No. 05-638

IN THE

Supreme Court of the United States

GIL N. MILEIKOWSKY, M.D.,
Petitioner,

–against–

TENET HEALTHSYSTEM, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FOUR

MOTION TO FILE BRIEF *AMICI CURIAE* IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI
AND
BRIEF OF THE *AMICI CURIAE* IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO A FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the associations listed below respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari submitted by Dr. Gil Mileikowsky. Respondent Tenet Healthsystems ("Tenet") has refused to grant consent, offering no explanation, and necessitating this motion.

The following *amici curiae* have a substantial interest in this Court's review under a writ of certiorari:

- the Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943, dedicated to defending the patient-physician relationship and free enterprise in medicine;

- the Union of American Physicians and Dentists ("UAPD") is an association of thousands of physicians and dentists, headquartered in California where the bulk of its members live and practice medicine, whose history of advocacy embraces concerns that doctors be accorded due process in tribunal proceedings;

- the Semmelweis Society International, Inc. ("Semmelweis Society") is a public interest group comprising approximately eighty physicians, attorneys and concerned citizens who advocate for good faith professional peer review in medicine;

- the Government Accountability Project ("GAP") is a 28-year-old non-profit, non-partisan public interest law firm specializing in legal advocacy to protect government and

corporate "whistleblowers" who expose institutional misconduct that undermines the public interest;

GAP works to see that whistleblowing is honored and rewarded. When, as in this case, institutions seek to punish whistleblowing, GAP defends the rights of the whistleblower. The reason for this is simple: If there is a penalty for exposing wrongdoing, people are much less likely to expose it. This is detrimental to the public in very direct ways. In this case, other medical practitioners are discouraged from coming forward when they are aware of problems or negligence in patient care. This chilling effect is directly detrimental to the public well-being. Therefore, we pray to be heard in this case.

- the Consumer Attorneys of California ("CAOC") is an organization of more than 3,000 attorneys who individually advocate on behalf of consumer and plaintiffs who have been wrongly injured through negligence or defective products and lack the resources and power to face corporate wrongdoers; and

- the Association of Trial Lawyers in America ("ATLA") is a voluntary association of approximately 50,000 lawyers, is committed to protecting the fundamental fairness of adjudicatory proceedings.

The interest of the foregoing *amici* groups in Dr. Mileikowsky's petition for certiorari stems from their dedication to preserving the integrity of proceedings conducted by administrative tribunals, and to ensuring that due process rights are provided when physicians face peer review procedures. This case addresses the integrity of those procedures, which are quasi-criminal in nature. Doctors, like the petitioner in this case, are required to defend themselves without counsel against charges that, as in this case, have been brought in retaliation for the doctor's support of a patient claiming inadequate care.

This case is of particular interest, therefore, because it implicates not only the capacity of individual physicians to defend themselves against retaliatory action when they stand up for the very oath by which they practice, but further goes to the very heart of the national public interest in preserving transparency and accountability within the complex managed health care system that patients cannot monitor on their own. The American public, as medical patients, will be the biggest loser if physicians are compelled to choose between their own livelihoods and speaking out when they witness dangerous or inadequate medical care. Few physicians will risk the dire consequences of a bad faith peer review to speak up on behalf of a single patient, and a critical prong in the checks and balances integral to a successful health care program will be silenced.

For the above reasons, this motion for leave to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether California violated the Due Process Clause when it denied a physician the right to counsel at a retaliatory suspension hearing which resulted in the loss of hospital privileges and which is required to be reported to the National Practitioner Data Bank pursuant to the Health Care Quality Improvement Act of 1986.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for *amici curiae* authored the brief in whole. No monetary contribution was received toward preparation or submission of the brief, other than monetary contributions by *amici curiae*.

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943, dedicated to defending the patient-physician relationship and free enterprise in medicine. The Union of American Physicians and Dentists ("UAPD") is an association of thousands of physicians and dentists, headquartered in California where the bulk of its members live and practice medicine, whose history of advocacy embraces concerns that doctors be accorded due process in tribunal proceedings. The Semmelweis Society International, Inc. ("Semmelweis Society") is a public interest group comprising approximately eighty physicians, attorneys and concerned citizens who advocate for good faith professional peer review in medicine.[2] The Government Accountability Project ("GAP") is a 28-year-old non-profit, non-partisan public interest law firm specializing in legal advocacy to protect government and corporate "whistleblowers" who expose institutional misconduct that undermines the public interest. The Consumer Attorneys of California ("CAOC") is an organization of more than 3,000

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[2] The Semmelweis Society is named for the Hungarian physician Dr. Ignas Semmelweis who discovered in 1847 that doctors in Vienna hospitals were spreading fatal infectious diseases while delivering babies. He required that all doctors under his supervision wash their hands before touching patients.

Dr. Semmelweis' observations were originally rejected by his peers and the controversy over his views resulted in Dr. Semmelweis ultimately suffering a break down. He was taken to a mental hospital where he died. As a result of Dr. Semmelweis' actions, all physicians now use antiseptics. Yann H.H. Geertruyden, The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 And State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review In The Medical Community, 18 J. of Contemp. Health Law & Policy 239, 239-40 (2001).

attorneys who individually advocate on behalf of consumer and plaintiffs who have been wrongly injured through negligence or defective products and lack the resources and power to face corporate wrongdoers. The Association of Trial Lawyers in America ("ATLA") is a voluntary association of approximately 50,000 lawyers, is committed to protecting the fundamental fairness of adjudicatory proceedings.

These *amici* groups have a vital interest in this matter as it addresses the integrity of peer review proceedings – highly legal in nature – in which doctors are called to defend themselves, without counsel, often, as in this case, after calling attention to a situation of improper, inadequate or dangerous medical care. This case implicates not only the capacity of individual physicians to defend themselves against retaliatory action when they stand up for the very oath by which they practice, but further goes to the very heart of the national public interest in preserving transparency and accountability within the complex managed health care system that patients cannot monitor on their own. The American public, as medical patients, will be the biggest loser if physicians are compelled to choose between their own livelihoods and speaking out on behalf of wronged patients. Whenever fewer physicians are willing to criticize the medical community out of fear of the dire consequences of a fundamentally unfair, bad faith peer review, an essential prong in the checks and balances integral to a successful health care program will be silenced.

SUMMARY OF ARGUMENT

On June 19, 2000, a plaintiff suing Encino-Tarzana Regional Medical Center (the "Hospital") and two of the doctors on its staff, identified petitioner Gil Mileikowsky, M.D. as her expert witness. Dr. Mileikowsky intended to testify that the Hospital's doctors performed a surgical procedure on the plaintiff – the removal of her fallopian tubes – without her informed consent, that the plaintiff's eggs and embryos were improperly stored and/or destroyed, and that the treatment of the plaintiff fell below the required standard of care.

Just four days later, the Hospital notified Dr. Mileikowsky that special security monitoring provisions were being implemented against him requiring that security personnel accompany him whenever he was on Hospital premises.

This was just the opening salvo in the Hospital's efforts to retaliate against Dr. Mileikowsky for daring to publicly take a stand opposing its treatment of a patient. A few months later, Dr. Mileikowsky's clinical privileges were summarily suspended based on trivial and dated allegations of misconduct, virtually all of which were unrelated to patient care, and which, but for his "whistleblowing," would never have become the basis for a peer review hearing.

Under California law – which directly contravenes federal law – a doctor who is facing suspension of his privileges is not entitled to the representation of counsel, even if he can afford one. His adversary, the hearing officer, may be a trained lawyer, as he was in this case. Indeed, here, he was a former counsel to the hospital itself. Without the benefit of counsel, the doctor must participate in an extraordinarily complex quasi-judicial procedure that includes discovery, the production of exhibits and witness lists, the filing of briefs, and "voir dire" of the physicians who will sit in judgment as members of the peer review panel.

Dr. Mileikowsky, already under extreme pressure because he faced the impending loss of his clinical privileges, was required to conduct himself, not only as a physician, but as a lawyer versed in the niceties of legal practice. At that, he apparently failed. The hearing officer decided that Dr. Mileikowsky's conduct was "disruptive" and imposed the administrative equivalent of "terminating sanctions"– permanently adjourning the hearing. The hearing officer, hardly a neutral party, faulted Dr. Mileikowsky's failure, not as a doctor, but as a "lawyer." His alleged misdeeds apparently included engaging in "ex parte communications" with members of the hearing committee by personally delivering his brief simultaneously to all parties and thus to committee members; failing to produce copies of his calendars regarding his "activities on dates when he disrupted or avoided appearing at peer review investigations" (A71a); failing to timely submit a brief that dealt not with his "underlying care of patients," but with his allegedly disruptive behavior; and engaging in "personal invective." (A73a.)[3] None of this would have happened had Dr. Mileikowsky been represented by counsel.

Without counsel or a hearing, Dr. Mileikowsky's summary suspension was upheld. A suspension must be reported to the National Practitioner Data Bank ("NPDB"). It then becomes accessible to all hospitals throughout the country. It is a professional death sentence – the end of a doctor's career.[4]

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[3] The ruling by the hearing officer is set forth in petitioner's appendix at A62a-78a.

[4] The procedures involved herein conflicted directly with

The numerous *amici* who support this Petition for a Writ of Certiorari – groups of physicians and attorneys – do so because of the pressing need for this Court's intervention in this important area. The hospital hearing officer wields enormous power. Although not a physician, by controlling the procedure, the hearing officer can use his/her power to silence hospital critics. In California, a doctor's livelihood can be destroyed without allowing the doctor to have an attorney who can advise and assist him through this complicated legal process. Then, if the doctor fails to comport himself like a lawyer, the hospital can deprive him of even the most rudimentary due process – the right to a hearing.

This is even worse than Kafka because, in Kafka, only Joseph K. suffered. Here, potentially all patients suffer when a doctor who has been willing to champion a patient's interests is silenced without due process. Patients, who have no voice in the process, are the ultimate victims of this unfair system. Patients, like the patient whose fallopian tubes were removed without her consent, rely on doctors who are willing to take unpopular positions, to speak up for them, and to testify on their behalf. When a doctor is punished for siding with a patient, it obviously discourages all doctors from supporting patients who may have received inferior medical care.

Doctors can be professionally destroyed if, like Dr. Mileikowsky, they "blow the whistle." The *amici*, therefore, urge this Court to step in, strike down the California procedure that is at odds with federal law, and decide that doctors are entitled to due process, including the right to counsel, when peer

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California Business and Professions Code § 2056, which by its terms is intended to protect physicians against retaliation.

review committees adjudicate issues that affect their basic property rights.

ARGUMENT

This case presents this Court with the opportunity to address a matter of national concern. Doctors who are sworn to protect their patients from harm increasingly face investigation, sanctions, and even financial ruin if they challenge hospital practices because they believe those practices adversely impact on patient care. Steve Twedt, "The Cost of Courage," Pittsburgh Post-Gazette, October 26, 2003, www.post-gazette.com/pg/03299/234499.stm.[5] If a physician loses his hospital privileges, he is reported to NPDB, established as part of the Health Care Quality Improvement Act of 1986 ("HCQIA"). 42 U.S.C. § 11101 et seq. Once a physician is reported, State medical boards and hospitals can check it for information on any doctor who applies for a license or staff privileges. A listing "can essentially make you unemployable." Steve Twedt, "'A Negative Data Bank Listing Isn't Easy to Erase," Pittsburgh Post-Gazette, October 27, 2003, www.post-gazette.com/pg/03300/234532.stm.

In enacting the HCQIA, Congress intended to provide for effective peer review of the competency of physicians and thereby improve the quality of medical care. Austin v. McNamara, 979 F.2d 728, 733 (9th Cir. 1992). Nevertheless, Congress wisely chose to ensure that there were strict standards imposed in connection with any hearing that could result in professional review action. Thus, a physician is entitled, among other protections, to notice, a hearing, the right to call and confront witnesses, and, most importantly, the right to "representation by an attorney." 42 U.S.C. § 11112(3)(C)(i).

[5] This article is part of a four-part series chronicling the problems facing physicians who challenge hospital procedures.

Under the HCQIA, a hospital loses any immunity from a suit in damages if it fails to comply with these standards.

The procedural safeguards contained in the HCQIA reflect Congress's recognition that a professional license constitutes a property interest. Barry v. Barchi, 443 U.S. 55 (1979) (defendant has property interest in harness racing license) In re Ruffalo, 390 U.S. 544 (1968) (attorney's license to practice is property interest). California has squarely held that "a physician has a vested property right in his or her medical license." Gray v. Superior Court, 125 Cal.App.4th 629, 636, 23 Cal.Rptr.3d 50, 54 (1st Dist. 2005), quoting Smith v. Board of Medical Quality Assurance, 202 Cal.App.3d, 248 Cal.Rptr. 704 (1st Dept. 1989). Additionally, the right of a physician to use the facilities of a hospital is also a property interest. Anton v. San Antonio Community Hosp., 19 Cal.3d 802, 823,140 Cal.Rptr. 442 (1977); Sahlolbei v. Providence Healthcare, Inc., 112 Cal.App.4th 1137, 1155, 5 Cal.Rptr.3d 598 (4th Dist. 2003). The Due Process Clause, in turn, mandates that before a defendant is deprived of a property interest, he receive notice and an opportunity to be heard. See, e.g., Wilkinson v. Austin, 125 S.Ct. 2384 (2005); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

Because Congress established the reporting requirements in the HCQIA, and because States, like California, must comply with this federal statute and report doctors who are sanctioned pursuant to peer review proceeding, these peer review hearings are not strictly private matters, but must now comport with federal due process standards. The physician undoubtedly is entitled to the due process mandated by the Fifth and Fourteenth Amendments. A hospital peer review hearing is a proceeding of a quasi-criminal nature. A ruling against the doctor can spell the end of a doctor's career. An opportunity to be heard, therefore, must include a meaningful opportunity to be heard. As Congress has recognized, this means that the physician must be entitled to

counsel if he so chooses.[6]

In California, however, doctors are afforded, at best, the illusion of due process. California, in violation of the federal law, endows hospitals with the unilateral power to deprive physicians of the right to counsel. Under section 809.3(c) of the California Business and Professions Code, a hospital peer review body may, by its bylaws, deprive the physician of the "option of being represented by an attorney." California takes the position that because it once was entitled to "opt out" of the provisions of HCQIA, and chose to do so, it can continue to disregard those provisions even though Congress eliminated the op-out provision years ago, and certainly before the hearing at issue in this case.

The California courts in this case did not even acknowledge that the "opt out" provision has been eliminated. Maryland, in contrast, another State that previously "opted out," has ruled that because Congress deleted the opt-out provision in 1989, the federal Act "necessarily supersedes inconsistent State law." Goodwich v. Sinai Hospital of Baltimore, 103 Md.App. 341, 354, 653 A.2d 541, 547 (1995), aff'd, 343 Md. 185, 680 A.2d 1067 (1996). This Court should grant certiorari to resolve the conflict over the whether the federal statute preempts conflicting State law.

But more importantly, this Court should clarify what procedures are necessary to ensure that a physician is not deprived of his property interest in his license and related

[6] There is no issue here regarding the appointment of counsel; rather California allows peer review boards to prohibit a physician from retaining counsel even at his own expense.

privileges without due process. A statutory scheme, like the one in place in California, that invests the peer review body – the very body that will be making the ultimate determination – with the right to determine whether or not the physician is entitled to the representation of counsel is inconsistent with basic principles of due process. See David Townend, "Hospital Peer Review Is A Kangaroo Court," Medical Economics, February 7, 2000, www.memag.com/memag/content/printContentPopup.jsp?id=122302. It creates an inherent conflict of interest, shifting the power to decide the extent of procedural safeguards to the very body which will determine the physician's fate.

This case demonstrates the fundamental unfairness of depriving a physician of a right to counsel. Without an attorney, a physician, facing sanctions and possible reporting to the NPDB, begins at an overwhelming disadvantage that can quickly escalate into a terminal disadvantage. The hearing officer, as in this case, may be an attorney – indeed, is likely to be an attorney with knowledge about health care law and procedure. The physician, unrepresented, is unlikely to be knowledgeable about health care law and is unlikely to understand the legal process. As in this case, he may fail to fully appreciate the possible consequences of such actions as communicating directly with the Medical Hearing Committee or failing to file exhibits or witnesses lists or briefs within the time constraints set by the hearing officer. In this case, the consequences were fatal: the termination of the right to a hearing itself.

Even if the physician receives his hearing, without counsel, the physician remains at a disadvantage. Unschooled in legal practice and procedure, he may be unable to adequately marshal his facts and arguments, confront and cross-examine witnesses, document his case. Without counsel, the hearing, before an already hostile peer review body, may be little more than a sham. Indeed, in this case, the sham itself provided the basis – the excuse – for a retaliatory action.

Amici urge this Court to intervene. As Congress recognized in enacting the HCQIA, improving patient care is an issue of extraordinary national importance. The need to protect physician "whistleblowers"from retaliation is inextricably linked to that issue. Doctors will inevitably be discouraged from challenging hospital practices if their licenses and other professional privileges are placed in jeopardy if they do so. The goals of peer review will be defeated, not promoted, if qualified physicians are punished and excluded from practice because they have chosen to stand up for a patient.

This is truly an issue of paramount concern. As a matter of federal constitutional law, it must be clearly established that a doctor has a property interest in his license and associated privileges, and that a State may not deprive the physician of that property interest without according the physician due process of law, including the right to the representation of counsel.

CONCLUSION

For the reasons set forth above, the petition for a writ certiorari should be granted.

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