S263180

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Matthew Boermeester,
Plaintiff and Appellant,

v.

Ainsley Carry et al.,
Defendants and Respondents.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B290675

LOS ANGELES SUPERIOR COURT, THE HONORABLE AMY D. HOGUE,
CASE NO. BS170473

APPLICATION TO FILE AMICUS BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF NO PARTY

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APPLICATION TO FILE AMICUS CURIAE BRIEF

California Hospital Association ("CHA") is a nonprofit membership corporation representing the interests of more than 400 hospital and health-system members in California, with 97 percent of the state's patient beds. CHA respectfully applies for leave to file the accompanying proposed amicus curiae brief in support of no party, in accordance with Rule 8.200(c) of the California Rules of Court. Amicus curiae is familiar with the content of the parties' briefs and the issues on appeal; if allowed to stand, the Court of Appeal's holding will set a dangerous and overbroad precedent that may affect hundreds of hospitals in California and their patients.

I. INTERESTS OF AMICUS CURIAE APPLICANT

CHA advocates for California's hospitals and health systems as they work to care for all Californians. CHA's goal is for every Californian to have equitable access to affordable, safe, high-quality, and medically necessary health care.

CHA hospitals and health systems furnish vital health care services to millions of our state's people. CHA supports hospitals in improving health care quality, access, and coverage; promoting health care reform and integration of services; complying with laws and regulations; and maintaining the public trust in healthcare.

CHA's primary concern in the present case is that the Court of Appeal's overbroad opinion, if left standing, will chill whistleblower reporting and exclude evidence from non-testifying witnesses in medical disciplinary hearings. In addition, the lower

court's holding will make such hearings even longer and more burdensome than they are already, by needlessly multiplying witnesses. In light of their duty to ensure their patients' safety, CHA members thus have a vital interest in this case's resolution.

California law requires hospitals to offer administrative hearings governed by fair procedure to physicians who are subject to adverse actions because their poor patient care or disruptive behavior endangers the public. Requiring cross-examination of all pre-hearing witnesses—whistleblowers and others—would create a great disincentive to these witnesses reporting patient safety concerns. The prospect of cross-examination in a formal adversary hearing will reasonably cause any nurse, physician assistant, or other member of a healthcare team to think twice about reporting an adverse patient care incident. That entirely foreseeable reaction would undermine established quality review processes. Also, because hospital peer review committees lack subpoena power, under the Court of Appeal's overbroad holding, witnesses' refusal to testify would lead to the exclusion of essential relevant evidence obtained from reliable non-testifying witnesses. All of these consequences will increase the risk of patient harm.

The essential flaw in the Court of Appeal's holding is its conflation of common law fair procedure requirements, applicable to private institutions like many California hospitals, with constitutional due process principles, applicable to state actors. The holding thus infringes not only on private institutions' authority to design their own fair procedure processes, but also

on their abilities to apply their expertise and discretion in their unique professional settings. As noted above, the resulting needless expansion of hearing rights would have potentially dire consequences in California hospitals. CHA therefore requests to submit an amicus curiae brief to assist the Court in its resolving these critical issues.

II. THE AMICUS CURIAE BRIEF'S PURPOSE

CHA's proposed brief will assist the Court in understanding the effects that the first issue presented in this case may have in other private institutional settings that are required to afford subjects of disciplinary proceedings with fair procedure, such as California's private hospitals. Applying CHA's unique perspective as the state-wide membership organization for California hospitals and health systems, the amicus brief will explain that: (I) hospitals rely on healthcare workers to conduct peer review and report quality of care concerns to maintain patient safety; (II) subjecting those who witness or report questionable conduct and care to live cross-examination would chill essential participation in peer review and reporting; (III) private institutions are the best situated to design their own fair procedures to give accused individuals notice and an opportunity to respond; (IV) fair procedure standards, applicable to private institutions such as hospitals, are distinct from constitutional due process, which apply to state actors; and (V) imposing a blanket mandatory live cross-examination requirement on fair procedure would exclude essential relevant non-testifying witness evidence gathered in

investigations. CHA's analysis of the impact of requiring compulsory cross-examination at a live hearing is informed not only by the relevant statutes and case law, but also by the real-world experiences of governing bodies and medical staffs in CHA's numerous member hospitals and health systems. CHA believes its unique perspective on these issues will assist the Court in deciding this matter.

No party, counsel for a party, person, or other entity—other than CHA and its counsel in this matter—authored the proposed amicus curiae brief in whole or in part, or made any monetary contribution intended to fund the brief's preparation or submission.

III. CONCLUSION

For the reasons set forth above, CHA respectfully requests that the Court accept and file the amicus curiae brief filed concurrently herewith.

Respectfully submitted,

Dated: June 30, 2021 Arent Fox LLP

By: _____

LOWELL C. BROWN
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PROPOSED AMICUS CURIAE BRIEF

I. INTRODUCTION

This brief addresses the first issue presented in this case:

> Under what circumstances, if any, does the common law right to fair procedure require a private university to afford a student who is the subject of a disciplinary proceeding with the opportunity to utilize certain procedural processes, such as cross-examination of witnesses[1] at a live hearing?

This issue essentially asks the court whether to impose burdensome and unnecessary procedural requirements on fair procedure. The Court should answer this question with a resounding "no" to protect California hospital patients. Compulsory cross-examination of all witnesses would chill misconduct reporting and allow harmful behavior to persist undetected at the expense of unsuspecting victims, witnesses, and the public in many settings beyond private universities. In

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[1] As used in this brief, "witnesses" are whistleblowers who report concerns, eyewitnesses, and others who provide information before a hearing, even if they do not testify. This is consistent with the Court of Appeal's use of the term to refer to the victim, eyewitnesses, and others with relevant information. *See e.g., Boermeester v. Carry* (Ct. App. 2020) 263 Cal.Rptr.3d 261, 280 (stating that "critical witnesses [included] AB [Boermeester's ex-girlfriend], MB2 [Roe's neighbor who was an eyewitness], DH [Roe's neighbor who was an eyewitness], and TS [Roe's neighbor who was not an eyewitness]").

California hospitals, where individuals are most vulnerable, the consequences could be fatal. The Court of Appeal's holding would undermine the peer review system and leave patients vulnerable to receiving unsafe care.

II. PATIENT SAFETY DEPENDS ON PEER REVIEW AND REPORTING BY MEDICAL PROFESSIONALS

It is crucial for hospitals to have functional peer review systems designed and directed by medical professionals in order to safeguard quality of care. California hospitals are required to perform peer review by reviewing the qualifications, privileges, employment, clinical outcomes, and professional conduct of their practitioners to improve quality of care and determine whether practitioners may safely practice at their institutions. (Cal. Bus. and Prof. Code Section 805(a)(1)(A)(i).) The Legislature has proclaimed that peer review "is essential to preserving the highest standards of medical practice" and that the primary purpose of peer review is "[t]o protect the health and welfare of the people of California [by excluding], through the peer review mechanism as provided for in California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct." (Cal. Bus. and Prof. Code Sections 809(a)(3), (a)(6).) When medical staffs in hospitals take adverse peer review action against a practitioner, they are required to offer an administrative hearing complying with the fair procedure standards provided by Business and Professions Code Section 809 *et seq*. This hearing is often called a medical staff hearing or peer review hearing.

The Legislature intended the peer review process and resulting medical staff hearings to be a collegial and professional process conducted by "medical or professional staff" in a manner that is fair, efficient, continuous, and that has an emphasis on educating practitioners. (Bus. and Prof. Code Sections 805(a)(1)(B)(i), 809(a)(7).) That is because not only do medical professionals have the appropriate knowledge and experience to assess their peers thoroughly and fairly, but they are also present onsite to alert hospitals when they witness questionable conduct that they believe may endanger patients. Effective peer review thus requires participation of all professionals who work at hospitals and are in positions to observe concerning conduct—not only physicians, but also physician assistants, nurses, social workers, and other hospital workers.

Of utmost importance is that all hospital workers must feel free to report concerns to enable hospitals to safeguard patient safety. California hospitals and their patients rely on hospital workers to participate in peer review processes and report unsafe practitioners or practices. This reporting is so vital that there are several California and federal laws that broadly protect individuals' communications regarding patient safety when such communications are in good faith and without malice. (*See e.g.,* Cal. Civ. Code Sections 43.7, 43.8; Cal. Evid. Code Section 1157; 42 U.S.C. Section 11101 *et seq.*) These laws seek to encourage sharing important quality of care information, engaging in thorough and uninhibited discussions, and acting in the interest of protecting patients without fear of liability or intimidation.

Reporting enables hospitals to act to prevent harm to patients before it occurs. Therefore, in order to keep patients safe and provide continuous access to high quality care, hospitals must be able to rely on all of their workforce to report patient safety concerns.

III. AN OVERBROAD LIVE CROSS-EXAMINATION REQUIREMENT WOULD CHILL PEER REVIEW PARTICIPATION AND REPORTING AND UNDERMINE PATIENT SAFETY

The Court of Appeal's holding will chill complaints in settings like hospitals where administrative hearings require fair procedure. The subject of a complaint, such as a physician or other practitioner, will insist on cross examining anyone who reported or witnessed his or her concerning conduct or practice. Healthcare workers will be deterred from participating in peer review and from reporting patient safety concerns that they observe for fear of being hauled into a medical staff hearing to testify. If they do not raise concerns that only they observe, peer review and quality efforts will be significantly stunted because concerning issues will not be brought to the attention of hospitals. As a consequence, California hospital patients will suffer.

The harmful impact of the Court of Appeal's holding would further put patients at risk by interfering with functional patient care teams. During medical staff hearings, which often last years, witnesses and healthcare workers who report concerning conduct or patient care generally continue to interact and work

with practitioners who are the subject of peer review hearings. Often, they continue to work together even after the hearings, when, for example, the adverse peer review action or hearing did not result in termination. In these situations, the specter of retaliation looms large. If members of a healthcare team know they may be required to testify against a practitioner in a medical staff hearing, they will reasonably worry that doing so may later result in an intimidating and hostile work environment. This is yet another chilling consequence of requiring testimony from any hospital worker who calls attention to a patient safety issue.

Many medical staff hearings result from physician's disruptive, hostile or harassing behavior. According to The Joint Commission, the leading national hospital accrediting and standard-setting organization, physician behaviors like intimidation undermine safe and quality patient care by compromising the ability of healthcare teams to interact and work together collaboratively. (*See* The Joint Commission, *Sentinel Event Alert 40: Behaviors That Undermine a Culture of Safety* (July 9, 2008), https://www.jointcommission.org/-/media/tjc/documents/resources/patient-safety-topics/sentinel-event/sea_40.pdf (stating that "[i]ntimidating and disruptive behaviors can foster medical errors," "contribute to poor patient satisfaction and to preventable adverse outcomes," and create "an unhealthy or even hostile work environment").) Hospital medical staffs are not currently required to produce for cross-examination every nurse or other hospital employee who has reported a

physician's unacceptably hostile or offensive behavior. It is not hard to imagine why a nurse who has already been bullied and intimidated once (or more) by a physician will not want to report that misbehavior and thus come face-to-face with that same person in a hearing. Allowing such whistleblower-chilling trauma in the name of witness confrontation is not a compromise that the Court should require caregivers to make.

IV. PRIVATE INSTITUTIONS HAVE THE DISCRETION AND PROFESSIONAL EXPERTISE TO DESIGN THEIR FAIR PROCEDURE PROCESSES, WHICH DO NOT REQUIRE LIVE CROSS-EXAMINATION

In private organizations, fair procedure only requires that the accused have notice of the charges against him or her and a reasonable opportunity to respond. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 ("*Pinsker*").) Fair procedure does not compel adherence to a single rigid procedure, and courts "should not attempt to fix a rigid procedure that must invariably be observed." (*Id.*) Further, this Court has recognized that fair procedure does not prevent a private institution from using its business judgment to set standards to take adverse action against individuals. (*Potvin v. Metro. Life Ins. Co.* (2000) 22 Cal.4th 1060, 1072 (stating that fair procedure did not prevent the insurer "from exercising its sound business judgment when establishing standards for removal of physicians from its preferred provider lists").)

This flexibility will suffer under the Court of Appeal's holding. Requiring live witnesses and their cross-examination on

every bit of evidence presented will unnecessarily multiply the time and expense of these hearings. A time-honored judicial principle governing peer review hearings is that "the fair procedure required in this setting clearly need not include the formal embellishments of a court trial." (*Pinsker* at 545.) CHA members widely report, however, that despite the *Pinsker* principle, medical staff fair procedure hearings are indeed becoming more and more like lengthy and complex court trials.

Ideally, in the hearings, particularly those involving disruptive behavior or that require setting up the background of the disciplinary action, reports of poor care or misconduct are presented in a summary fashion. In the interests of efficiency and maintaining the proper focus on patient safety, there is little or no testimony by the individuals involved in making the initial reports. That approach is consistent with the established evidentiary rule for administrative hearings:

> Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Cal. Gov. Code Section 11513; *see also Pick v. Santa Ana-Tustin Cmty. Hosp.* (1982) 130 Cal. App. 3d 970, 980 ("It is of course true

that in hearings concerning the qualifications of an applicant for admission to medical staff privileges a hospital should receive as evidence and consider only the kind of relevant matter upon which responsible persons customarily rely in the conduct of serious affairs.").)

If, however, all such initial reports must be presented through live witnesses, the time required will be multiplied and the process made even more burdensome. This will further discourage vital reporting by hospital workers.

As long as the individuals subject to disciplinary action are afforded notice and a reasonable opportunity to respond, private institutions should have the discretion to customize their hearing procedures to their own settings. Their professional expertise makes them the most appropriately situated to the task. Utilizing their institutional knowledge and understanding of unique organizational subject matter, needs, and goals, institutions should be able to tailor their procedures in a manner that gives individuals proper notice of the issues in order to prepare a defense. They should not be constrained by inflexible rules characteristic of a formal trial that do not fit every situation. The proper role of the court is only "to afford relief in the event of the abuse of [institutional] discretion." (*Pinsker* at 556.)

As discussed above, in California hospitals, medical professionals are meant to conduct peer review because their expertise makes them best equipped to know what is in patients'

best interests and what meets professional standards of care, unlike courts and lawyers. The Court should not intrude into the affairs of private organizations to impose heightened and inflexible hearing procedures that would impede hospitals from effectively addressing quality concerns and undermine patient safety.

V. COURTS AND THE LEGISLATURE HAVE RECOGNIZED THAT FAIR PROCEDURE, WHICH APPLIES TO PRIVATE INSTITUTIONS, IS SEPARATE AND APART FROM CONSTITUTIONAL DUE PROCESS, WHICH APPLIES TO STATE ACTORS

Statutory law distinguishes between fair procedure requirements and due process. Due process is the required procedure only where there is state action. (*See e.g.,* U.S. Const., Fourteenth Amendment, Section 1; Cal. Const. Art. 1, Section 7(a).) Due process does not apply to decisions of private institutions. The Legislature codified the fair procedure requirements for hospital medical staff hearings in Section 809 *et seq*. In Section 809.7, the Legislature specifically carved out hearings conducted in state, county, or publicly-owned hospitals and stated that due process applies to hearings in such hospitals. Also, California Civil Procedure Section 1094.5 permits individuals to challenge administrative decisions on the basis of whether they received fair procedure overall, not whether they were afforded a formal due process hearing. (Cal. Civ. Code Section 1094.5(b).)

This Court has long recognized that fair procedure, which governs actions of private organizations, is distinct from due process.

> It is important to note that the legal duties imposed on [private] defendant organizations arise from the common law rather than the Constitution . . . In an attempt to avoid confusing the common law doctrine involved in the instant case with constitutional principles, we shall refrain from using 'due process' language and shall simply refer instead to a requirement of a 'fair procedure.'

(*Pinsker* at 550 n.7.)

Similarly, courts have recognized that hospital medical staff hearings are based on the fair procedure doctrine, not due process. (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 986 ("A hospital's duty to provide certain protections to a physician in proceedings to deny staff privileges was grounded originally in the common law doctrine of fair procedure."); *Powell v. Bear Valley Community Hospital* (2018) 22 Cal.App.5th 263, 27, quoting *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 102 (Fair procedure rights in private hospitals "arise from section 809 *et seq.* and not from the due process clauses of the state and federal

Constitutions.").) Therefore, fair procedure principles should not be conflated with due process requirements.

VI. BECAUSE PRIVATE INSTITUTIONS DO NOT HAVE AUTHORITY TO ENFORCE MANDATORY CROSS-EXAMINATION, ESSENTIAL RELEVANT EVIDENCE WOULD BE EXCLUDED FROM FAIR PROCEDURE HEARINGS

Private institutions have no subpoena power to compel witness testimony. If private organizations are subject to a mandatory cross-examination rule, they will be unable to introduce evidence obtained from non-testifying witnesses that was relevant to their decision making.

For example, if essential witness testimony is gathered in a hospital investigation, but the witness is unavailable or unable to testify at the medical staff hearing for any reason, hearing bodies will be unable to consider evidence that may have fundamentally supported the peer review action. Excluding relevant evidence due to an overbroad judicially imposed procedure would undermine the ability of hospitals and medical staffs to prove that their decisions were fair and reasoned. Such a result will discourage hospitals and medical staffs from acting to protect patients based on reliable information received from witnesses, particularly if witnesses have expressed unwillingness to participate in peer review hearings.

This is especially problematic where retaliation is a concern. Requiring cross-examination would create a perverse

incentive for subjects of disciplinary action to intimidate and retaliate against witnesses to discourage them from testifying. Accused individuals willing to engage in such behaviors will know that by doing so they can manipulate the fair hearing process to prevent institutions from considering relevant evidence. The Court must not approve a rule that would incentivize misconduct and retaliation at the expense of healthcare teams and most importantly, of the patients who rely on those teams to keep them safe.

VII. CONCLUSION

The quality of California healthcare depends on effective peer review processes designed and led by medical professionals. Redefining fair procedure standards to require live cross-examination of witnesses is not supported by the law and is harmful to patient care teams and patient safety. CHA thus urges the Court not to create precedent that adds burdensome and unnecessary procedures to administrative hearings governed by fair procedure.

Dated: June 30, 2021 **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 brief consists of 2,581 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Microsoft Word word-processing program used to generate it.

Dated: June 30, 2021

ARENT FOX LLP

By: _____

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Boermeester v. Carry et al.
Case No. S263180

I am a citizen of the United States. My business address is Arent Fox LLP, 555 West Fifth Street, 48th Floor, Los Angeles, California 90013. My email address is Katryn.smith@arentfox.com. I am employed in the County of Los Angeles where this service occurs. I am over the age of 18 years, and not a party to the within cause.

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Katryn Smith

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Case No. S263180

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Date

/s/Katryn Smith

Signature

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