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July 12, 2005

The Honorable Chief Justice Ronald M. George
Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4712

Re: Gil Mileikowsky, M.D. v. Tenet HealthSystems
Supreme Court Case No. S134269
2d Dist., Div. 4, Case No. B168705
Support for Review

Dear Chief Justice George and Associate Justices:

The Association of American Physicians & Surgeons, Inc. ("AAPS")[1] urges this Court to grant the Petition for Review ("Petition") recently filed in the above referenced case by Appellant Gil Mileikowsky, M.D. ("Appellant" or "Dr. Mileikowsky").

This case merits review because it involves issues of tremendous public interest: whether a hospital may summarily suspend the privileges of a physician, in the absence of a threat of imminent harm, because he spoke out against improper care at the

[1] AAPS is a non-profit, national group of thousands of physicians founded in 1943. For over 60 years, it has defended the practice of private and ethical medicine. AAPS is dedicated to defending the patient-physician relationship and free enterprise in medicine. AAPS is one of the largest physician organizations that is almost entirely funded by physician membership, including many in California. This enables it to speak directly on behalf of physicians and their patients. AAPS files amicus briefs in cases of high importance to the medical profession, like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court citing AAPS frequently); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997). AAPS has also submitted an amicus letter brief in support of this Court's review of Dr. Mileikowsky's previously filed and pending Petition for Review in *Mileikowsky v. Tenet*, Case No. B159733, Supreme Court Case No. S133894.

hospital. The decision below erred in refusing to reach the substance of Dr. Mileikowsky's claims. The decision below also conflicted with other California and federal rulings in this area. For the reasons stated below, it is essential that this Court grant the Petition to deter the misuse of peer review.[2]

Summary suspension is the equivalent of the death penalty for a physician. It announces to the whole world that the physician is so dangerous that he had to be immediately restrained. Federal law requires reporting it to the National Practitioners Data Bank, upon which all hospitals nationwide rely. Summary suspension is understood to be the most extreme action a hospital can take against a physician on staff, and is historically confined to the threat of imminent bodily harm.[3] Its legal analog is the exigency exception to search warrant requirements, whereby the police can enter a home without a warrant if a defendant is armed and dangerous or there is otherwise an emergency. But the exigency must be legitimate, and it was not here, and Dr. Mileikowsky is entitled to have a court reach the substance of his claims.

The most serious charge underlying the summary suspension appears to be that Dr. Mileikowsky performed an inadequate circumcision, but the "expert" who made the allegation had never himself performed a circumcision. Moreover, there was no harm to the patient, who was released immediately afterwards by that same doctor who examined him. Another reviewer was ignored by the hospital. He criticized Dr. Mileikowsky in a way that directly contradicted the complaint of the first "expert". In another instance, Tenet improperly attempted to extend a restriction on nurses to Dr. Mileikowsky, complaining that he violated the Nurses Policy Manual regarding fundal pressure and a vacuum procedure in connection with delivering a baby. Afterwards, the mother and child were in excellent health and the child's father expressed gratitude to Dr. Mileikowsky for their fine care. The other charges against this physician date back as far as ten years and cannot justify discipline as harsh as the summary suspension, which is necessarily premised on "imminent danger."

There is more here than meets the eye to explain Tenet's action. It feared the consequences of Dr. Mileikowsky's outspokenness against wrongdoing attributable to

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[2] AAPS agrees with, and incorporates by reference, (1) the letter of the Union of American Physicians & Dentists dated May 23, 2005,; (2) the letter of the California Medical Association dated July 5, 2005,; and (3) the letter of C. William Hinnant, Jr., M.D., J.D. of Medicolegal Consultants, LLC, on behalf of Semmelweis Society International, dated June 21, 2005, all urging this Court to grant the Petition.

[3] We incorporate by reference the discussion in Dr. Mileikowsky's Petition for Review, pp. 10-11 concerning the admissions by Gerald Clute, the hospital's Chief Operations Officer, concerning the inevitably devastating consequences of a summary suspension of hospital staff services.

the hospital. In 2000, Dr. Mileikowsky spoke out about the improper destruction of the embryos of two couples and also agreed to testify against the Encino Tarzana Regional Medical Center in a malpractice and battery proceeding, as both Fallopian tubes were removed without the patient's consent. The powerful hospital was determined not to allow a witness against it to continue to remain on staff. Dr. Mileikowsky was poised to tell the truth on behalf of patients. Tenet feared imminent financial harm to the hospital, and fought back by eliminating Dr. Mileikowsky from its staff. By its conduct, Tenet perverted the process that was designed to promote quality health care and patient protection, by using that very process as a weapon to silence one who spoke out on behalf of patients.[4]

The incessant retaliation against physicians who report negligence, as Dr. Mileikowsky did, has contributed to keeping the numbers of deaths negligently caused by hospitals astronomically high. Several years ago a widely publicized study by the Institute of Medicine revealed that hospitals negligently kill as many as 98,000 patients each year. How could that be with so many physicians watching? The answer is illustrated by this case of Dr. Mileikowsky, who complained about hospital negligence and found himself subjected to a career-ending action by the hospital. Predictably, the numbers of deaths caused by hospital negligence has not declined since the Institute of Medicine's report. In a recently widely publicized report in the *Journal of the American Medical Ass'n (JAMA)*, a review of the five years since the IOM study concluded that "progress since then has been slow." Lucian L. Leape, MD, and Donald M. Berwick, MD, "Five Years After *To Err Is Human," 293 JAMA* 2384-90 (2005).[5]

The Christian Science Monitor reported last year that "about 1 of every 200 patients admitted to a hospital died because of a treatment mistake ... [which] was more ... than died in 1998 from highway accidents (43,458), breast cancer (42,297), or AIDS

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[4] What is at stake is the enforcement of a right affecting the public interest. It is well established that "... the Legislature has recently specified that in exercising its discipline or authority, 'Protection of the public shall be the highest priority' of the Board. ([Business and Professions Code] § 2229, subd.(a))." *Arnett v. Del Cielo* (1996) 14 Cal.4th 4, 9. Earlier decisional authority is to the same effect. *See, e.g., Yakov v. BMQA* (1968) 68 Cal.2d 67, n 6 ("The purpose of an action seeking revocation of a doctor's certificate is not to punish the doctor but rather to protect the public."); *Ettinger v. BMQA* (1982) 135 Cal. App. 3d 853, 856 ("The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.").

[5] *See also*, the comments of L.L. Leape, M.D. in "Errors Still Taking Lives: Hospitals Are Urged to Take Action," *USA Today*, dated May 18, 2005, quoted in Appellant's Petition for Review, p. 25.

(16,516)." It then added that some experts think this number of deaths due to hospital misconduct "was almost certainly far too low." Gregory M. Lamb, "Fatal Errors Push Hospitals to Make Big Changes," *Christian Science Monitor*, July 8, 2004. Clearly, treatment errors can only be eliminated if they are identified and disclosed in the first instance, and then rectified by changing procedures or physician accountability. One crucial way to encourage accountability and preventative steps is to protect physicians who have the courage to speak out. Allowing hospitals like Tenet to sanction such physicians is not simply unfair to the practitioner who speaks out in favor of the patients, but inevitably dissuades other physicians from coming forward in the future. Ultimately, of course, patients are the ones who suffer the devastating consequences, ranging from death to disability.

A study by Health Grades, Inc., estimates that medical errors in American hospitals "contributed to almost 600,000 patient deaths over the past three years, double the number of deaths from a study published in 2000 by the Institute of Medicine." Paul Davies, "Fatal Medical Errors Said To Be More Widespread," *Wall Street Journal*, at D5 (July 27, 2004). This Health Grades study was based on data from "37 million Medicare patients in every state over three years." *Id.* But when physicians like Dr. Mileikowsky complain about poor care, they face discipline by the hospital and revocation of their privileges or even license, and this retaliation must stop.

Dr. Scott Plantz published a study of about 400 physicians in a 1998 edition of the Journal of Emergency Medicine. He found that almost 1 in 4 of roughly 400 physicians who responded to his survey had been terminated or threatened with termination for reporting problems with patient care. Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series "The Cost of Courage." His articles demonstrated the pervasiveness of this problem nationwide, describing in detail the experiences of 25 physicians and a nurse all of whom experienced retaliation after trying to improve care at their respective institutions.

Intervention by the Supreme Court of Virginia was required to correct a similar injustice against Dr. Harry Horner. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 2004 Va. LEXIS 83 (Va., June 10, 2004). Dr. Horner, like Dr. Mileikowsky, was exposing the poor care of patients when an administrator at Western State Hospital charged him with violating another employee's right to confidentiality. Similar to the picayune charges against Dr. Mileikowsky here, the administration of Dr. Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. See Bob Stuart, "Court Rules for Whistleblower," *News Virginian*, June 16, 2004.

The impact of allowing retaliation against physicians like Dr. Mileikowsky is severe, and not just to the individual physician. The chilling effect of retaliatory discharge on the willingness of other physicians to come forward cannot be

underestimated. While the hospital benefits economically from hushing up problems and covering up negligence, the public pays an enormous price indeed. Lives are lost and disabilities proliferate and with them come the profound ripple effects on the families of patients, employers who lose productivity and experience increased health insurance costs, even the tax base of the state for those whose incomes plummet from disease and injuries suffered while in hospital care. Establishing quality control of the delivery of medical care might be seen by hospitals as economically detrimental in the short term (depriving them, as it does, of the revenue that flows from treatment of the very errors caused by staff personnel), it is essential to the public's safety, the welfare of families and productive state economy which now suffers the financial burdens stemming from inadequate quality control of health care.

In 2003, Tenet Healthcare Corporation and Tenet HealthSystems Hospitals, Inc., the owners and affiliates of the hospital at issue here, paid $51 million "to settle government allegations that Tenet's Redding, California facility performed unnecessary cardiac procedures that were then billed to Medicare, Medicaid and TRICARE. In addition, Tenet paid nearly $3 million to reimburse California's Medicaid funds." "Corporate Accountability and Compliance in Health Care - Will Health Care be the Next Enron?," *Monday Business Briefing*, July 26, 2004. This is but one example[6] which exemplifies both how hospitals profit from allowing improper medical practices to flourish, how so often hospital physicians and staff turn a blind eye whether because of self-interest or intimidation[7], and how public funds are diverted in various ways due to hospital failings, and only occasionally is there accountability. What is at stake here, what is fundamental to peer review, is that physicians must be held accountable, yes, but physicians must also be encouraged to speak out for patients without fear of retribution. If the system works as intended, government need not pursue reimbursement claims against the likes of Tenet.

Tenet Violated the Procedural Rights of Dr. Mileikowsky.

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[6] Following the Redding scandal, California Blue Cross investigated and found comparable transgressions in another neighboring Tenet facility in Modesto, California where experts found nearly 60% of the heart bypass procedures to be unnecessary. See M. Davis, "Tenet Tangles with California Blue Cross" *TheStreet.com*, November 4, 2003.

[7] As reported in the 60 Minutes expose and published in CBSNEWS.com on July 27, 2003, Tenet administrators ignored warnings about the now infamous Dr. Moon and "built their heart center around his practice...." 167 patients died after surgery ordered by Dr. Moon. "But it wasn't a doctor or nurse who finally did something about what was

On December 22, 2004, California Superior Court Judge Raymond M. Cadei recognized how procedurally unjust this action by Tenet really was. Judge Cadei granted an extraordinary Writ of Mandamus in favor of Dr. Mileikowsky against the Medical Board of California to prevent it from acting on Tenet's baseless complaint to it (Tenet's "805 Report"). Judge Cadei held that:

> "In this case, the Court finds that, as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination, **no showing of good cause was made, or, in fact, could be made under the procedure followed in this case**." (bold added)

Amended Minute Order, Dec. 10, 2004, p. 2 (emphasis added). Judge Cadei found that the incidents were quite dated and that much of the allegations were based on hearsay "without any specific factual context." *Id.*

It is well-established in California that hospitals may not exclude a physician based merely on personality conflicts, which is all that exists here. See this Court's opinion in *Rosner v. Eden Township Hospital District*, 58 Cal.2d 592, 598-99 (1962) (overturning an exclusion of a physician from a medical staff by holding that "[i]n these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where consideration having no relevance to fitness are present"). In *Rosner*, as here, the physician was targeted by the hospital because of his testimony against it in a malpractice action. *Id.* at 599 (Dr. Rosner "has apparently testified for plaintiffs in malpractice cases"). This Court noted that "a hospital ... should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application." *Id.* at 598. *See also, Clark v. Columbia/HCA Info. Servs.*, 25 P.3d 215 (Sup. Ct. Nev. 2001) (holding against Tenet's partner HCA finding as pretextual the hospital's claim that the physician had been "disruptive"[8]). As it had nothing to do with the quality of the delivery of care by Dr. Clark, the Nevada Supreme Court rejected HCA's claim of immunity under the HCQIA.

It was improper to terminate the proceedings for Dr. Mileikowsky on the pretext that he was somehow disrupting it, when there was at most a personality conflict. *See* Lawrence R. Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," 9 *Journal of American Physicians and Surgeons* 68 (Fall 2004) ("The term 'disruptive

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going on at Redding Medical Center. It was a priest...." "Unhealthy Diagnosis", *CBSNEWS.com*, July 27, 2003.

[8] As here, where Dr. Mileikowsky acted as a "whistleblower", HCA labeled Dr. Clark as "disruptive". Why? Because he had the temerity to report the hospital owner, HCA, to JCAHO, the Nevada Medical Board, and Champus Insurance Company.25 P.3d at 216.

physician' is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish."). There is no evidence of actual disruption in the hearing transcript here, but there was uncontradicted evidence that Dr. Mileikowsky had agreed to testify as an expert against other staff physicians, creating an unmistakable image of retaliatory discharge. The improper termination of the proceedings against Dr. Mileikowsky constituted a violation of his procedural rights under *Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434 (1991).

In *Rosenblit*, the Court of Appeal reversed because the physician, Dr. Rosenblit, had not received a fair hearing. Likewise here, the court below conflicted with the *Rosenblit* holding:

> "We are concerned with fair play and fair treatment; with the physician's right to practice his profession; with the public's right to a diversity of opinion among competent specialist and a variety of treatment options. The record demonstrates Hospital was dedicated to removing Rosenblit rather than providing a physician with a fair opportunity to defend his treatment regimen ...."

Id. at 1447. Dr. Rosenblit's lack of objection at the time could not constitute a waiver because he, like Dr. Mileikowsky, was denied representation by counsel. *See id.* at 1437; *see also, Hackethal v. California Medical Association*, 138 Cal.App.3d 435, 444 (1982) ("Failure to object to those sessions should not be taken as a binding waiver. The person whose rights are being determined should not be placed in a position of being required to object and thereby spur hostility or not object and thereby suffer waiver.").

Tenet is Not Entitled to any Immunity Here.

Tenet's bad faith peer review of Dr. Mileikowsky is not entitled to any protections of statutory immunity. Tenet cannot cite a summary suspension ***anywhere*** that was upheld on facts akin to those at bar. The injustice to Dr. Mileikowsky is far more compelling than in the leading precedents rejecting peer review immunity: *Brown v. Presbyterian Health Care Serv.*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997), and *Islami v. Covenant Med. Ctr., Inc.*, 822 F. Supp. 1361 (N.D. Iowa 1992). Both of those decisions held in favor of the physicians on weaker evidence of bad faith than here.

In *Brown v. Presbyterian Health Care Serv.*, the Tenth Circuit underscored how qualified immunity does not protect hospitals whenever they can find an expert to support their action. "We are not persuaded by the defendant's view. Under its theory, a peer review participant would be absolutely immune from liability for its actions so long as it produced a single expert to testify the requirements of 42 U.S.C. § 11112(a)

were satisfied. **This would be in direct contravention to Congress' intention to provide 'qualified immunity.'"** 101 F.3d at 1334 (emphasis added).

The *Islami* court likewise rejected arguments of immunity:

> "The critical issue in Dr. Islami's motion for summary judgment becomes whether the procedures the defendants afforded to Dr. Islami were fair under the circumstances. ... The court believes that "fairness based on the circumstances" is the paradigm jury question. The parties have diametrically opposed views on the issue and believe that the factual record viewed as a whole supports their position. This is an issue for the jury to decide."

822 F. Supp. at 1374. The evidence against immunity is even more compelling here than what the *Islami* court found to be adequate.

The court below said that "we acknowledge the concern expressed by amicus Association that too much power in the hands of the hearing officer could lead to the loss of the statutorily-mandated peer review." But the lower court did not alleviate that concern.

AAPS urges this Court to grant the Petition and ensure due process and a true and meaningful peer review system. Due process is essential to protect physicians who, having the courage to speak out for patients, for quality medical care and for hospital accountability, are the subject of retaliatory proceedings. This is especially true when it comes to hospitals' misuse of summary suspension—which here lasted so far a full five years! Such abuses are compounded when carried out in proceedings controlled by corporate palace guards and conflicted counsel who masquerade as neutral hearing officers not as California law intended, i.e., by independent and unbiased peers. Accordingly, AAPS cannot conceive of any higher priority in the name of public interest for the people of California and for the nation as a whole.

Respectfully submitted,

David B. Parker, of
PARKER MILLS & PATEL LLP

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 865 S. Figueroa Street, Suite 3200, Los Angeles, CA 90017.

On July 12, 2005, I served the following described as: **July 12, 2005 AMICUS LETTER TO THE SUPREME COURT IN CASE NO. S134269 OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF REVIEW OF PETITION OF GIL MILEIKOWSKY, M.D., PETITIONER** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[x] **(MAIL)** I am readily familiar with the firm's practice of collection and processing correspondence by overnight mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of the addressee.

[x] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (FEDERAL) I declare that I am employed in the offices of a member of this Court at whose direction the service was made.

Executed on July 12, 2005, at Los Angeles, California.

ALICIA NAVARRO
PRINT NAME

SIGNATURE

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