirements of the United States Constitution"]; *McMahon v. Lopez* (1988) 199 Cal.App.3d 829, 837-838 [neither state licensing and regulation of hospitals nor receipt of federal funds establishes state action].) The necessary implication is that persons dealing with private actors may have fewer protections than those dealing with state actors, but that does not render the distinction impermissible. The constitutional due process requirement "erects no shield against merely private conduct, however discriminatory or wrongful." (*Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 276 [quoting *Shelley v. Kraemer* (1948) 334 U.S. 1, 13], superseded by

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2396394, at *2.)

statute on other grounds.)

Natarajan argues private hospitals conducting peer review are state actors subject to due process because a hospital peer review hearing serves the public interest and qualifies as an "official proceeding" under the anti-SLAPP law. (Code Civ. Proc., § 425.16; OBOM 31-32, 71-72 [citing *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192].) But if the "public" nature of private hospital peer review demanded treating hospitals as government agencies subject to constitutional due process, the above cases would have been decided differently. Instead, the baseline requirement of fair procedure arises from the quasi-public nature of the enterprise. (*Pinsker II*, 12 Cal.3d at 549-552.) An entity that is wholly private, unlike a hospital that serves the public, is not subject even to fair procedure requirements. *Pinsker* recognized the public nature of private hospital peer review, yet explained it did not implicate constitutional due process. (*Id.* at 550, fn. 7; *Pinhas v. Summit Health, Ltd.* (9th Cir. 1989) 894 F.2d 1024, 1034.) Moreover, this Court has considered the fact that private hospital peer review decisions are subject to judicial review under the mandamus laws—one of the bases of the *Kibler* decision—and nonetheless clearly held that minimal fair procedure, not due process, applies. (*Anton*, 19 Cal.3d at 815-816; *Kibler*, 39 Cal.4th at 200.)

Sixth, "it must be emphasized that this is not a criminal setting, where the confrontation is between the state and the person facing sanctions. Here the rights of the patients to rely upon competent medical treatment are directly affected, and

must always be kept in mind. An analogy between a surgeon and an airline pilot is not inapt; a hospital which closes its eyes to questionable competence and resolves all doubts in favor of the doctor does so at the peril of the public." (*Goodstein v. Cedars-Sinai Med. Ctr*. (1998) 66 Cal.App.4th 1257, 1266 [quoting *Rhee*, 201 Cal.App.3d at 489]; cf. *Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 157 ["revocation or other similar disciplinary proceedings involving [physician] licensees are not for the purpose of punishment but primarily to protect the public served by the licensee employed by a hospital.... So long as a fair hearing is provided, in disciplining or suspending those who do not meet its professional standards, the hospital should not be hampered by formalities not required by its bylaws nor by due process considerations."].)

Physicians at private hospitals subject to "fair procedure requirements" receive only "rudimentary procedural and substantive fairness." (*Ezekial*, 20 Cal.3d at 278.) Notice of the charges and the right to a hearing are required. (*Pinsker II*, 12 Cal.3d at 553.) Both fair procedure and due process require fairness and an impartial decision-maker. (*Natarajan*, 42 Cal.App.5th at 389 ["[t]here is a core protection even under fair procedure of an impartial decider"].)

No case has explained the *practical* significance of the fair procedure/due process distinction in the context of claimed financial bias of non-adjudicator hearing officers.[38] But fair

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[38] Cases suggest procedural differences. Decisions partially supported by hearsay do not violate fair procedure. (*Cipriotti*,

procedure contemplates a less formal, more flexible scheme than due process, in recognition of the intraprofessional nature of peer review proceedings. (*Pinsker II*, 12 Cal.3d at 555-556; MJN 168 [CMA Model Bylaw stating "the hearing officer shall endeavor to promote a less formal, rather than more formal, hearing process and also to promote the swiftest possible resolution of the matter, consistent with the standards of fairness set forth in these bylaws"].) When establishing "direct financial benefit from the outcome" as the disqualification standard for peer review hearing officers, the Legislature may have understood a hearing officer is optional, a hearing officer cannot decide a matter, and the pool of experienced hearing officers is limited. To the extent the Legislature's section 809.2(b) standard differs from a constitutional standard, Natarajan has never argued the statute is unconstitutional or the Legislature lacked the power to act.

4. Peer review hearing officers are not decision-makers.

The case law concerning financial bias focuses on bias of administrative *decision-makers*, which hearing officers in peer review proceedings are not. No reported cases involve claims of hearing officer financial bias, besides *Yaqub* and this case, likely because peer review hearing officers have virtually no ability to influence the outcome of a case. Thus, there is no need to disqualify a hearing officer for an interest that falls short of a

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147 Cal.App.3d at 155, fn. 2.) A rule "rendering representation by counsel a matter within the discretion of the judicial review committee [] is not offensive to the standard of 'minimal due process' which is applicable in proceedings of this kind." (*Anton*,

"direct financial benefit from the outcome."

Section 809.2(b) permits, but does not require, appointment of a hearing officer to preside at a peer review hearing. The statute prohibits hearing officers from acting as prosecutor or advocate and from voting. (*Mileikowsky*, 45 Cal.4th at 1269.) Hearing officers' duties include making rulings on the relevance of evidence (§ 809.3(a)(4); *Powell*, 22 Cal.App.5th at 280), discovery and requests for information (§ 809.2(d); *Powell*, 22 Cal.App.5th at 280), and requests for continuances. (*Id.*, § 809.2(d), (g).) A hearing officer may "impose any safeguards the protection of the peer review process and justice requires." (§ 809.2(d).) A hearing officer must have "no part in the decisionmaking process" and may not prevent panel members from reviewing the recommendation regarding privileges or membership. (*Mileikowsky*, 45 Cal.4th at 1271.) A hearing officer may not dismiss the proceeding for lack of evidence or otherwise eliminate the JRC's role in deciding the merits. (*Id.* at 1269, 1272.) If particular medical staff bylaws grant a hearing officer greater powers (§ 809.6(a)), then the medical staff voted for that provision. The St. Joseph's Medical Staff Bylaws state the hearing officer "should" participate in the deliberations (PAR01616-17 ¶ 9.4E); and CMA's Model Bylaws permit the hearing officer to participate in the deliberations if requested by the JRC. (MJN 168.)

While a hearing officer's procedural and evidentiary rulings may have some effect on how the case is ultimately decided, a

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19 Cal.3d at 827.)

jury trial is the same; the judge makes such rulings but does not decide the case. (*Natarajan*, 42 Cal.App.5th at 387 [citing *Mileikowsky*, 45 Cal.4th at 1269].) The hearing officer in most physician peer review cases is *not* analogous to a judge in a bench trial, because medical staff hearings involve a separate decision-making panel that does not include the hearing officer. (§ 809.2(a), (b); *Mileikowsky*, 45 Cal.4th at 1264 ["The merits are determined by the trier of fact, often a panel drawn from other of the physician's peers"].)

Medical staffs typically select and hospitals typically pay hearing officers, as the superior court found occurred here. That does not support any inference of conflict or impropriety. In *El-Attar*, the Court recognized that hospitals and medical staffs often select and pay panels and hearing officers. Yet the Court (citing *Haas*) saw "no basis to presume that [peer] review hearing participants chosen by the governing body [upon delegation by the medical staff] necessarily have a pecuniary interest in the outcome or some similar conflict of interest that renders them unfit to serve." (*El-Attar*, 56 Cal.4th at 996; *id.* at 995 ["In the administrative law context, an adjudicator's impartiality in reviewing the propriety of an adverse action taken by an agency may be presumed even if the adjudicator is chosen by ... the agency prosecuting the matter."]; *Kaiser*, 128 Cal.App.4th at 109 ["[I]t is evident that the Legislature intended to permit the unilateral selection of panel members and a hearing officer by the peer review body."].) Even when an agency pays an *adjudicator*, no inference of impropriety arises. "Certainly due process does

not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person's right to a hearing." (*Haas*, 27 Cal.4th at 1031; *Thornbrough v. Western Placer Unified Sch. Dist.* (2013) 223 Cal.App.4th 169, 189.)

In this setting, the Legislature understood and approved that physicians typically would not have a say in selecting or paying the hearing officer. In fact, the Legislature made this quite clear when it (i) expressly required that when the hearing is not held before a JRC but instead before "an arbitrator or arbitrators," the person(s) must be "selected by a process *mutually acceptable to the licentiate*" (§ 809.2(a) [emphasis added]), and (ii) with respect to hearing officers and JRCs, permitting only physicians, not hospitals or medical staffs, to conduct voir dire and to challenge the hearing officer's/panel members' impartiality (§ 809.2(c))—demonstrating that the physician has no say in their initial selection.

It is worth noting that the selection of hearing officers has rarely been a cause of concern in California case law over many decades. Other than the Opinion in this case, only *Yaqub* considered the claimed financial bias of a physician peer review hearing officer. Although hearing officers have presided over physician peer review hearings for decades, and always have at least some possibility of being engaged by medical staffs for future work, physicians did not assert this was disqualifying

financial bias under any standard of any derivation.

C. The "direct financial benefit from the outcome" standard does not disqualify a hearing officer who might be hired in the future to serve at affiliated hospitals.

Natarajan asserts Singer had disqualifying financial bias because of the speculative possibility that another Dignity Health hospital might in the future hire him as a hearing officer. There is no support for such a speculative prospect of employment to disqualify a non-adjudicator hearing officer.

1. Natarajan's theory would disqualify every hearing officer after a single service.

Natarajan's theory has a profound logical flaw: it depends on speculation that a JRC's decision in favor of one hospital enhances the hearing officer's expectation of future work at other hospitals. If that were true, the expectation would not be limited to work at other hospitals within a multi-hospital system. Medical staff leaders generally select hearing officers for their proceedings, and every hearing officer presumably would like to be hired for future work, so every hearing officer would have a stake in being perceived *by any medical staff* as pro-medical staff/hospital. As the superior court explained in its statement of decision: "[T]he possibility that Mr. Singer might be hired by medical staffs of other Dignity-affiliated hospitals is no greater than the possibility that he would be hired by medical staffs of hospitals not affiliated with Dignity …." (9-CT-2520:12-14.) Even Natarajan concedes this: "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."[39] (OBOM 74; *id.* 19, 81.) The superior court explained: "To conclude that a hearing officer has a financial interest in future appointments merely because he might have a general reputation as hospital-friendly stretches the reasoning underlying Section 809.2(b) too far.… [Such a] possibility cannot qualify as a direct financial benefit …." (9-CT-2520:10-15.)

If the Court adopts Natarajan's theory of impermissible financial bias, it would disqualify virtually any hearing officer after a single engagement.[40] The small pool of well-qualified hearing officers would be promptly depleted, and medical staffs would have to engage novice hearing officers or delay peer review proceedings for years. Given that peer review hearings typically arise after a medical staff has recommended a physician's termination or discipline due to patient safety risks, such delay could leave patients in jeopardy while the physician continues to practice at the hospital pending her hearing. (*Sahlolbei v. Providence Healthcare* (2003) 112 Cal.App.4th 1137, 1149 [physician must receive internal hearing before adverse action (other than summary suspension) may take effect].)

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[39] As discussed *infra* Part IV.C.6, such a reputation would not make a hearing officer an attractive candidate to a hospital or medical staff.

[40] That Natarajan's rule would disqualify virtually every hearing officer exposes that Natarajan's real dispute is with medical staffs' unilateral hiring of hearing officers, which is plainly permissible under California law. (*El-Attar*, 56 Cal.4th at 995-996; § 809.2(a) [requiring the physician's consent only if an

Reliance on novice hearing officers is not feasible. To be effective and efficient, a hearing officer should be qualified to perform this highly specialized work. (<https://www.csha.info/hearing-officer-requirements> [California Society of Healthcare Attorneys (CSHA) listing qualifications for peer review hearing officers]; Amicus Curiae Brief of California Medical Association filed Jan. 7, 2019, pp. 18-19 [CMA agreeing "[h]earing officers are experts on health care law and peer review procedures …. Such expert qualifications better enable attorney hearing officers to serve fairness and efficiency in peer review proceedings …."].)[41] Candidates must have relevant experience, knowledge, and understanding of complex medical evidence, hospital/medical staff operations, and complicated bylaw provisions. They must be well-versed in the unique body of state and federal statutory and case law applicable to physician peer review, as well as industry standards issued by organizations such as The Joint Commission. They must have the time to participate in proceedings involving multiple hearing sessions over a period of months or years. And they must have flexibility to accommodate the schedules of physician parties, witnesses, and JRC members, which typically require holding hearings at night.

If each hearing officer is automatically disqualified by the

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arbitrator is selected].)

[41] Natarajan contends retired judges could be hearing officers. (OBOM 19.) However, CMA's Model Bylaws cite the CSHA website as a resource to "help[] attorneys identify candidates for potential selection" as hearing officers, signaling a recognition

mere fact of having served as a hearing officer—*i.e.*, *being experienced*—the pool available to medical staffs at hundreds of California hospitals, which must continuously engage in peer review, will be quickly depleted.

2. *Haas* and *Yaqub* do not support disqualifying non-decision-maker hearing officers based on the speculative prospect of future employment.

Natarajan's theory that potential future employment by another Dignity Health hospital creates impermissible financial bias is inspired by *Haas*, as well as *Yaqub*, which uncritically applied *Haas* to the physician peer review setting.[42] Neither case supports altering the statutory standard.

In *Haas*, a county hired an administrative law judge on an ad hoc basis to adjudicate administrative hearings under Government Code section 27720 et seq. The judge was referred to as a "hearing officer," although as a decision-maker she was unlike hearing officers in physician peer review proceedings. The county's hiring procedure was subject to *no* statutory standards, other than that the person must have practiced law for five years. (Gov't Code, § 27724.) In contrast to the physician peer review context, where a hearing officer could be hired for similar work at any of California's nearly 400 hospitals[43], the county was the *only*

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that particular expertise is desirable. (MJN 167, fn. 172.)

[42] In contrast to *Yaqub*, another court searchingly questioned and did not apply *Haas* to a setting where it does not belong. (*Southwest Reg. Council of Carpenters v. Limon* (C.D. Cal. Jan. 28, 2019) 2019 WL 1873292, at *5 [finding *Haas* "not persuasive in the context of union disciplinary proceedings"].)

[43] <https://www.chcf.org/wp-content/uploads/2017/12/PDF-

potential employer of a person seeking work as an administrative judge—it was "the only player in the hearing officer game." (*Natarajan*, 42 Cal.App.5th at 392.)

Moreover, in *Haas,* the Deputy County Counsel testified repeatedly at trial (in the presence of the administrative judge) that the county *intended* to hire her for future hearings if she was interested. The Court held that under these circumstances, applying the constitutional standard, an "average person" would have a "possible temptation" to favor the county in decision-making to secure work from the county for future hearings. The Court explained the administrative judge's "future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings." (*Haas*, 27 Cal.4th at 1029.)

Here, no hearing officer would be "entirely dependent" on a single hospital, or even a single hospital system, for future work; rather "the hearing officer can pursue employment with the *other* hospital networks that have made use of his services." (*Natarajan*, 42 Cal.App.5th at 392 [emphasis in original].) The system in *Haas* that created a financial bias violating constitutional due process (*Haas*, 27 Cal.4th at 1032) simply does not exist in the hospital peer review context.

The *Haas* Court understood the unique situation presented in that case, and expressly limited its decision to the specific

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circumstances of the procedure before it, stating "the problem we address here is limited in scope" and the opinion "do[es] not consider the constitutional validity of any rule or practice not presently before us." (*Haas*, 27 Cal.4th at 1036-1037.) Nonetheless, Natarajan wrongly insists *Haas* controls this case and demanded Singer's disqualification.

a. Unlike in *Haas,* physician peer review hearings are governed by statutory standards.

In *Haas*, the Court stated "[t]he problem" of impermissible financial bias in the ad hoc system of hiring administrative judges "arises from the lack of specific statutory standards governing temporary hearing officers appointed by counties under Government Code section 27724." (*Haas*, 27 Cal.4th at 1036.) The Court noted "[m]any other administrative adjudicators already work under rules that greatly reduce *the specific risk of bias present in this case*." (*Id.* at 1036-1037 [emphasis added; footnote omitted].) The Court cited the statutory conflict-of-interest provisions of the Administrative Procedure Act and Political Reform Act and the statutory disqualification rules for temporary judges and referees. (*Id.* at 1036-1037 & fn. 21.)

Here, in contrast to *Haas* but similar to the other statutory contexts *Haas* cited, statutory rules govern conflicts for peer review hearing officers. The Legislature examined what type and degree of financial bias should disqualify peer review hearing officers and enacted a specific statute imposing a specific standard. The "problem" in *Haas* does not exist here.

b. *Haas* involved a decision-maker; physician peer review hearing officers are not decision-makers.

The "hearing officer" in *Haas* was the decision-maker. (*Haas*, 27 Cal.4th at 1020 [statutory provision for hearing officer to make findings of fact and conclusions of law]; *id.* at 1023.) *Haas* considered the constitutional implications of subjecting a party "to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case" (*id.* at 1025 [quoting *Tumey*]) and the potential conflict arising from the prospect of "income from *judging*." (*Id.* at 1037 [emphasis added].)

In contrast, peer review hearing officers are not adjudicators. They have no authority to determine the outcome of a case. (*Mileikowsky*, 45 Cal.4th at 1271.)

Natarajan argues Singer made evidentiary and instructional rulings adverse to him, and speculates Singer *could have* influenced the outcome.[44] (OBOM 24-26.) However, a

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[44] Natarajan cites Singer's denial of Natarajan's challenge to one panelist, Dr. Goldman, as an example of influence on the JRC hearing. (OBOM 24-25.) Natarajan asserts a financial connection between Goldman and St. Joseph's—which is not surprising, as the Bylaws require that JRC panelists be members of the St. Joseph's Medical Staff, if possible. (PAR01616 ¶ 9.4.D.) Moreover, "[w]hatever incidental economic benefit doctors may gain by disciplining other doctors is not of constitutional proportion; their training, technical knowledge, and experience give them the necessary expertise to make such judgments, while prima facie these are lacking in lay persons." (*American Motor Sales*, 69 Cal.App.3d at 990-991.) At any rate, Natarajan identifies no problem with Goldman's service, and the JRC decision was unanimous, making harmless any arguable "bias."

hearing officer's role is to make such rulings. (*Mileikowsky*, 45 Cal.4th at 1271 [noting a "hearing officer's authority at the hearing or over the evidence adduced there"]; PAR01616-1617 ¶ 9.4.E ["The hearing officer ... shall have the authority and discretion to make all rulings on questions which pertain to ... the admissibility of evidence"].)

A hearing officer's effect on admission of evidence and other procedural matters—even if the rulings are erroneous or favor one party—is not impermissible bias. "[R]uling against a party, even erroneously, does not show bias." (*Thornbrough*, 223 Cal.App.4th at 190, fn. 18.) As this Court explained:

> numerous and continuous rulings against a litigant, even when erroneous, form no ground for a charge of bias or prejudice. This rule is tenable in both a judicial and an administrative context. To fulfill his duty, an ALO [administrative law officer] must make choices when conflicting evidence is offered; thus, his reliance on certain witnesses and rejection of others cannot be evidence of bias no matter how consistently the ALO rejects or doubts the testimony produced by one of the adversaries. As the Supreme Court declared, "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

(*Andrews*, 28 Cal.3d at 795-796 [citation omitted].)

Finally, Natarajan cites facts unique to this particular case that do not demonstrate Singer was a decision-maker or support a blanket disqualification rule. For instance, Natarajan complains Singer deliberated with the JRC panel (OBOM 25-26), but there is no statutory restriction on his participation, and the St. Joseph's Medical Staff Bylaws provide "[t]he hearing officer *should participate in the deliberations* of the hearing committee ...." (PAR01616-1617 ¶ 9.4.E [emphasis added].) The CMA

Model Bylaws say the same thing. (MJN 168.)

Natarajan argues Singer wrote the JRC decision, but offers no evidence that Singer made any part of the decision or altered the JRC's findings. (OBOM 25.) He argues that only one panel member signed the JRC recommendation, but that says nothing about Singer's involvement. (*Ibid.*)

c. ***Haas* addressed constitutional due process; due process does not apply to private hospitals.**

The county defendant in *Haas* was a government agency. The decision was *expressly* based on principles of constitutional due process. The analysis section of the *Haas* opinion mentions "constitution," "due process," or the "Fourteenth Amendment" at least 45 times. The *Haas* "possible temptation to the average man as a judge" standard is the "constitutional standard." (*Haas*, 27 Cal.4th at 1031 [citing cases involving government actors]; *id.* at 1030 [noting the "'possible temptation' not to be scrupulously fair, alone and in itself, offends the Constitution"] [quoting *Tumey*].) The stringent constitutional rules applied in *Haas* have no application to physician peer review at private hospitals. (*Supra* Part IV.B.3.)

d. ***Yaqub* is wrong.**

Yaqub involved a hearing officer in a physician peer review proceeding at a public hospital. *Yaqub* applied *Haas*, without analysis, to disqualify a non-decision-maker hearing officer for purported financial bias based on his past employment and other relationships with the hospital. It did so erroneously.

Yaqub notably *never mentioned* section 809.2(b), the

governing statute controlling the peer review hearing officer bias inquiry at private hospitals.[45] "Given *Yaqub*'s failure even to consider the distinction between the strict standard under due process for pecuniary interest and the statutory restatement of the principles of fair procedure limited to a *direct* financial interest in the outcome under section 809.2, [the Court of Appeal in this case] consider[ed] *Yaqub* to be a deviation from the strong current of precedent and therefore a 'derelict on the waters of the law' ...." (*Natarajan*, 42 Cal.App.5th at 391 [emphasis in original; citation and some internal quotation marks omitted].)

In the 15 years that *Yaqub* was the sole citable precedent on the subject of peer review hearing officer financial bias, its holding was never applied or followed in any published opinion. (*Natarajan*, 42 Cal.App.5th at 391.) *Yaqub* was *cited* in two published opinions, neither of which applied or discussed it. Both merely referenced *Yaqub* for the general proposition that a hearing officer may be disqualified for financial bias. (*El-Attar*, 56 Cal.4th at 996; *Thornbrough*, 223 Cal.App.4th at 188.)[46]

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[45] The hospital was a district hospital (<http://www.achd.org/list-of-members/>) and a state actor subject to the due process considerations of *Haas*. (*Jablonsky v. Sierra Kings Healthcare Dist*. (E.D. Cal. 2011) 798 F.Supp.2d 1148, 1149.) As Natarajan notes, *Yaqub* never mentioned this fact. This lack of clarity about whether *Yaqub* applied due process rules highlights that the court never acknowledged the statute governing hearing officer financial bias at private hospitals.

[46] Natarajan suggests *Yaqub* is viable because this Court cited it in *El-Attar*. *El-Attar* was not a hearing officer financial bias case and did not consider *Yaqub*'s neglect of the governing statute or its admission that there was no evidence of "direct" benefit. *El-Attar* cited *Yaqub* only for a general rule.

Since *Yaqub*, this Court clarified the legal landscape, rendering *Yaqub* even further out of step. In *Mileikowsky*, 45 Cal.4th at 1271, the Court affirmed the limited, non-decision-maker role of a peer review hearing officer. That limited role makes any "bias" less likely to affect the outcome. In *El-Attar*, the Court clarified that a peer review action will not be reversed for unfair procedure if a claimed error was harmless. (*El-Attar*, 56 Cal.4th at 990-991; *infra* Part IV.E.) This typically would be the case if a non-adjudicator hearing officer had some undetected bias.

Yaqub is not even consistent with *Haas*. While *Haas* described the financial interest of the administrative judge there as "direct," *Yaqub* disqualified a non-decision-maker hearing officer for financial conflict even though the court expressly conceded "there was *no evidence* ... of a *direct financial interest in the outcome of the case*." (*Yaqub*, 122 Cal.App.4th at 485 [emphasis added].) A hearing officer with no "direct" interest has no disqualifying financial conflict under section 809.2(b) or even under *Haas*. *Yaqub* also acknowledged that *Haas* involved a decision-maker while *Yaqub* did not, yet it equated the hearing officer's rulings to factfinding. (*Ibid*.) And the court appeared to weigh as a factor supporting impermissible bias that the hearing officer "ruled on the challenge to his own appointment as hearing officer" (*ibid*.), notwithstanding that this procedure is *required* by section 809.2(c), which *Yaqub* also did not mention.

Yaqub also relied on evidence of the hearing officer's *past* connections to the hospital, including presiding over prior peer

review hearings—including one involving Dr. Yaqub—working as arbitrator and mediator in disputes involving the hospital, and serving on the Board of Governors of the hospital's fundraising foundation, a position elected by the hospital's board. (*Yaqub*, 122 Cal.App.4th at 483-484.) Here, in contrast, the evidence showed no prior involvement of Singer with St. Joseph's. Regardless, only the prospect of *future* employment is pertinent to financial conflict under *Haas*. Evidence of past employment does not rebut "the presumption that the hearing officer was a reasonably impartial, non-involved reviewer …." (*Thornbrough*, 223 Cal.App.4th at 187-188 [no financial bias shown where decision-maker/hearing officer was asked about past and present employment but not "about *future* employment prospects with the District"] [citations and internal quotation marks omitted; emphasis in original]; *Imagistics Int'l v. Department of General Services* (2007) 150 Cal.App.4th 581, 591-592; *Department of Alcoholic Beverage Control v. Alcoholic Beverages Control Appeals Board* (2002) 99 Cal.App.4th 880, 886.) *Yaqub* stated "there was the potential for further appointments in the future" (*Yaqub*, 122 Cal.App.4th at 485) but cited no supporting evidence.

In fact, CMA proposed in 2009 to add a provision to section 809.2 that would have disqualified only hearing officers with *specific* past financial relationships to the hospital: "an attorney from a firm utilized by the hospital, the medical staff, or the involved licentiate within the preceding two years shall not be eligible to serve as a hearing officer." (MJN 93.) The provision did not become law. (MJN 64.)

Natarajan requests judicial notice of legislation proposed in 2005, arguing it evidences legislative rejection of arguments that *Yaqub* was wrong.[47] (OBOM 66-67.) Shortly after *Yaqub*, the California Hospital Association sponsored legislation that would have expressly overruled *Yaqub*. This proposed legislation cannot shed light on the proper interpretation of section 809.2(b) when *Yaqub* did not even mention that statute and decided the case without regard to statutory requirements. The bill merely evidences, at most, CHA's recognition that *Yaqub* was erroneous, and its interest in ensuring that *Yaqub* not be treated as binding law on the subject. Failure of the bill to become law was in no way a legislative rejection of the positions stated therein or evidence of "the Legislature's complete lack of support for reversing *Yaqub*." (OBOM 66.) The committee hearing was "canceled at the request of author" and the bill later died on January 31, 2006 pursuant to a constitutional provision prohibiting legislative vote on the bill after that date. (Natarajan's Motion for Judicial Notice, p. 21; Cal. Const., art. IV, § 10(c).)

3. Natarajan's statutory interpretation arguments fail.

Throughout this litigation, Natarajan virtually ignored

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[47] Natarajan did not request judicial notice of this legislative history in the Court of Appeal or superior court. Yet when Dignity Health sought judicial notice in the Court of Appeal of the legislative history of Assembly Bill No. 120, Natarajan objected, asserting the material was not presented to the superior court and the bill was irrelevant to interpreting section 809.2. (MJN 172-175.) Both objections apply equally to the material he

section 809.2(b). Yet he now argues that applying "fundamental rules of statutory construction" shows section 809.2 must be read to incorporate the *Haas* standard. (OBOM 60.) These arguments should be rejected.

Natarajan disregards the first and most "fundamental" rule of statutory construction: plain, unambiguous statutory language governs a statute's interpretation. "When the language of a statute is clear and unambiguous, there is no need for construction or resort to the legislative history, and the court should apply its plain meaning." (*Unnamed Physician*, 93 Cal.App.4th at 622; *In re A.N.*, 9 Cal.5th at 351 ["we review our familiar principles of statutory construction. 'We start with the statute's words, which are the most reliable indicator of legislative intent.'"].) Section 809.2(b)'s "gain no direct financial benefit from the outcome" language is unambiguous.

Natarajan argues his interpretation of section 809.2(b) effectuates the purpose of the hearing procedures to protect physicians. (OBOM 60.) But the overarching purpose of peer review and section 809 et seq. is to protect *the public*. (§ 809(a); *Cipriotti*, 147 Cal.App.3d at 157.) Regardless, declining to expand the statutory standard to include the factual scenario here is no more harmful to physicians than applying the common-law "direct pecuniary interest" standard to any litigant in an administrative proceeding. The Legislature determined these standards adequately protect the fairness of hearings absent a factual showing that a hearing officer has some other bias.

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now asks for the first time to be judicially noticed.

Natarajan argues section 809.2 must be read as a whole, and faults the Opinion for discussing subdivision (b) in isolation. Natarajan's briefing to the Court of Appeal did not discuss, and barely mentioned, subdivisions (a) or (c) of section 809.2. Moreover, the Opinion's interpretation of subdivision (b) is consistent with subdivision (c), which permits a hearing officer to be challenged for impartiality and leaves that decision to the hearing officer. Construing section 809.2(b) in the context of section 809.2 as a whole supports the conclusion that *only* a direct financial benefit from the outcome is a basis for a blanket disqualification without raising and proving bias in fact under subdivision (c). The Legislature also imposed a standard of independent judicial review of questions of hearing officer bias. (Code Civ. Proc., § 1094.5(b).) These procedures would be unnecessary if the mere possibility of future work were an automatic disqualifier.

Natarajan argues the language of the statute must be harmonized with common law as stated in *Haas*. But *Haas* does not represent common law; it was based on constitutional due process inapplicable to private hospitals. Moreover, *Haas* was not decided until 13 years after the statute was enacted. To the extent section 809.2(b) must be harmonized with *Haas*, the Hospital has harmonized it by showing why *Haas* is distinguishable and inapplicable. Natarajan says *Haas* "sets a higher threshold than Section 809.2 for a disqualifying financial interest in the outcome …." (OBOM 65.) But section 809.2(b) sets the applicable *minimum* required standard (*El-Attar*, 56

Cal.4th at 988; *Mileikowsky*, 45 Cal.4th at 1268); no "higher threshold" applies.

Finally, Natarajan argues that equating fair procedure and due process in this context would avoid a constitutional conflict.[48] (OBOM 69.) But constitutional due process does not apply in private hospital peer review hearings (*supra* Part IV.B.3), so there is no constitutional issue to avoid. Nor does Natarajan challenge the constitutionality of section 809.2(b).

4. Any appearance of bias under *Haas* is mitigated by a three-year restriction on future work.

Even if *Haas* applies to a non-decision-maker in a non-constitutional context, *Haas* itself "suggest[ed] some procedures that might suffice to *eliminate the risk of bias* ...." (*Haas*, 27 Cal.4th at 1037, fn. 22 [emphasis added].) It explained "a county that wished to continue appointing temporary hearing officers on an ad hoc basis might adopt the rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time long enough to eliminate any temptation to favor the county." (*Ibid.*)

Singer and St. Joseph's agreed to such a restriction. Under Singer's contract with St. Joseph's, he became ineligible to serve

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[48] Natarajan "reserv[es]" federal due process claims for assertion in federal court (OBOM 71, fn. 8), but a federal complaint would be barred by the statute of limitations and res judicata. (*Jackson v. Fong* (9th Cir. 2017) 870 F.3d 928, 936 [two-year statute for section 1983 claims in California]; *Mir v. Little Company of Mary Hospital* (9th Cir. 1988) 844 F.2d 646, 651-652 [physician's federal suit alleging violations of federal law barred by state-court mandamus judgment].)

as hearing officer at St. Joseph's for three years after Natarajan's hearing.[49] Singer testified "I would consider myself ineligible for participation on behalf of the facility for a three-year period …." (PAR00248.) The superior court made the unchallenged finding that "[t]he three year exclusion from serving as a Hearing Officer for the St. Joseph's Medical Staff was a sufficiently long time to remove any financial temptation to favor St. Joseph's or its Medical Staff in Petitioner's JRC hearing." (9-CT-2517:11-13.)

Singer's agreement did not restrict future employment at other Dignity Health-affiliated hospitals, but future prospects at other hospitals are irrelevant to whether Singer had financial bias in presiding over a hearing at St. Joseph's. The contract provision eliminated any supposed conflict, as *Haas* permits.

5. Natarajan's theory is contrary to how hospital peer review works and contrary to the evidence.

Natarajan attempts to expand *Haas* to impose a sweeping rule whereby one engagement as a hearing officer by one medical staff at one hospital automatically disqualifies a hearing officer from serving at *any other hospital within the same hospital system* for years.[50]

The law does not require that a hearing officer must be walled off from future work at different hospitals with the same

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[49] This provision was not a concession that *Haas* applies. (OBOM 21-22.) Singer suggested the provision as "insurance" because, although he knew *Haas* did not apply, he also knew others disagreed. (AAR22-26, 33.)

[50] No logical principle limits Natarajan's expansion of *Haas* only to other hospitals within a single hospital system. (*Supra* Part

corporate owner. *Haas* does not stand for that proposition, as it involved only a single employer, and the peer review statute certainly does not impose such a requirement, although it would have been simple for the Legislature to include this restriction. *Yaqub* too involved a hospital district that owned one hospital. The Legislature presumably was aware that more than half of California hospitals were part of hospital systems with two or more separately licensed hospitals, including Kaiser, Sutter, and Catholic Healthcare West (now Dignity Health). Natarajan's requested expansion of the statute should be rejected.

First, Natarajan ignores the distinction between a hospital and its independent medical staff and the legal requirements of how peer review proceedings must work. In *Haas*, the county hired the hearing officer and it was the county that could hire her again. But Natarajan is concerned with the prospect of future work at other, commonly-owned hospitals. Unlike in *Haas*, any hiring decision would be made, not by those hospitals, but by their independent medical staffs. The hiring decisions contemplated in *Haas* do not provide a basis for an apples-to-apples comparison to the unique world of physician peer review. A hospital's medical staff is an *independent and self-governing* body that exercises control over its own peer review. (§§ 2282(c), 2282.5; Cal. Code Regs., tit. 22, § 70701(a)(1)(D), (F).) The corporate formalities of a particular hospital or its owner do not change the default presumption—which the superior court found here in an unchallenged finding— that the statutorily

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IV.C.1.)

independent and self-governing medical staff is presumed to have made its own decision in selecting a hearing officer or delegated the decision to its own hospital.

This Court has explained that a medical staff may lawfully delegate particular peer review functions to a hospital, as happened here when the Medical Staff authorized hospital representatives to contact and contract with Singer. (*El-Attar*, 56 Cal.4th at 989 [medical staffs may delegate certain duties to hospitals].) "Because a hospital's medical staff and its governing body both have significant and at times overlapping roles to play in the peer review process, the identity of the entity that appoints the participants in a physician's judicial review hearing is not ... necessarily determinative of whether the physician does or does not receive a fair hearing." (*Id.* at 995.) There is "nothing in the mere fact of having been appointed by a hospital's governing body instead of by the medical staff that would inherently cast doubt on the impartiality of a review hearing participant." (*Id.* at 997.)

Absent actual evidence in a particular case of a corporate parent's direct influence over a hospital and its medical staff to select particular hearing officers, there is no reason to assume the corporate structure creates a direct financial benefit to the hearing officer from the outcome.

Second, Natarajan ignores the distinction between a hospital and its corporate owner. Dignity Health hospitals are not owned by separately incorporated subsidiaries but are operated under fictitious business names of Dignity Health. That does not make operations at an individual hospital attributable to

the corporate entity for purposes of deciding whether a peer review hearing officer is biased.

St. Joseph's is owned by Dignity Health, but it is not Dignity Health. St. Joseph's is operated separately from the Dignity Health corporation, with a separate governing board and separate management, and its own independent medical staff responsible for peer review in the first instance. The Dignity Health corporate bylaws require the creation of Hospital Community Boards with delegated authority for medical staff matters at Dignity Health-affiliated hospitals. (8-CT-2051-2052 § 11.1 ["This Corporation shall establish one or more Hospital Community Boards related to hospitals owned and operated by this Corporation"]; *id.* § 11.3(c) ["The Hospital Community Board shall have final authority regarding medical staff matters delegated to it by this Board pursuant to Article IX of these bylaws and as set forth in the Hospital Community Board bylaws."]; MJN 142-143.) The *Medical Staff's* Bylaws—not Dignity Health's corporate Bylaws—determine how peer review proceedings at St. Joseph's are conducted. (*Payne v. Anaheim Mem. Med. Ctr.* (2005) 130 Cal.App.4th 729, 739, fn. 5; *El-Attar*, 56 Cal.4th at 989.)

Further, California law distinguishes between a hospital and an entity that owns the hospital. A hospital is a "facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness" (Health & Saf. Code, § 1250), making hospitals subject to regulation as such regardless of their ownership or form of

business. The physician whistleblower statute applies to both a hospital *and* its corporate owner in separate provisions. (Health & Saf. Code §§ 1278.5(b)(1), (2) [separately prohibiting retaliation by a "health facility" and an "entity that owns or operates a health facility"].) Code of Civil Procedure section 1094.5(d) concerns review of final decisions of "private hospital boards," not hospitals' corporate owners. Medicare also distinguishes between hospitals and corporate owners. (42 C.F.R. §§ 489.2(b)(1), 489.3, 498.1(i).) There is no reason to assume a hospital and its corporate owner function as one unit in the peer review context.

Third, the hospital board, not the hearing officer presiding over a peer review hearing, renders the final decision in a peer review proceeding. Because a hospital may be sued for "negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility," and "[h]ospital assets are on the line," "[a] hospital's governing body must be permitted to align its authority with its responsibility and to render the final decision in the hospital administrative context." (*Hongsathavij*, 62 Cal.App.4th at 1143; *El-Attar*, 56 Cal.4th at 993].) Because hospitals make the final decision, they do not need to make purported promises to hearing officers of future employment to obtain favorable decisions, and hearing officers know this.

Fourth, Natarajan's argument is contrary to the evidence showing the St. Joseph's Medical Staff hired Singer, not the Dignity Health corporation. As the superior court found, in an unchallenged finding, Singer "is always hired by a hospital's

medical staff directly, regardless of the accounting practices of the hospital's parent company." (9-CT-2515:22-23.) The St. Joseph's Medical Staff Bylaws delegate to St. Joseph's' president the authority to appoint hearing officers. (PAR01616-1617 ¶ 9.4.E.) The superior court found that the initial contact was made by a Dignity Health attorney (9-CT-2516:2-4), but that was irrelevant to bias. (*Sadeghi v. Sharp Memorial Med. Ctr. Chula Vista* (2013) 221 Cal.App.4th 598, 616-617.) Natarajan insists St. Joseph's' president acted as "Dignity Health" in appointing Singer. But nothing about the delegation of the Medical Staff's appointment authority to a St. Joseph's administrator gives the Dignity Health corporation authority over hearing officer hiring decisions at St. Joseph's.

Natarajan offered no evidence that St. Joseph's' president had any larger role or influence over the corporation or any other Dignity Health hospital. And the independent, self-governing Medical Staff retained the power to appoint, and did appoint, the JRC panel—the actual adjudicators. (PAR01616 ¶ 9.4.D.)

Natarajan also relies on the fact that Dignity Health signed Singer's contract and issued his checks. For administrative efficiencies, Dignity Health provides some services at the corporate level. These structural business design choices do not convert St. Joseph's' selection of Singer into a decision of "Dignity Health" creating a financial conflict. (*Hongsathavij*, 62 Cal.App.4th at 1143 ["The rule of necessity precludes a claim of bias from the structure of the process."].) A hospital's payment of a hearing officer does not give rise to an inference of bias.

(*Thornbrough*, 223 Cal.App.4th at 189.)

Finally, Natarajan put on no evidence that the St. Joseph's Medical Staff, or Dignity Health hospitals' medical staffs in general, would hire—let alone *likely* would hire—Singer for future hearing officer work if the outcome of Natarajan's hearing favored the hospital. The only evidence on the subject of future employment was Singer's restrictive agreement and his testimony that he was precluded from working at St. Joseph's for three years. (PAR00248.) A hearing officer's testimony that he "knew 'of no potential or actual conflicts of interest that require disclosure in this matter'" "functions as a denial of future employment prospects with the District, the problem described in *Haas*." (*Thornbrough*, 223 Cal.App.4th at 188.) Singer's contract does not mention future employment. (*Id.* at 189-190 ["Nothing in the purported [hearing officer] contract on its face suggests that the District was holding out the promise of *future employment*, which is the problem identified by *Haas*."] [emphasis in original].) As the HCB put it, "it is clear in this record that Mr. Singer was not implicitly or explicitly offered the possibility of future employment in exchange for favorable rulings and his arrangement with St. Joseph's Medical Center was not 'open-ended[]'; the facts are quite the reverse." (PAR00206.)

6. The assumption that a medical staff or hospital will be more inclined to hire hearing officers who favor the medical staff is unsupported.

Another flawed premise of Natarajan's financial bias theory

is that a hearing officer will consistently try to steer the JRC to rule for the medical staff to curry favor and be hired again. This makes no sense. Hospitals and medical staffs have an overriding interest in a fair and unbiased peer review process, to, for example, avoid disputes alleging unfair treatment of medical staff members and attract qualified physicians to the medical staff. Further, if a hearing officer's rulings are not supported by the record and have a prejudicial impact on the outcome of the case, the decision will likely be reversed, either by the hospital board or by a court in a Code of Civil Procedure section 1094.5 mandamus proceeding. That could lead to expensive and time-consuming do-overs of the administrative proceedings, or result in orders requiring hospitals to reinstate doctors who have been determined to endanger patient safety. A hearing officer who made unfounded rulings favoring a hospital would do the hospital a great disservice, decreasing rather than enhancing the chances of future engagement.

Natarajan complains that the outcomes of peer review proceedings are rarely reversed because the substantial evidence review standard of section 1094.5 is so deferential as to be toothless. He says the prospect of reversal has not deterred medical staffs from retaining hearing officers to serve in multiple cases. (OBOM 82, 84.)

However, section 1094.5's deferential standard for review of the merits of a hospital board decision is the standard the Legislature chose to impose, and also applies to decisions in numerous administrative proceedings, governmental and private.

If a physician believes the hearing officer was biased, he is free to challenge the fairness of the proceeding, which is reviewed de novo. But he still needs admissible evidence establishing direct financial benefit meeting the statutory standard to obtain a reversal. Natarajan did not have such evidence and he never assigned error on appeal to the superior court's specific findings against him on this very evidence in the statement of decision. (*Rosenblit*, 231 Cal.App.3d at 1443.)

7. St. Joseph's' purported economic motive to terminate Natarajan does not change the result.

A theme meandering throughout Natarajan's brief is that the hospital terminated his privileges for economic reasons, as Natarajan's hospitalist group competed with the hospital's own hospitalist practice. Thus, he asserts Singer's exclusion of Natarajan's proffered evidence of an economic motivation for the termination prejudiced his case.

Natarajan failed to challenge the JRC's specific rejection of his claim of economic motive: "The [hearing committee] finds no persuasive evidence in support of Dr. Natarajan's suggestion that Medical Staff leaders were pressured to initiate the investigation or reach adverse conclusions in the investigative process for reasons other than concern for efficient and high quality patient care at the Medical Center." (PAR09430-9431, fn. 8.) These unchallenged findings are binding. (*Johnson*, 24 Cal.4th at 69-70.)

As for Singer's ruling, Natarajan complains Singer limited evidence regarding St. Joseph's' purported "economic incentive"

to terminate Natarajan. (OBOM 17-18.) But Singer's ruling explained: "It is now abundantly clear that aside from speculation, Dr. Natarajan doesn't have evidence—much less specific, tangible, or reliable evidence—of any misconduct based upon economic motives on the part of anyone with respect to the investigation and decision-making leading up to the recommendation to terminate his medical staff membership, and certainly not on the part of the MEC." (PAR05695; PAR05355-5363.)

Further, this Court has acknowledged the potential for the same economic motive Natarajan alleged here. (*El-Attar*, 56 Cal.4th at 995 ["A hospital's governing body could undoubtedly seek to select hearing officers and panel members biased against the physician. It might even do so because it wishes 'to remove a physician from a hospital staff for reasons having no bearing on quality of care'"] [quoting *Mileikowsky*, 45 Cal.4th at 1292].) Nonetheless, the Court would not presume that this motive would cause prohibited appearance of bias in any hearing officer the hospital selected, without facts showing the hearing officer was biased. (*El-Attar*, 56 Cal.4th at 995; § 809(a)(6) [the purpose of peer review is to "exclude … those healing arts practitioners who provide substandard care or who engage in professional misconduct, *regardless of the effect of that exclusion on competition*"] [emphasis added].)

8. Singer's purported friendship with counsel for the MEC is irrelevant.

Natarajan asserts Singer was biased in favor of the hospital because of his alleged "30 year friendship" with Harry

Shulman, an attorney for St. Joseph's' MEC. This argument goes well beyond the scope of the financial bias inquiry under subdivision (b) and does not show bias under subdivision (c). Natarajan asserts that under California law, appearance of bias is sufficient to disqualify an adjudicator when "other personal or professional relationships might affect his or her neutrality." (OBOM 28-29.) This is incorrect. A personal relationship must meet an actual bias standard to support disqualification. (*Andrews*, 28 Cal.3d at 793; *Tumey*, 273 U.S. at 523 ["matters of kinship [and] personal bias ... would seem generally to be matters merely of legislative discretion"].) Natarajan never put on evidence that this purported friendship caused Singer to be actually biased against Natarajan.

Further, Natarajan exaggerates the "friendship." Singer explained he is acquainted with Shulman because they both practice in the world of physician peer review. Singer detailed their few social interactions over the years. (*Supra* Part II.C.) There was no conflict.

D. The proper remedy for unfairness would be a writ vacating the decision and ordering a new "fair" hearing.

Natarajan argues that if this Court reverses the decision, he can proceed directly with a damages action, rather than submit to another, "fairer" hearing. This ignores that if the HCB decision is vacated, there is no final administrative decision to sue upon and the last administrative findings would be those of the JRC, which are binding and adverse to Natarajan. (*Johnson*, 24 Cal.4th at 69-70 [administrative findings are binding in civil

actions if not first overturned by mandamus].) Even if Natarajan had shown prejudicial error (*infra* Part IV.E), a new hearing would be required. (*Pinsker II*, 12 Cal.3d at 557, fn. 17 ["In all prior cases in which a hearing has been improperly denied, the courts have simply ordered that a hearing be afforded."] [citations omitted].)

Natarajan cites *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, arguing that if his termination is reversed for procedural unfairness, he need not undergo another hearing and may sue directly for "tort remedies," including damages. (OBOM 86.) But any damages would have been caused not by the decision to exclude him (which was and is supported by unchallenged substantial evidence), but rather by the procedural violation itself. "There are substantial inherent difficulties in proving a party's damages resulted from the denial of a hearing, particularly where, as here, the government agency and the administrative hearing officer had substantial discretion in ruling on the merits of the issue." (*Carlsbad Aquafarm v. State Dep't of Health Services* (2000) 83 Cal.App.4th 809, 822-823.)

Carlsbad Aquafarm illustrates how compensatory damages may cross the line from the proven offense—denial of a hearing—to a different, unproven offense—the underlying termination decision. The complainant alleged it suffered damages because it was removed from a vendor list without a hearing. The Court of Appeal reversed a jury award of damages because it was based on the unsupported presumption that but for the procedural

violation, the complainant would not have been removed from the list: "Although the jury was instructed it must find the due process violation 'caused' Aquafarm's claimed lost profit damages, there was little or no evidence linking the *absence of a hearing* to the ultimate damages. Instead, Aquafarm focused primarily on arguing that it suffered damages because it was removed from the Interstate List." (*Ibid.* [emphasis in original].) This required reversal of the damages award. (*Id.* at 823; *MHC Financing Ltd. Pshp. Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1188 ["to determine the damages resulting from the violation of a right to petition, a court will be required to determine whether the party who was denied the right to petition *would have been successful* had it exercised the right"] [emphasis in original].)

This distinction matters. There is no reason to presume that if Singer were impermissibly biased, the underlying decision necessarily was wrong. "Where the deprivation of a protected interest is substantively justified but procedures are deficient in some respect, there may well be those who suffer no distress over the procedural irregularities." (*Carey v. Piphus* (1978) 435 U.S. 247, 263.) "[W]here a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure." (*Ibid.*) A plaintiff is not entitled to damages for justified deprivation if he proves only procedural deficiencies.

Permitting Natarajan to sue for damages for purportedly wrongful exclusion, where the substantive findings have never been set aside, cannot be reconciled with this principle.

E. Any defects in the hearing process were harmless.

The JRC determined Natarajan endangered patient safety and should be terminated. The HCB and superior court found this conclusion supported by substantial evidence. Natarajan did not challenge any of these findings and has waived such a challenge. (*Natarajan*, 42 Cal.App.5th at 385; *City of Merced*, 126 Cal.App.4th at 1322-1323.) The evidence of substandard care is what it is no matter who presided over the hearing. The unchallenged, copious substantial evidence against Natarajan does not become tainted or untrustworthy just because Natarajan might support a claim of bias by the non-adjudicating hearing officer. Thus, had any procedural irregularity occurred, it was harmless and would not justify reversal.

This Court has explained "[n]ot every violation of a hospital's internal procedures provides grounds for judicial intervention.... [W]e have long recognized that departures from an organization's procedural rules will be disregarded unless they have produced some injustice." As such, "a deviation from the mandated procedures is not 'prejudicial,' and thus does not warrant relief, unless the deviation is material." (*El-Attar*, 56 Cal.4th at 990-991; Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) "[N]othing in [section 809 et seq.'s] text or adoption history suggests that the Legislature sought to displace the requirement of prejudice and instead compel judicial reversal of *every* decision involving a failure to adhere to hospital bylaws." (*El-Attar*, 56 Cal.4th at 991 [emphasis in original].) Where, as here, substantial evidence supports the findings (and the

physician does not claim otherwise), and there is no evidence that actual hearing officer bias impacted the proceedings adversely to the physician, any error is immaterial. "Simply because the governing body of a hospital may be in a position to deprive a physician of a fair hearing does not mean that it is likely to do so." (*Id.* at 996.)[51]

Natarajan claims Singer excluded Natarajan's evidence. The possibility of additional evidence supporting Natarajan's view does not negate that the record contained substantial evidence supporting the MEC. "If substantial evidence exists, it is of no consequence that the trial court believing other evidence or drawing other reasonable inferences might have reached a contrary conclusion." (*Picerne Constr. Corp. v. Castellino Villas* (2016) 244 Cal.App.4th 1201, 1208-1209.)

El-Attar's application of the harmless error rule to physician peer review proceedings makes particular sense. It would be absurd to require hospitals—with already strained funding—to re-spend hundreds of thousands of dollars to "do over" a hearing with a correct result. The "prejudicial error" standard applied in *El-Attar* means that even if the evidence establishes (as here) the physician threatens patient safety, the physician cannot continue to practice at the hospital while the hearing is redone, which obviously would undermine peer review's purpose of protecting patients.

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[51] Natarajan has never alleged that his fair hearing violated any Medical Staff Bylaw.

V. CONCLUSION

The Legislature has stated the applicable rule for hearing officer bias, and it was not met here. The Opinion should be affirmed.

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

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c), I certify that this Answer Brief contains 17,938 words, not including table of contents, table of authorities, the caption page, or this Certification page.

Dated: August 7, 2020

MANATT, PHELPS & PHILLIPS, LLP

By: s/ Barry S. Landsberg

BARRY S. LANDSBERG
Attorneys for Respondent
DIGNITY HEALTH

PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 2049 Century Park East, 17th Floor, Los Angeles, California 90067. On **August 7, 2020**, I served the within: **ANSWER BRIEF ON THE MERITS** on the interested parties in this action addressed as follows:

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

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

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

Brigette Scoggins

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/10/2020 by Ines Calanoc, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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

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

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

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION TO FILE OVER-LENGTH BRIEF	Application for Oversized Brief
BRIEF	Answer Brief on the Merits
MOTION	Motion for Judicial Notice

Service Recipients:

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

8/7/2020

Date

/s/Joanna McCallum

Signature

McCallum, Joanna (187093)

Last Name, First Name (PNum)

Manatt Phelps & Phillips LLP

Law Firm