Case No.: S244148

IN THE SUPREME COURT OF CALIFORNIA

ARAM BONNI

Plaintiff and Appellant,

vs.

ST. JOSEPH HEALTH SYSTEM, et al.

Defendants and Respondents.

RESPONDENTS' JOINT REPLY TO AMICI CURIAE BRIEFS

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

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

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RESPONDENTS' JOINT REPLY TO AMICI CURIAE BRIEFS

I. INTRODUCTION

The amici curiae in this case represent California's long-recognized defenders of patient safety and public health, including the overwhelming majority of California hospitals and physicians. The California Hospital Association ("CHA") and Dignity Health, Sutter Health, Adventist Health, MemorialCare, and Sharp Healthcare ("Major Healthcare Providers" or "MHP") demonstrate that peer review is infused with protected speech and petitioning throughout, and thus a lawsuit arising from peer review should satisfy the first prong of the anti-SLAPP statute.

Remarkably, the California Medical Association ("CMA")—the physicians' trade association—unites with CHA and the Major Healthcare Providers in confirming that anti-SLAPP protects peer review decisions. Today, from their differing perspectives, all amici speak with one, clear voice: anti-SLAPP applies to reportable peer review actions, including summary suspensions and terminations.

All amici agree that peer review is an integrated, ongoing process, culminating in quasi-judicial hearings and reporting to the Medical Board of California—a law enforcement agency. Hearings and reporting are core speech and petitioning activities. Examined together, amici's briefs demonstrate that all peer review activities are acts in furtherance of speech and petitioning rights under anti-SLAPP subdivisions (e)(2) and (e)(4).

Amici directly contradict Plaintiff's primary defense against anti-SLAPP. According to Plaintiff, his retaliation claims arise from his

summary suspensions and "termination," which Plaintiff attempts to equate with the unprotected tenure decision in *Park*. On behalf of its 50,000 physician members, CMA rejects this false equivalence. As all amici explain, peer review summary suspensions and terminations—unlike the tenure decision in *Park*—are protected acts in furtherance of speech and petitioning through hearings and reporting. The anti-SLAPP statute thus applies to Plaintiff's entire cause of action.

II. AMICI'S ARGUMENTS DEMONSTRATE THAT ALL PEER REVIEW ACTIVITIES ARE ANTI-SLAPP PROTECTED UNDER SUBDIVISIONS (E)(2) AND/OR (E)(4).

CHA and CMA are often at odds in legal and policy matters. In peer review cases, CMA typically defends individual physician plaintiffs and whistleblowers; CHA typically defends medical staffs and peer reviewers. But in this case, both sides soundly reject Plaintiff's broadside attack on peer review protections. That even CMA refuses to endorse Plaintiff's position—indeed, actively disputes it—demonstrates how untenable it is.

A. CHA and the Major Healthcare Providers Confirm That Reportable and Non-Reportable Peer Review Activities Are Anti-SLAPP Protected.

The anti-SLAPP statute guards against frivolous lawsuits chilling participation in matters of public interest. (Code Civ. Proc., § 425.16, subd. (a).) As CHA and the Major Healthcare Providers demonstrate, physician participation in peer review is essential to protecting the public. (CHA, pp. 28–31; MHP, pp. 15–20.) All aspects

of peer review, from non-reportable committee discussions to reportable terminations, contribute to this public safety goal. (CHA, § II; MHP, §§ VI, VII.)

What is more, all aspects of peer review depend on speech and petitioning. Peer review committees must have the freedom and protection to candidly critique physician shortcomings, prevent poor patient care, and cooperate with the Medical Board. As the Major Healthcare Providers explain, these steps are "intertwined into a seamless and ongoing process, comprised of steps that are not discrete." (MHP, p. 14, § V.) Peer review cannot be allocated into parts that assist Medical Board investigations, and those that do not; parts that are anti-SLAPP protected and those are not. (CHA, § II.) All of peer review contributes to the Legislature's plan for protecting patients.

B. CMA Agrees That All Reportable Peer Review Activities, Plus Some Non-Reportable Activities, Are Anti-SLAPP Protected.

Representing California's physicians, CMA agrees with CHA and the Major Healthcare Providers that reportable peer review actions are protected speech and petitioning activities. According to CMA, anti-SLAPP protection applies to "peer review proceedings and actions that are subject to the reporting and fair hearing rights of Business and Professions Code sections 805 and 809 *et seq*., respectively." (CMA, p. 14.) CMA provides a list of reportable peer review acts that should receive anti-SLAPP protection, including:

- Denying a physician's application for medical staff membership or privileges;
- Terminating a physician's membership or privileges;

- Restricting a physician's membership or privileges;
- Initiating an investigation, if the physician resigns after receiving notice of the investigation; and
- Summarily suspending a physician's membership or privileges for more than 14 days.

(CMA, pp. 36–37, quoting Bus. & Prof. Code, § 805, subds. (b), (c), (e).)

CMA further argues that at least some *non*-reportable peer review acts, including initiating charges or an investigation, may also be anti-SLAPP protected under subdivision (e)(4). (CMA, p. 39; see *infra*, Part IV.) Again, CMA agrees with CHA and the Major Healthcare Providers that "[e]arlier stages of peer review may … qualify for anti-SLAPP protection as 'other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.' Code Civ. Proc., § 425.16(e)(4). (*Ibid.*) As CMA recognizes: "The anti-SLAPP statute can be a powerful tool against abusive litigation tactics, including in litigation involving hospital peer review." (CMA, p. 13.)

Given CMA's history of advocacy on behalf of plaintiff physicians, it is particularly noteworthy that CMA, CHA, and the Major Healthcare Providers support Defendants' position in this case. In 2007, CMA drafted and sponsored the bill that expanded Health and Safety Code section 1278.5 ("Section 1278.5") whistleblower protections to physicians.[1] As amicus curiae, CMA regularly aligns with physician

[1] A.B. 632 (2007–08 reg. sess.), Stats. 2007, ch. 683; CMA Amicus Curiae Brief, *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 2015 WL 4039096, at *2.

plaintiffs alleging Section 1278.5 violations[2] and other claims arising from peer review.[3] But here, CMA recognizes that peer review is a process steeped in speech and petitioning, and that reportable (and some non-reportable) peer review actions and decisions are anti-SLAPP protected.

C. All Amici Contradict Plaintiff's Primary Anti-SLAPP Defense.

By confirming that reportable peer review acts are protected conduct, CMA, CHA, and the Major Healthcare Providers all reject Plaintiff's primary defense to anti-SLAPP. Applying CMA's position to Plaintiff's First Amended Complaint ("FAC") demonstrates that Plaintiff's entire retaliation cause of action arises from protected peer review activity.

Plaintiff argues that his complaint truly arises from just two alleged acts: his summary suspension ("the lead act of retaliation") and the "termination"[4] of his medical staff privileges. (Answer, pp. 10, 31.)

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[2] See, e.g., CMA Amicus Curiae Briefs: *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 660, 2013 WL 4028291; *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 2015 WL 4039096, p. 2.

[3] See, e.g., CMA Amicus Curiae Briefs: *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1265; *Brennan v. Superior Court* (Cal.App. 1 Dist., May 21, 2010, No. A128581) 2010 WL 2675395, at *1; *Vo v. Pomona Valley Hospital Medical Center* (Ct. App., Sept. 20, 2018, No. B277409) 2018 WL 1400758; *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 984, 2012 WL 4707800, A1.

[4] The St. Joseph MEC only "recommended" termination; it was never imposed. (1 AA 54.) At Mission, the hospital board denied Plaintiff's application for reappointment. (1 AA 239.)

Per Plaintiff, these two reportable acts are not anti-SLAPP protected. (*Id.* at pp. 43–49.) Plaintiff attempts to analogize these reportable actions to the university's final tenure decision in *Park*, which the Court held was not a "statement" in connection with an official proceeding, nor was it likely an act in furtherance of speech and petitioning. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1070.) Plaintiff concedes that, unlike a tenure decision, summary suspensions and terminations involve Medical Board reporting and hearings. (Answer, p. 43.) But Plaintiff maintains peer review does not *further* such speech and petitioning rights. (*Id.* at pp. 42–49.)

CMA repudiates Plaintiff's position. All amici—including CMA—agree that summary suspensions and terminations are protected activities under anti-SLAPP subdivisions (e)(2) and/or (e)(4). (CMA, p. 14; CHA, p. 23; MHP, p. 40.) What is more, all amici agree *why* they are protected: they further speech and petitioning rights in connection with Medical Board reporting and fair hearings. (CMA, pp. 14, 36–37; CHA, p. 12; MHP, p. 14.) That conclusion is diametrically opposed to Plaintiff's primary arguments against anti-SLAPP. (See, e.g., Answer, p. 43.)

As CMA correctly concludes, the Legislature crafted peer review as an integrated "official proceeding" like no other. (See CMA, pp. 34, 36.) This official proceeding integrates (a) fair hearings rights under Business and Professions Code section 809 ("Section 809"); and (b) mandatory reporting to the California Medical Board under Business and Professions Code section 805 ("Section 805"), with the ultimate aim of saving lives. (CMA, pp. 36, 39.) According to CMA,

reportable peer review acts are thus protected under anti-SLAPP subdivision (e)(2).[5] (*Id.* at p. 36.)

All amici agree core speech and petitioning rights permeate Sections 805 and 809. (CMA, pp. 14, 36–37; CHA, p. 12; MHP, p. 14.) **First,** under Section 805 peer review bodies report corrective action to the Medical Board, acting as a law enforcement agency. (CMA, p. 23.) Reporting to law enforcement is an exercise of speech and petitioning rights under the anti-SLAPP statute. (Opening Brief, p. 42.) Thus reportable peer review acts are conduct in furtherance of speech and petitioning rights. (*Id.* at pp. 42, 54–56.)

Second, under Section 809 reportable peer review acts lead to quasi-judicial hearings. (CMA, p. 37.) A long line of anti-SLAPP case law establishes that participating in judicial and quasi-judicial proceedings is an exercise of speech and petitioning rights. (Opening Brief, pp. 47, 66.) Thus reportable peer review acts are conduct in furtherance of speech and petitioning rights in connection with quasi-judicial peer review hearings. (*Id.* at p. 59.) Amici's guidance confirms that Plaintiff's entire retaliation cause of action arises from protected activity under anti-SLAPP subdivisions (e)(2) and (e)(4).

III. ALL NON-REPORTABLE PEER REVIEW ACTIVITIES ARE PROTECTED BY ANTI-SLAPP SUBDIVISION (E)(2).

CMA agrees that reportable peer review acts are anti-SLAPP protected. CMA contends, however, that *non*-reportable peer review

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[5] Defendants, CHA, and the Major Healthcare Providers agree that reportable peer review acts are protected, although under anti-SLAPP subdivision (e)(4).

activities are *not* protected under anti-SLAPP subdivision (e)(2), although they may be protected under (e)(4). (CMA, p. 39.) As a result, CMA advocates for a "bright line" rule on (e)(2), protecting reportable acts, but not other peer review speech and petitioning activity that often precedes and may forestall reportable acts. CMA misapprehends *Kibler*, *Park*, and the peer review statute. CMA's "bright line" rule is not supported by law, would lead to absurd results, and ultimately is neither bright nor a line.

A. No Party Has Ever Raised CMA's Suggestion and the Court Should Not Entertain It.

CMA claims that the following *non*-reportable peer review speech and petitioning activities might not be protected:

- Issuing a written Notice of Charges alleging lapses of patient care by a physician. (CMA, p. 39.)
- Referring physicians to well-being committees[6] for assistance with behavioral and substance abuse problems. (CMA, p. 38.)
- Initiating an investigation or root cause analysis of unsafe patient care practices. (CMA, pp. 38, 39.)
- Statements by peer review committee members evaluating the care of their colleagues. (See CMA, p. 28, critiquing *Shaham v. Tenet HealthSystem QA, Inc.* (Ct. App., Apr. 15, 2014, No. B246549) 2014 WL 1465882, at *1–2.)

For the reasons discussed below, CMA's self-contradicting position turns anti-SLAPP and peer review law and logic on its head.

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[6] For a discussion of well-being committee work, see *infra*, Part III.C.1.

But the Court should disregard CMA's (e)(2) argument for a more fundamental reason: Plaintiff has not once raised this argument in five and a half years of briefing and litigation (and for good reason). (See *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422 ["It is settled that points not raised in the trial court will not be considered on appeal."].) Indeed, Plaintiff argues nearly the opposite position: That pre-decisional peer review activities may be protected, but reportable decisions are not. (See Answer, pp. 30, 35.) The Court should not undo 10 years of *Kibler* jurisprudence on an inconsistent theory that neither party has raised nor briefed on the merits.

B. CMA's Claim That Non-Reportable Peer Review Activities Are Not Protected by Anti-SLAPP (e)(2) Has No Basis in Law.

CMA's argument that non-reportable peer review activities are not protected under anti-SLAPP (e)(2) has no legal basis. *Kibler* held that statements in connection with peer review are protected under subdivision (e)(2), and the Legislature has defined peer review as all statutorily-mandated activities by a peer review body, whether reportable or not. *Park* confirmed that such statements may be protected. Nothing in *Kibler*, *Park*, or any other case justifies the line CMA attempts to draw.

1. *Kibler* Held, and *Park* Confirmed, That Statements in Connection with Peer Review Are Protected Under (e)(2).

In *Kibler*, the Court held that "a hospital's peer review qualifies as 'any other official proceeding authorized by law'" under anti-SLAPP

subdivision (e)(2). (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198.) As a result, "a lawsuit arising out of a peer review proceeding is subject to a special motion under section 425.16 to strike the SLAPP suit." (*Ibid.*) *Kibler* thus requires just two components for (e)(2) to apply: (a) statements, (b) in connection with peer review.

CMA, however, proposes changing *Kibler*'s holding such that *only* peer review *acts that are reportable to the Medical Board and lead to hearings* receive (e)(2) anti-SLAPP protection. (CMA, pp. 36–37.) Contrary to CMA's misapplication of *Kibler*, the Court never said or suggested anything similar. The Court easily could have stated that "peer review *hearings*" are official proceedings under (e)(2). It did not. Instead, *Kibler* held that "a hospital's peer review *procedure* qualifies as an 'official proceeding authorized by law.'" (*Kibler*, *supra*, 39 Cal.4th at p. 199, emphasis added.) The Court then helpfully defined that peer review procedure:

> Peer review is the **process** by which a committee comprised of licensed medical personnel at a hospital "**evaluates** physicians applying for staff privileges, **establishes standards** and procedures for patient care, **assesses** the performance of physicians currently on staff," and **reviews** other matters critical to the hospital's functioning.

(*Ibid.*, quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10, internal editing omitted, emphasis added.) The Court has always viewed peer review as an ongoing process. Peer review begins when physicians set

standards and assess the performance of their peers—long before reporting and hearings. Each step of peer review involves speech and petitioning activity: *evaluating* applications, *establishing* standards, *assessing* performance, and *reviewing* critical hospital functioning. (See *ibid*.)

Park did not disturb *Kibler*'s holding. (*Park*, *supra*, 2 Cal.5th at p. 1070.) In *Park*, the Court emphasized that "statements in connection with but outside the course of such a [peer review] proceeding can qualify as 'statement[s] ... in connection with an issue under consideration' in an 'official proceeding.'" (*Ibid.*, quoting Code Civ. Proc., § 425.16, subd. (e)(2).) CMA's position ignores this case law.[7] In sum, peer review statements are protected under (e)(2) as statements in connection with an official proceeding, regardless of whether they are also reported to the Medical Board. (CHA, pp. 39–46; MHP, pp. 42–54.)

2. The Legislature Has Defined Peer Review to Include All Activities by a Peer Review Body.

CMA's faulty argument depends not only on rewriting *Kibler*, but also on ignoring the statutory definition of peer review. According to CMA, only hearings constitute an "official peer review proceeding"

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[7] CMA also misunderstands the legal elements at issue in *Park*. (CMA, p. 34 ["Unlike the tenure decision underlying the national origin discrimination claim in *Park*, it appears that the adverse peer review decision itself is an element of a 1278.5 retaliation claim, rather than merely evidence of retaliation."].) As described in Defendants' Reply, Section 1278.5 includes the "threat" of changes in privileges, and thus may encompass speech as a necessary legal element of the cause of action. (See Reply, pp. 11–13.)

under (e)(2). (See CMA, p. 37.) But the Legislature defined peer review to include all activities of peer review bodies, from start to finish. (Bus. & Prof. Code, § 805(a)(1)(A).) By statute, "peer review" means:

> (i) **A process** in which a peer review body **reviews** the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct of licentiates to **make recommendations for quality improvement and education**, if necessary, in order to do either or both of the following:
>
> > (I) **Determine whether a licentiate may practice** or continue to practice in a health care facility, clinic, or other setting providing medical services, and, if so, to determine the parameters of that practice.
> >
> > (II) **Assess and improve** the quality of care rendered in a health care facility, clinic, or other setting providing medical services.
>
> (ii) **Any other activities of a peer review body** as specified in subparagraph (B).

(Bus. & Prof. Code, § 805(a)(1)(A), emphasis added; see also Bus. & Prof. Code, § 809.05(a) ["The governing bodies of acute care hospitals have a legitimate function in the peer review process."].) Peer review is a process that may lead to, but is not limited to, hearings and Medical

Board reporting.

Furthermore, all aspects of peer review bear the hallmarks of an "official proceeding." According to CMA, "One set of attributes about peer review marking it as an official proceeding is that the Legislature has recognized peer review to serve an important public interest." (CMA, p. 36.) But this is equally true of non-reportable peer review activities. The Legislature stated: "It is the intent of the Legislature that peer review of professional health care services be done efficiently, on an ongoing basis, and with an emphasis on early detection of potential quality problems and resolutions *through informal educational interventions*." (Bus. & Prof. Code, § 809(a)(7), emphasis added.)

Non-reportable peer review activities are also mandated by law, through a complex statutory scheme, just like Section 809 hearings and Section 805 reporting. (See, e.g., *Kibler*, *supra*, 39 Cal.4th at p. 199 [comprehensive statutory scheme is evidence of an "official proceeding"].) As a few examples of many:

- Peer review bodies must perform ongoing quality assurance activities. (Bus. & Prof. Code, §§ 2282(c), 2282.5(a).)
- Every medical staff must perform credentialing and support well-being committee activities. (Cal. Code Regs., tit. 22, § 70703(d).)
- Hospitals and medical staffs must conduct formal investigations into patient care concerns. (Bus. & Prof. Code, §§ 805(c), 809.05(b).)

As the Court described in *Arnett*, these peer review activities often serve to assist Medical Board investigators as they "regulate and discipline errant healing arts practitioners" and may lead to future

hearings. (*Arnett*, *supra*, 14 Cal.4th at pp. 10–11.) In sum, activities by peer review bodies are mandated by law, described in statute, and necessary for eventual reporting to the Medical Board. (See Bus. & Prof. Code, § 805.) They are essential parts of the peer review "official proceeding."

3. Contrary to CMA's Claim, Courts Have Consistently Applied Anti-SLAPP to All Aspects of Peer Review.

In its brief, CMA attempts to square its argument that anti-SLAPP subdivision (e)(2) applies to only certain stages of peer review with the post-*Kibler* case law. (See CMA, pp. 24–30.) CMA cannot do so. Rather than abandon its unsupported theory, however, CMA doubles down and concludes that the lower courts have applied *Kibler* "inconsistently," even "erratic[ally]." (CMA, pp. 24, 27.) The truth is far simpler. When the cases are analyzed through the correct lens that all peer review activity is protected, but non-peer review activity is unprotected, the courts' holdings are completely consistent.

The earliest case CMA discusses is *O'Meara v. Palomar-Pomerado Health System*.[8] (CMA, p. 27.) In that case, the Court of Appeal considered and rejected CMA's argument that non-reportable peer review activities are not anti-SLAPP protected. (*Ibid.* ["Because the statutory responsibilities of a peer review board go far beyond the

[8] *O'Meara v. Palomar-Pomerado Health System* (Ct.App., 4th Dist., Mar. 12, 2007, No. D043099) 2007 WL 731376. Like CMA, Defendants discuss these unreported cases to highlight the historical pattern, and not to rely on their holdings. (See CMA, p. 27.)

ultimate determinations of staff privilege terminations or denials, we reject Dr. O'Meara's argument that peer review proceedings are protected under the anti-SLAPP statute only if the proceedings result from an evidentiary hearing required for certain 'ultimate' types of discipline."].) CMA appears confused by this case, describing it as part of an "historical erratic pattern." (CMA, p. 27.) In fact, it was only the first of a long line of cases correctly interpreting *Kibler*.

In subsequent cases, the Court of Appeal carefully, and correctly, parsed claims arising from peer review (protected activity) from claims not arising from peer review (unprotected activity), often pled in the same complaint. (See, e.g., CMA, pp. 25–27; *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 56, 62 [summary suspension was protected activity, but denial of an application *before* peer review body involvement was not]; *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1, 7, 18, 21, disapproved of in *Park*, *supra*, 2 Cal. 5th at p. 1070 [termination was protected activity, but racially-discriminatory statements allegedly made *outside* the peer review process were not].) *Park* disapproved of *DeCambre* to the extent it "overread *Kibler*" as holding more than it did under anti-SLAPP subdivision (e)(2). (*Park*, *supra*, 2 Cal. 5th at p. 1070.) But *DeCambre* arrived at the right conclusion, albeit by a disfavored path.[9]

The other cases cited by CMA follow this same pattern—claims arising from peer review are subject to anti-SLAPP; claims *not* arising from peer review are *not* subject to anti-SLAPP. (See, e.g., CMA, pp.

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[9] The *DeCambre* court could have relied on subdivision (e)(4) that protects conduct in furtherance of speech and petitioning, instead of *Kibler* and subdivision (e)(2) that protects statements.

24, 2728; *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, disapproved[10] of in *Park*, *supra*, 2 Cal. 5th at p. 1070 [summary suspension and termination were protected activity]; *Shaham*, *supra*, 2014 WL 1465882 at *1–2 [allegedly-defamatory statements made in "the peer review proceeding" were protected activity]; *Kaye v. Van Putten* (Ct.App., 5th Dist., Mar. 21, 2011, No. F058513) 2011 WL 955713, at *1 [allegedly-defamatory statements made during a root cause analysis were protected activity]; *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 58 [administrative writ petition did *not* arise from peer review activity, and so was *not* protected].)

In sum, all the peer review cases CMA cites (and those it did not) apply the same, consistent principle: peer review activities are protected; non-peer review activities are not. That is, every case applied this principle until *Bonni*. Relying on dicta from *Park*, a non-peer review case, the *Bonni* court decided for the first time that a lawsuit arising from peer review activity was not subject to anti-SLAPP. As this Court held in *Wilson*, *Bonni* was wrongly decided. (See *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 892, disapproving of *Bonni*.)

C. CMA's Position on Non-Reportable Peer Review Speech and Petitioning Would Lead to Absurd and Inconsistent Results.

Adopting CMA's argument and failing to protect all of peer

[10] *Park* disapproved of *Nesson* for the same reason as *DeCambre*—that it overread *Kibler*'s holding.

review would lead to absurd and inconsistent results at odds with the Legislature's intent. Where possible and without compromising patient safety, the Legislature prefers that medical staffs conduct peer review "with an emphasis on early detection" and "through informal educational interventions." (Bus. & Prof. Code, § 809(a)(7).) CMA, however, would deny medical staffs anti-SLAPP protection for employing such informal interventions.

1. Anti-SLAPP Protects Well-Being Committee Activities.

To accomplish their patient safety goals, medical staffs employ many more tools than just reportable summary suspensions and terminations. For example, medical staffs assist members through "well-being committees" pursuant to Title 22. (Cal. Code Regs., tit. 22, § 70703(d).) These committees support physicians through physical health challenges, alcohol or drug reliance, mental health crises, burnout, and behavioral concerns. (See, e.g., *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1261 [committees often include "a psychiatrist, a substance abuse specialist, and an experienced member of the [medical staff]"].)

Well-being committees are non-punitive; they focus on evaluation and treatment. (See *ibid.* ["The Committee's goal is to intervene before any problem arises which could threaten patient care."].) However, if a physician fails to comply with a treatment plan in a way that endangers patients, that may be grounds for reportable action. (See *ibid.*) In that way, well-being committees are a critical part of the integrated system supporting the Medical Board's regulation of the medical profession.

Well-being committees are unquestionably in the public interest: they protect the health of both patients and physicians. That is why they are statutorily-mandated. (See Cal. Code Regs., tit. 22, § 70703(d).) CMA, however, singles out well-being committee referrals as speech that should *not* be anti-SLAPP protected. (CMA, p. 38 ["Non-disciplinary proceedings, such as referrals to well-being committees that address behavioral and substance abuse issues, do not trigger 805 reporting or 809 fair hearing rights. Such proceedings therefore would not be subject to anti-SLAPP scrutiny."].)

CMA is wrong. A "referral" to a well-being committee is a statement in connection with an official proceeding (peer review). (See Code Civ. Proc., § 425.16(e)(2).) Well-being activities are conduct in furtherance of speech and petitioning (e.g., peer review discussions and recommendations) on issues of public interest (patient safety). (See Code Civ. Proc., § 425.16(e)(4).) CMA's interpretation also turns the Legislature's intent on its head. (See Bus. & Prof. Code, § 809(a)(7) [encouraging informal resolutions].) Under CMA's rule, hospitals would receive anti-SLAPP protection for terminating a physician's membership, but not for the medical staff referring her to a well-being committee to address issues caused by impairment or stress. This absurd result is not and should not be the law.

2. Anti-SLAPP Protects Investigations.

Investigations are another critical peer review function that CMA claims would not warrant anti-SLAPP protection because they are often[11] not reportable. (CMA, p. 39.) Medical staffs are required to

[11] Investigations are reportable if the physician resigns after receiving notice of a pending investigation. (Bus. & Prof. Code, § 805(c).)

"[a]ssess and improve the quality of care rendered in a health care facility." (Bus. & Prof. Code, § 805(a)(1)(A) [definition of "peer review"].) To do so, peer review committees conduct investigations, including speaking with a physician's colleagues and other witnesses about patient care concerns. (See *California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1483 ["The committees compile records and evaluations and engage in frank discussions about the performance and competence of their peers."].) Investigations also give the subject physician an opportunity to provide information to the investigating committee, either in person or in writing. (See, e.g., 2 AA 515 [Mission Bylaws, § 4].)

Investigations, and the witnesses involved, are frequent targets of retaliatory Section 1278.5 lawsuits. (See Health & Saf. Code, § 1278.5 [defining prohibited discriminatory treatment to include "the threat" of "unfavorable changes in … privileges"];) But these speech and petitioning-infused processes are protected activities under anti-SLAPP subdivisions (e)(2) and (e)(4). (See, e.g., *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120 [statements made during a HUD investigation protected under (e)(2)]; *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 28 [air district investigatory acts protected under (e)(4)]; *Blue v. Office of the Inspector General* (2018) 23 Cal.App.5th 138, 156 [OIG's investigatory acts protected under (e)(4)].)

Recognizing the danger of chilling such investigations, the Legislature enacted Evidence Code section 1157 ("Section 1157"), which shields peer review documents from discovery. (*California Eye Institute*, *supra*, 215 Cal.App.3d at p. 1484 ["Section 1157 was enacted

upon the theory that external access to peer review investigations conducted by staff committees stifles candor and inhibits objectivity."].) Section 1157 evidences the Legislature's intent to protect investigations, even at the expense of plaintiffs' rights. (See *id.* at pp. 1485–1486 ["The Legislature presumably balanced this potential burden [on a physician plaintiff seeking evidence of peer review wrongdoing] against the public interest in promoting candor and frankness at peer review committee meetings and concluded the latter outweighed the former."].)

CMA, however, rejects anti-SLAPP protections for non-reportable investigations under subdivision (e)(2). (CMA, p. 39.) Here too CMA's position would lead to absurd results. According to CMA, a medical staff could invoke anti-SLAPP against a frivolous lawsuit arising from a summary suspension. But that same medical staff would have no early recourse against a frivolous lawsuit alleging defamation during the investigation leading up to the suspension. Such a result would chill both peer review investigations and suspensions, ultimately hurting the public.

3. Anti-SLAPP Protects All Peer Review Activities, Regardless of Reportability.

Well-being committees and investigations are just two examples of the essential public safety functions performed by peer review committees, all of which are protected parts of an "official proceeding." (See Bus. & Prof. Code, § 805(a)(1)(A) [defining "peer review" as "[a]ny other activities of a peer review body"].) Limiting anti-SLAPP protections to only reportable acts would chill the entire peer review process. Peer review committees rely on letters of admonition, one-on-

one meetings, written warnings, case monitoring, behavior agreements, Focused Professional Practice Evaluations, outside expert review, supplemental continuing medical education, and a host of other tools to counsel physicians and protect patients. (See, e.g., 2 AA 366, § 12.1.2 [St. Joseph Bylaws: "They may counsel, educate, issue letters of warning or censure, or institute retrospective or concurrent monitoring … in the course of carrying out their duties without initiating formal corrective action."]; see also *id.* § 12.2 [Focused Review].)

These tools for protecting the public are established, immunized, and integral parts of the peer review continuum. They are imbued with speech and petitioning activity. CMA's unsupported limitation would leave the door wide open to sham retaliation lawsuits at any stage of the peer review process prior to a formal hearing. It would also lead to perverse legal results that would discourage medical staffs from taking *less* restrictive action, even when a lesser intervention is warranted.

D. CMA's Supposed "Bright Line" Rule Is Vague and Unworkable.

CMA's unsupported theory is driven by its desire for "a bright line rule." (CMA, pp. 31, 35.) But any "bright line rule" cannot attempt to slice and dice peer review into protected and unprotected pieces. The resulting uncertainty and litigation would chill all of peer review—defeating the purpose of anti-SLAPP protections.

CMA's proposed rule, for example, would create far more confusion than it would resolve. Consider investigations. According to CMA, investigations are not anti-SLAPP protected because they are generally not reportable. (CMA, p. 39.) But if a physician resigns after receiving notice of the investigation, the investigation *does* become

reportable. (Bus. & Prof. Code, § 805(c).) Thus according to CMA, anti-SLAPP protection depends not on the medical staff's action—initiating an investigation—but instead on the plaintiff's response—deciding to resign. (See CMA, pp. 37, 39.) That is not how the anti-SLAPP statute works. (See *Park*, *supra*, 2 Cal.5th at p. 1063 [prong one examines the "the defendant's conduct," not the plaintiff's conduct].)

As another example, CMA argues that pre-hearing statements are not anti-SLAPP protected because they do not occur during the "official proceeding." (CMA, p 39.) But it is well established that "communications *preparatory* to or in anticipation of the bringing of an action or other official proceeding" are anti-SLAPP protected. (*Briggs*, *supra*, 19 Cal.4th 1106 at p. 1115.) CMA's position thus cannot be squared with this Court's existing anti-SLAPP case law.

Instead of CMA's slicing and dicing, the Court should adopt *Kibler*'s simple, bright line rule: "a lawsuit arising out of a peer review proceeding is subject to a special motion under section 425.16 to strike the SLAPP suit." (*Kibler*, *supra*, 39 Cal.4th at p. 198.) All peer review activity should be protected activity.

E. Failing to Protect Peer Review Would Chill Participation.

Failing to protect all of peer review would chill participation in an essential public service. CMA concedes this very possibility. (See CMA, p. 38 [admitting its position "could subject some hospitals and medical staffs to …. undue litigation burdens"].) CMA nevertheless argues that at least "individual physicians are spared" because "section 1278.5 does not allow individual doctors to be sued." *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 837.

But *Armin* provides cold comfort for peer reviewers. Frivolous lawsuits would chill peer review even if participants are not personally named as defendants. (See CHA, pp. 49–50; MHP, p. 40.) Hospitals must rely on their peer reviewers' testimony to defend against these lawsuits, so individuals still would be burdened by depositions and other discovery. (See *ibid*; see also *West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 851–852 [warning that "the burdens of discovery and involuntary testimony on the basis of their committee work … could cause many doctors to refuse to serve on the committees"]; *Willits v. Superior Court* (1993) 20 Cal.App.4th 90, 102–103 [warning that "damage actions would be a powerful disincentive to serve on such committees, to uninhibited participation by those willing to serve, and to full and candid investigation of incidents such as needle stick injuries"]; *Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1485 ["Facing the specter of attorney fees, hospitals [conducting peer review] would have to consider taking the safer course and ignoring all but the most egregious malfeasance."].) Anti-SLAPP protection is crucial to preventing this outcome.

IV. CONTRARY TO CMA'S ARGUMENTS, PEER REVIEW IS ALWAYS AN "ISSUE OF PUBLIC INTEREST" UNDER ANTI-SLAPP SUBDIVISION (E)(4).

CMA argues that certain non-reportable peer review activities, including initiating charges and investigations, may be protected under anti-SLAPP subdivision (e)(4). (CMA, pp. 14, 39.) According to CMA, such acts may constitute "conduct in furtherance" of speech and petitioning rights "in connection with a public issue or an issue of

public interest." (*Ibid.*; Code Civ. Proc., § 425.16(e)(4).) But CMA also muses that "such [(e)(4)] cases should be rare because it is unlikely that individual peer review cases will meet the 'public interest' requirement." (*Ibid.*)

CMA is incorrect. (See CHA, pp. 43–46; MHP, pp. 45–54.) All peer review activity furthers speech and petitioning on matters of public interest, including patient safety. As a result, all peer review activity is protected under subdivision (e)(4), to the extent it is not already protected as speech and petitioning under subdivision (e)(2).

A. Peer Review Speech Is Always in Connection with an Issue of Public Interest.

Anti-SLAPP subdivision (e)(4) protects conduct, including terminations, if two requirements are met. First, the conduct must relate to speech and petitioning "in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16(e)(4); see *FilmOn.com Inc. v. DoubleVerify, Inc.* (2019) 7 Cal.5th 133.) Second, the conduct must "further" the exercise of those speech and petitioning rights. (Code Civ. Proc., § 425.16(e)(4); see *Wilson*, *supra*, 7 Cal.5th at p. 900.)

1. Peer Review Is a Matter of Public Interest.

On the first issue, courts examine the *content* and the *context* of speech and petitioning to determine whether it is "in connection with a public issue." (*FilmOn.com Inc.*, *supra*, 7 Cal.5th at p. 142.) Both analyses demonstrate that peer review speech relates to critical matters of public interest: public health and patient protection. (See MHP, pp. 45–54 [analyzing content and context of peer review].)

Peer review speech and petitioning relates to public health and physician competence. (Bus. & Prof. Code, § 805 [defining peer review as "review[ing] the basic qualifications … medical outcomes, or professional conduct of licentiates" to "[a]ssess and improve the quality of care rendered in a health care facility"].) These are clearly public issues under (e)(4). (*Yang v. Tenet Healthcare Inc.* (2020) 48 Cal.App.5th 939, 947 [so holding].)

In addition, the *context* of peer review discussions confirms its public interest nature. (See *FilmOn.com Inc.*, *supra*, 7 Cal.5th at p. 144.) Peer review speech occurs in the context of an official proceeding carefully designed by the Legislature. In *FilmOn*, the Court explained that speech in the context of an "official proceeding," is protected. Under anti-SLAPP subdivisions (e)(1) and (2), "the Legislature '*equated* a public issue with the authorized official proceeding to which it connects,' effectively defining the protected status of the statement by the context in which it was made." (*Id.* at p. 144, quoting *Briggs*, *supra*, 19 Cal.4th at p. 1117, italics in original; see also MHP, pp. 45–46.)

In addition, when analyzing the context of peer review speech, the Court may also rely on the Legislature's own emphatic declarations that peer review is a crucial public service. In Section 809, the Legislature decreed: "Peer review, fairly conducted, is essential to preserving the highest standards of medical practice." (Bus. & Prof. Code, § 809, subd. (a)(3).) All of peer review assists the Medical Board in its "responsibility to regulate and discipline errant healing arts practitioners." (Bus. & Prof. Code, § 809, subds. (a)(5)–(6).)

The Legislature esteems peer review as serving the public interest through numerous statutory protections and immunities. (See, e.g., Opening Brief, p. 69; CHA, pp. 25–30; Bus. & Prof. Code, § 805, subd. (j), § 809.08, subd. (b), § 2318; Civ. Code, § 43.7, subd. (b), § 43.8, subd. (a), § 47, subd. (b); 42 U.S.C. § 11111, subd. (1).) Peer reviewers also enjoy discovery bars and confidentiality protections. (Evid. Code, § 1157; Health & Saf. Code, § 1278.5, subd. (h); Bus. & Prof. Code, § 805, subd. (g), § 805.1, subd. (b), § 805.01, subd. (d).)

Peer review is an "issue of public interest" because the Legislature mandates it. All hospitals must have organized medical staffs that conduct peer review, or risk losing their license to operate. (Cal. Code Regs., tit. 22, § 70703, subd. (a); Bus. & Prof. Code, § 809, subd. (a)(8); 42 C.F.R. § 482.22, subd. (a)(1)–(2); Health & Saf. Code, § 32128(a)(1).) If a medical staff fails to stop an errant doctor, the hospital is civilly liable to patients the doctor injures. (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 341.) In addition, hospitals that fail to report certain peer review acts to the Medical Board may face a $100,000 fine; medical staff leaders may face action against their medical license and may be guilty of a crime. (Bus. & Prof. Code, § 805, subd. (k), § 805.01, subd. (g), (h).)

This multifaceted, complex statutory scheme—integrated throughout the Civil Code, the Business and Professions Code, the Evidence Code, and the Health and Safety Code—makes peer review an "official proceeding" like no other. Lawsuits arising from this official proceeding arise from acts in furtherance of speech and petitioning rights "in connection with a public issue or an issue of public interest," under anti-SLAPP subdivision (e)(4).

2. Peer Review Furthers Speech and Petitioning Regarding Public Health and Patient Safety.

Under subdivision (e)(4), conduct must not only relate to a matter of public interest, it must "further" or "contribute to" that interest (*Wilson*, *supra*, 7 Cal.5th at pp. 871, 898, 900; see also MHP, pp. 47–53.) In *Terry v. Davis Community Church*, the Court of Appeal held that communications "furthered" an issue of public interest under (e)(4) "because they involved the societal interest in protecting a substantial number of children from predators, and the matter was referred to the Davis Police Department for investigation …." (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1547.) In *FilmOn*, this Court approved of *Terry*, explaining that although the discussions were private, their purpose and effect was to protect public safety. (*FilmOn.com Inc.*, *supra*, 7 Cal.5th at pp. 146, 150.) Likewise, peer review activities furthers the public interest by protecting patients from dangerous physicians. As in *Terry*, peer review activities also further reporting to law enforcement, in this case, the Medical Board.

As another example, in *Murray v. Tran*, the Court of Appeal held that under anti-SLAPP (e)(4), a dentist's "statements—made to a current employer—were directly tethered to the issue of public interest (a dentist's competence to perform dental work) and promoted the public conversation on that issue *because they were made to a person who had direct connection to and authority over the patient population* with whom [the dentist] was working at the time." (*Murray v. Tran* (Ct.App., 4th Dist., Sept. 24, 2020, No. D076104) ___ Cal.App.4th ___, 2020 WL 5668741, at *15, emphasis added.)

Peer review meets (e)(4)'s public interest requirement for the same reasons. When a nurse reports dangerous physician practices to the MEC, he is petitioning the body that has "authority over the patient population with whom [the physician is] working at the time." (See *ibid.*) In turn, when the MEC recommends that the hospital terminate a physician's privileges, the MEC is petitioning the hospital's governing board, the body that shares "authority over the patient population." (See *ibid.*) And when the hospital's governing body terminates a physician's privilege and reports that act to the Medical Board, the hospital is petitioning to a body that shares "authority over the patient population." (*See ibid.*) Throughout this process, the hospital's medical staff furthers public health and patient safety goals by sharing its investigatory findings with other health facilities. (See Bus. & Prof. Code, § 809.08 ["[T]he sharing of information between peer review bodies is essential to protect the public health."].) All of peer review contributes to these essential conversations on matters of public safety and protection.

B. CMA Paints an Inaccurate and Biased Picture of Peer Review.

CMA's ambivalence as to whether peer review advances the public interest exposes some bias against peer reviewers. (See, e.g., CMA, pp. 15–21 [describing peer review alternatively as "effective, efficient, and fair" and as a means of "unjust control and arbitrary exclusions"].) Defendants need not address most of CMA's broadsides; the Legislature itself has rejected CMA's more incendiary language. (See, *supra*, Bus. & Prof. Code, § 809, subd. (a)(3) [essential nature of peer review].) Two points, however, warrant correction.

First, the Lumetra study on which CMA relies was poorly conducted and has been thoroughly discredited. CMA did not attach the complete study, and it is not part of the appellate record. (See *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882 ["Generally, documents and facts that were not presented to the trial court and which are not part of the record on appeal, cannot be considered on appeal."].) Moreover, the study itself highlights its shortcomings. (Lumetra Study, p. 39 ["Through several sources, we heard about criticism of the study while it was in progress."].) Stakeholders criticized Lumetra for its lack of independence, minimal funding, and poor methodology, and argued that its "[s]uperficial and biased survey questions would produce sensational results but no meaningful data," among many other concerns. (*Id.*, pp. 39–41.) Defendants urge the Court *not* to cite or rely on the Lumetra study in its opinion, so as not to lend unwarranted credence to this study through a published Supreme Court opinion.

Second, the Court should view CMA's canard of "sham peer review" with due skepticism. (CMA, pp. 13, 18.) Courts can and should protect whistleblowers raising legitimate patient safety concerns from retaliation. (See, e.g., Health & Saf. Code, § 1278.5.) But as a practical matter, commandeering a peer review hearing for whistleblower retaliation would require a lengthy and unlikely string of conspiracies and deceptions.

First, a majority of the MEC, typically comprised of over a dozen physicians, would need to recommend action limiting a physician's privileges—not because of any legitimate patient safety concerns, but due to retaliatory animus. During the resulting fair hearing, the MEC

would need to deceive a Judicial Review Committee, comprised of three to seven unbiased physicians, chosen after voir dire and with no prior involvement in the case, into agreeing with its recommendation. To do so, the MEC would need to concoct evidence—medical records, expert reports, and witness testimony—falsely describing patient care lapses. Then, following an appellate hearing, the hospital board would need to affirm the retaliatory act, although doing so would expose the hospital to liability. But even that is not the end. The hospital board would then need to defend against a writ proceeding in Superior Court and trick that tribunal into finding that "substantial evidence" supports the hospital's action.

This is beyond unlikely to occur. (See CHA, p. 54 [noting "the sheer unlikelihood of the conspiracy that would be required" for sham peer review to succeed].) Whistleblowers are not relying solely on Section 1278.5 lawsuits to vindicate their rights; they also enjoy extensive statutorily-mandated peer review hearing rights and judicial review via a writ of administrative mandate.

V. CONCLUSION

The amici's briefs confirm that peer review is an ongoing process, imbued with speech and petitioning throughout. This process supports quasi-judicial hearings and reporting to the Medical Board. All peer review activities are thus protected activities under Code of Civil Procedure section 425.16(e)(2) and (4).

Dated: October 16, 2020

ARENT FOX LLP

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned hereby certifies that this **RESPONDENTS' JOINT REPLY TO AMICI CURIAE BRIEFS** contains 7067 words, exclusive of the cover page, tables, signature block, and this certification, as counted by the Microsoft Word word-processing program used to general it.

Dated: October 16, 2020 By: 

DEBRA J. ALBIN-RILEY

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, 48th Floor, Los Angeles, CA 90013. On October 16, 2020, I caused a true and correct copy of the document listed below to be served in the manner indicated to the parties on the service list.

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Executed on October 16, 2020, at Garden Grove, California.

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