No. 09-____

In the Supreme Court of the United States

RAKESH WAHI, M.D.,

Petitioner,

v.

CHARLESTON AREA MEDICAL CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PUBLIC VERSION

QUESTIONS PRESENTED

1. The Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, provides a hospital immunity from monetary damages for disciplining a doctor "*after*" providing "adequate notice and hearing" or other "fair" procedures. § 11112(a)(3) (emphasis added). By contrast, the Act allows disciplining "immediately"—that is, *before* notice and a hearing or other "fair" procedures—only where "failure to take such an action may result in an imminent danger to the health of any individual." § 11112(c).

   Did the court below err in holding, in conflict with four other circuits, that a hospital can obtain immunity for disciplining a doctor immediately—before notice and a hearing—where the hospital concedes that it did not find or rely upon the possibility of imminent danger?

2. Under the Act, may an immunity determination be made by a jury, as the First and Tenth Circuits hold, or is a jury forbidden from making such a determination, as the Eleventh Circuit and Colorado Supreme Court hold—and as the Fourth Circuit effectively held here?

PARTIES TO THE PROCEEDINGS

Petitioner Rakesh Wahi was the plaintiff-appellant in the court below. Respondents Charleston Area Medical Center, Inc., Glenn Crotty, Jamal Kahn, H. Rashid, K.C. Lee, Andrew Vaughn, and John L. Chapman were defendant-appellees below. There are no other parties.

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INTRODUCTION

By twice misinterpreting the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 ("HCQIA"), the decision below has created a new circuit split *and* widened a mature, acknowledged split on the federal standards for physician peer-review immunity. These twin errors are of signal importance to the health care industry and patients nationwide because they allow hospitals to summarily strip doctors of their credentials without any justification, depriving them of their livelihoods—and then take away their right to a jury.

The court of appeals' first error concerns immunity for a summary suspension of hospital privileges. Under the HCQIA, a hospital is immune from monetary damages for disciplining a doctor "*after*" providing "notice and hearing" or other "fair" procedures. § 11112(a)(3) (emphasis added). By contrast, a hospital can discipline "immediately"—that is, *before* "notice and a hearing" or other "fair" procedures—only in "emergencies," when "failure to take such an action may result in an *imminent danger* to the health of any individual." § 11112(c)(2) (emphasis added). But even then, immunity is "subject to subsequent notice and hearing or other adequate procedures." *Ibid.*

Here, while conceding that petitioner was suspended immediately—that is, before receiving "notice and a hearing" or other "fair" procedures—the Fourth Circuit held that the hospital could ignore the "imminent danger" requirement and still obtain immunity if it *later* "me[t] the usual standard" of providing notice and a hearing or other fair procedures. In other words, under the decision below, a

doctor can be immediately suspended—without any "imminent danger"—so long as the hospital provides some procedures at some point.

This judicial rewriting of Congress' carefully calibrated regime is indefensible, as shown by four contrary circuit decisions squarely holding that, to preserve immunity for a summary suspension, imminent danger is required. Because the Fourth Circuit's reasoning is so obviously flawed, and because respondent *concedes* that it suspended petitioner "without a prior finding that he posed an imminent danger," Pet. 81a, the Fourth Circuit's resolution of this issue would be suitable for summary reversal.

With its second error, the decision below widens an acknowledged split over the availability of jury trials to determine federal immunity. The First Circuit holds that the statute "contemplates a role for the jury, in an appropriate case, in deciding whether a defendant is entitled to HCQIA immunity." *Singh* v. *Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25 (1st Cir. 2002). Indeed, "[t]he weight of authority" holds that the proper inquiry is "whether *a reasonable jury* could find that the defendants did not conduct the relevant peer review actions in accordance with one of the HCQIA standards." *Id*. at 33 (citing cases; emphasis added). The Tenth Circuit has reached the same conclusion. *See Brown* v. *Presbyterian Healthcare Servs*, 101 F.3d 1324 (10th Cir. 1994).

While the court below framed the issue in terms of what a "reasonable jury" could have concluded (see Pet. 14a), its application of this standard makes it clear that the Fourth Circuit will never send an HCQIA immunity issue to a jury. That court thus

aligned itself with the Eleventh Circuit, which, in acknowledged "*contradiction of the other circuits*," *Singh*, 308 F.3d at 34 n.7 (emphasis added), holds that "*[u]nder no circumstances* should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury," *Bryan* v. *James E. Holmes Regional Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994) (Tjoflat, C.J.). The Supreme Court of Colorado holds the same, *North Colorado Medical Center* v. *Nicholas*, 27 P.3d 828 (Colo. 2001), setting up an intra-state conflict with the Tenth Circuit.

The need for this Court's review is heightened by important practical and policy considerations. Granting hospitals blanket immunity for issuing what amount to summary professional death sentences will seriously compromise our nation's health care system—ruining careers, wasting expertise, and depriving patients of innovative and compassionate medical care. Indeed, as the due process requirements of the HCQIA reveal, the statute is designed to protect patients *and* doctors—not (as here) hospitals that punish excellent doctors for entertaining employment opportunities with competing hospitals.

This Court has not yet construed the landmark, two-decades-old HCQIA. It is thus all the more important—and timely—that the Court make clear that the HCQIA means what it says about what is required to issue an immediate suspension, and that doctors who build powerful records like the one here are entitled to take their cases to a jury.

OPINIONS BELOW

The opinion of the district court is reprinted in the appendix to this petition at 43a-74a, and is reported at 453 F. Supp. 2d 942 (S.D.W. Va. 2006). The Fourth Circuit's opinion affirming the decision of the district court (1a-40a) is reported at 562 F.3d 599 (4th Cir. 2009). The Fourth Circuit's order denying rehearing *en banc* (41a-42a) is unreported.

JURISDICTION

The opinion of the Fourth Circuit was entered on April 10, 2009, and the order of the Fourth Circuit denying petitioner's petition for rehearing *en banc* was entered on May 8, 2009. On July 28, 2009, Chief Justice Roberts extended the time for filing this petition to and including September 15, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the HCQIA's "[s]tandards for professional review actions," 42 U.S.C. § 11112, which are reprinted in total in the appendix at 76a-79a, and which govern the federal immunity provided under section 11111 of the Act. Subsection (a) of those standards provides:

(a) In general

> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a).

Subsection (c) provides:

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection (a)(3) of this section—

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

42 U.S.C. § 11112(c).

STATEMENT

In 1986, Congress passed the HCQIA to improve the quality of medical care by subjecting doctors' competence and professionalism to "effective professional peer review" that meets certain standards of due process. 42 U.S.C. §§ 11101(1), (3), 11112. In so doing, "[t]he statute attempts to balance the chilling effect of litigation on [physician] peer review with concerns for protecting physicians improperly subjected to disciplinary action." *Bryan*, 33 F.3d at 1333. In this case, the court below has dramatically altered that balance—in defiance of the HCQIA's plain language, in conflict with four other circuits, and at great cost to petitioner and our nation's health care system.

A. Statutory Framework

To strike the desired balance between effective peer review and protecting doctors from unjustified discipline, the HCQIA provides immunity from monetary damages for what the statute calls "professional review action[s]," 42 U.S.C. § 11111(a)(1), so long as those actions comply with certain statutory "safe harbor" procedures, § 11112(b). One safe harbor governs actions taken in the normal course of business, *ibid.*; a separate provision governs actions

taken "in investigations or health emergencies," 42 U.S.C. § 11112(c).

1. "Professional review actions." Under the HCQIA, "professional review action" is defined as:

> an action or recommendation of a professional review body * * * based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician.

§ 11151(9). Under this definition, a separate professional review action occurs *whenever* privileges are restricted. Thus, a suspension of privileges is a separate professional review action from outright revocation or a refusal to renew privileges. See *Poliner* v. *Texas Health Sys.*, 537 F.3d 368, 377 (5th Cir. 2008). Further, certain professional review actions must be reported to a national database, the National Practitioner Data Bank or NPDB, which a hospital must consult before hiring a physician. 42 U.S.C. §§ 11133-11135.

2. Due process requirements. For professional review actions not taken in "investigations or health emergencies" (42 U.S.C. § 11112(c)), the HCQIA provides a detailed list of procedures that, if followed, will enable a health care entity to be "deemed" protected under the statute. These include "adequate notice and hearing procedures"—which involve providing notice of the proposed action, the reasons for the action, and notice that the physician

has a right to request a hearing. §§ 11112(a)(3), 11112(b)(1). If the physician requests a hearing, the hospital "must" provide "notice stating—(A) the place, time, and date, of the hearing * * * and (B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body." § 11112(b)(2)(A), (B).

While meeting these requirements automatically qualifies a health care entity for HCQIA protection, "failure to meet the [notice and hearing list of] conditions shall not, in itself, constitute failure to meet the [adequate notice and hearing procedures] standard." § 11112(b). Rather, the standard may be met by "[o]ther procedures that are fair to the physician under the circumstances." § 11112(a)(3). Further, a "professional review action shall be presumed to have met the [adequate notice and hearing standards] * * * unless the presumption is rebutted by a preponderance of the evidence." § 11112(a)(4).

3. "[I]mmediate suspension." All notice and hearing procedures can be temporarily foregone, however, in the case of "health emergencies." § 11112(c)(2). Thus, "an immediate suspension or restriction of clinical privileges" is not "preclude[ed]" "where the failure to take such an action may result in an imminent danger to the health of an individual" *and* "notice and hearing or other adequate procedures" are later provided. *Ibid.*

B. Background of This Dispute

A highly skilled heart surgeon whose professional training includes service at the legendary Mayo Clinic, Dr. Rakesh Wahi was recruited in 1992 from a successful surgical practice in Chicago by the Charleston Area Medical Center ("CAMC") in Charleston, West Virginia. JA 98. Measured by CAMC's own criteria and national standards, Dr. Wahi achieved the best patient outcomes at CAMC. PFN 37-38, 40.[1] The mortality rate for Dr Wahi's patients was three times *lower* than the national average; and CAMC entrusted Dr. Wahi with the care of its high-risk patients. PFN 37-38, 40. In July 1994, Dr. Wahi launched his own surgical practice and began exploring the possibility of associating with surgeons at a neighboring hospital, Raleigh General. .JA 967.

1. CAMC's investigations and Dr. Wahi's exoneration. During the next few years, CAMC repeatedly investigated and temporarily suspended Dr. Wahi. Pet. 3a-4a. While these investigations were being conducted, however, the duly constituted peer review committee of CAMC charged with continuously monitoring CAMC's physicians evaluated Dr. Wahi's treatment of his patients and found it to be within the required standard of care. JA 967, 1015. And in April 1999, CAMC's Credentials Committee recommended Dr. Wahi's reappointment to the medical staff at CAMC for another year. JA 532, 963.

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[1] "PFN" stands for "Plaintiff's Fact Number," and refers to the paragraph number in the Statement of Controverted Material Facts and Counterstatement of Material Facts in the district court.

But shortly thereafter, when Dr. Wahi began treating a patient who had been referred to Dr. Wahi by Bluefield Regional Hospital—approximately 100 miles away—the Credentials Committee abruptly rescinded its favorable recommendation without notifying Dr. Wahi. JA 572-73, 975. The Committee then formally asked CAMC's Chief of Staff to conduct an "investigation and an appropriate suspension of Dr. Wahi's clinical privileges for treating the Bluefield patient." JA 572.

Before the investigation began, however, the Committee tentatively concluded that treatment of the patient was outside the scope of Dr. Wahi's delineated clinical privileges. *Ibid.* Specifically, Dr. Wahi was accused of caring for a patient (who was in his fifties) that CAMC deemed too high-risk. There was no dispute that Dr. Wahi's surgery benefited the patient. JA 721, 730-732, 744.

Led by senior CAMC officials, the investigation report exonerated Dr. Wahi. With the help of an external reviewer, the Chief of Staff conducted the investigation along with the Chief of the Department. Together, they concluded that Dr. Wahi's treatment "did *not* fall outside of his delineated clinical privileges." JA 964. (emphasis added).

2. CAMC's summary suspension of Dr. Wahi. Despite this exculpatory report, CAMC took an adverse "peer review action" against Dr. Wahi, directing its Chief of Staff to immediately suspend Dr. Wahi's privileges. JA 189, 600-602, 965. Two days later, CAMC notified Dr. Wahi of the suspension. Notably, the letter was bereft of any suggestion that

Dr. Wahi posed an imminent danger to his patients or any "danger" at all. JA 586.

Indeed, CAMC's Chief of Staff was later asked: "If you had seen a danger to the patient would you have taken steps to stop it then?" He responded, "Absolutely." JA 609. Further, the Chief of Staff testified that "Dr. Wahi [was allowed] to manage the medical treatment of the two patients currently in-house" *after* his summary suspension. JA 605-06. And with respect to that continuing treatment, the Chief of Staff was asked and answered as follows:

> Q: Would you have allowed him to continue with that treatment after the suspension if you thought he posed an imminent danger to those two patients?
>
> A. No.

JA 605-06.

Further, the Chief of Staff's Note to file, dated two days after the summary suspension, and describing its rationale, makes no reference to imminent danger. Rather, it concerns Dr. Wahi's "inability to follow procedural guidelines outlined by the Committee" and "diminishing trust between us and him, as well as the Credentials Committee and him." JA 965. Witnesses, staff members, and physicians consistently disclaimed any finding of or reliance upon any imminent danger. JA 322, 600, 800, 830, 887, 1006-1008, 1012.

A second letter in August 2009 stated that Dr. Wahi was entitled to a hearing if a written request

was received within four weeks.[2] Less than two weeks later, Dr. Wahi submitted a written request for a hearing. JA 648. Dr. Wahi also requested: (i) a more particularized statement of the charges; (ii) the factual predicate for the charges; (iii) access to related documents in CAMC's possession; and (iv) a list of witnesses that CAMC intended to call. JA 649-650.

Almost three months later, CAMC notified Dr. Wahi that a panel had been appointed to hear his appeal. JA 672-78. The letter said that senior CAMC *lawyers* would both serve as the presiding officer and represent CAMC. *Ibid*. The letter did not, however, provide a date or time for the hearing; nor did it identify CAMC's proposed witnesses. Another letter was sent to the Board members, requesting that they work with the President to schedule a hearing. JA 654. CAMC's lawyer sent two letters to Dr. Wahi that, among other things, asked him to let CAMC know about any dates that were particularly bad. But CAMC never provided Dr. Wahi a witness list—which would have enabled him to determine how long he would need to prepare, whom he should call as *his* witnesses, and when they were available for a hearing. Nor did CAMC itself schedule the hearing even though, in its final letter, it assured Dr. Wahi that it *would* set the hearing. JA 699. CAMC, moreover, never provided Dr. Wahi with the required witness list. Pet. 26a, 30a.

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[2] This letter also notified Dr. Wahi that the Credentials Committee had recommended that he be denied reappointment to the medical staff. JA 647. But that request has never been acted upon by CAMC's board.

Faced with CAMC's declared plan to set a hearing conducted by its own lawyers, and without providing a list of witnesses, in 2000 Dr. Wahi filed suit in West Virginia state court, requesting that a fair hearing panel review his suspension and denial of reappointment. JA 99-114. CAMC opposed Dr. Wahi's request, arguing that the state court need not intervene because CAMC was going forward with the hearing and would replace the panel members, including the presiding officer. JA 181, 183-187. Based on these representations, the court dismissed Dr. Wahi's suit without prejudice. JA 131-146.

3. Further exoneration by the West Virginia Board of Medicine. Rather than provide Dr. Wahi the hearing it promised, CAMC requested that the West Virginia Board of Medicine prosecute him. JA 147-150, 701. In November 2003, however, the Board dismissed CAMC's charges with prejudice, JA 254-265, as it had done with CAMC's two previous complaints against Dr. Wahi. The Board ordered all charges to be expunged from Dr. Wahi's record. JA 248-253.

C. This Litigation

That same year, Dr. Wahi filed suit alleging that CAMC's actions were taken, among other things, pursuant to a conspiracy by CAMC to monopolize thoracic and cardiovascular medicine and surgery "in the Charleston, Beckley, Bluefield, and Parkersburg area of West Virginia." Pet. 47a. CAMC defended on the ground that its actions were immune under the HCQIA. 48a.

1. The district court's grant of summary judgment without addressing the "imminent danger" requirement. The district court awarded summary judgment of HCQIA immunity to CAMC. It did so without considering Dr. Wahi's argument that his summary suspension was invalid because it was not justified by the requisite "imminent danger"—even though that issue had been raised and briefed extensively. Opp. to MSJ at 41-47.

Instead, the district court simply declared that Dr. Wahi received "procedures as are fair * * * under the circumstances" because he received, but had not responded, to two letters asking him to provide dates for a hearing. Pet. 57a, 60a. The district court did not explain how sending Dr. Wahi letters *after* his summary suspension remedied CAMC's failure to rely on any "imminent danger" in suspending him; how the letters constituted "procedures"; how such "procedures" were fair given CAMC's refusal to provide Dr. Wahi a witness list; why it was up to Dr. Wahi to set the hearing date when the HCQIA assigns that task to the hospital, 42 U.S.C. § 11112(b)(2)(A); or how to reconcile its conclusion with HCQIA's statement that "the right to the hearing may be forfeited," not if the doctor fails to provide hearing dates, but "if the physician fails without good cause to appear." 42 U.S.C. § 11112(b)(3)(B).

2. The Fourth Circuit's affirmance. The Fourth Circuit affirmed for essentially the reasons given by the district court—with one critical exception. Pet. 16a-31a. In contrast to the district court, the Fourth Circuit acknowledged Dr. Wahi's argument that the summary suspension was not supported by any "imminent danger." But it held that

the HCQIA's "emergencies" provision—subsection (c)—was not violated because it is *optional*.

Though CAMC had never suggested the idea, and without citing any precedent, the Fourth Circuit held that, as compared with the statute's main immunity provision—subsection (a)—the "health emergencies" provision in subsection (c) "sets out distinct ways in which a health care entity can be immune under the HCQIA *without* having complied with the usual requirements for claiming immunity." Pet. 17a; *accord id.* (health emergencies provision "presents additional routes to HCQIA immunity beyond that set forth in [adequate notice and hearing provisions]").

Consequently, the court reasoned, "[a]lthough Wahi may be correct that the facts show CAMC cannot assert immunity based on [the "health emergencies" provision of subsection (c)(2)], the only significance is that CAMC must meet the *usual* standard of qualifying for immunity set forth in [the adequate notice and hearing provisions of subsection (a)(3)]." Pet. 17a-18a. Thus, the panel concluded that the [redacted] Pet 18a n.18.

Having thus set aside the "imminent danger" requirement, the Fourth Circuit struggled to explain how Dr. Wahi received "procedures" that were "fair"—and indeed, extensively criticized CAMC. For example, the court stated that "CAMC's path to immunity in this case is not a recommended model."

Pet. 30a. In addition, "CAMC should have followed its Bylaws and the Procedures manual and provided Wahi a witness list." *Ibid.* Further, CAMC should have "simply set a prompt hearing." *Ibid.* According to the court, these were all "failures by CAMC." *Ibid.*

Whether CAMC would be immune despite these many "failures," the court acknowledged, would turn on "whether a reasonable jury, viewing all facts in a light most favorable to [Wahi], could conclude that he had shown, by a preponderance of the evidence, that [CAMC's] actions fell outside the scope" of the HCQIA's adequate notice and hearing provisions. Pet. 14a. But because Dr. Wahi did not provide "dates for a hearing" when asked—and solely for that reason—the Court concluded that Dr. Wahi had not "rebut[ted] the presumption that CAMC's actions satisfied" the HCQIA. *Id.* at 21a, 30a. And on that basis, the Fourth Circuit affirmed.

REASONS FOR GRANTING THE PETITION

Review is needed to resolve two circuit splits—one created by the decision below, the other widened by it. Moreover, by immunizing summary suspensions without the statutorily required possibility of imminent danger, and then denying the doctor an possibility of a jury trial, the Fourth Circuit has handed hospitals an all-purpose shield that will immunize them in virtually every case. Individually, each of the Fourth Circuit's errors flouts the HCQIA; but together they effectively make the HCQIA useless to protect doctors from sham peer review. Left uncorrected, the cost of this judicial failure will be counted, not only in ruined careers, but in artificially high prices caused by lack of competition, dimin-

ished innovation, and lack of adequate care for high-risk patients—particularly those residing within the Fourth Circuit.

I. With its misreading of the HCQIA, the decision below creates a conflict with decisions of the Third, Fifth, Eighth, and Ninth Circuits.

Reflecting the congressionally ordained balance between quality care and fairness, the HCQIA's general provisions—in subsection(a)—provide a hospital with immunity from damages when it disciplines a doctor "*after*" providing "adequate notice and hearing" or other "fair" procedures. § 11112(a)(3) (emphasis added). Different standards apply, however, if the hospital disciplines the doctor "immediately"—that is, *before* notice and a hearing or other "fair" procedures. In that situation, the subject of subsection (c), immunity is "preclude[d]"—unless "failure to take such an action may result in an imminent danger to the health of any individual" *and* "subsequent notice and hearing or other adequate procedures" are provided. § 11112(c)(2) (emphasis added).[3] The Fourth Circuit re-wrote this sensible standard and, in so doing, placed itself in conflict with several other circuits.

[3] Subsection (c)(1) also allows a hospital to suspend a doctor pending an "investigation." *Id.* § 11112(c)(1). But CAMC has never invoked this provision, no doubt because the record shows that the hospital's "investigation"—such as it was—had *already* been completed when Dr. Wahi was suspended.

A. The decision below flouts the plain language of the HCQIA.

In the court below, Dr. Wahi argued that CAMC "cannot claim immunity" because it summarily suspended him "without first finding that he posed an imminent danger to his patients." Pet. 16a. But the Fourth Circuit held that, even where summary suspension is at issue, the possibility of imminent danger is *optional*:

> [S]ubsection (c) presents additional routes to HCQIA immunity beyond that set forth in subsection (a)(3). Although Wahi may be correct that the facts show that CAMC cannot assert immunity based on (c)(1) or (c)(2), the only significance is that CAMC must meet the usual standard of qualifying for immunity set forth in subsection (a)(3).

Pet. 17a. Consistent with that logic, the Fourth Circuit reasoned that, as to the "imminent danger" provision, [redacted] Pet 18a n. 18.

1. The Fourth Circuit's approach violates the plain text of the "emergencies" provision. By its terms, that provision "*preclude*[s]" immunity for an "immediate suspension" unless two conditions are met: first, it must be the case that "failure to take such action may result in an imminent danger to the health of an[] individual"; and second, the doctor must be provided "subsequent notice and hearing or other adequate procedures." 42 U.S.C. § 11112(c)(2) (emphasis added).

It cannot be true, then, that a hospital can take an alternative "route" to immunity for a summary suspension merely by "meet[ing] the usual standards of qualifying for immunity set forth in subsection (a)(3)." Pet. App. 17a-18a. To meet the standard of subsection (a)(3), the required notice, hearing, and/or "other procedures" must occur "*before*" the "*proposed*" peer review action—here, a suspension. § 11112(a)(3), (b)(1) (emphasis added). By definition, however, in the case of an immediate suspension such procedures occur *after* the suspension—by which point the "proposed" action is not merely "proposed," but has already occurred. Such post-discipline procedures therefore cannot satisfy the requirement that the procedures come "before" the discipline.

Furthermore, the Fourth Circuit's reading would eliminate from the "emergencies" provision the phrase "imminent danger." The substantive requirements of subsection (a)(3)—"adequate notice and hearing" or "other fair procedures"—are repeated in the "emergencies" provision, which expressly requires such procedures "subsequent" to an immediate suspension. § 11112(c)(2). Thus, Congress considered whether providing later procedures constituted an "additional route[]" to immunity (Pet. 17a), and decided that it did—but only "*where the failure to [suspend] may result in an imminent danger*." § 11112(c)(2) (emphasis added). The decision below reads this phrase out of existence, rendering the "additional" route no different than the original. This is re-drafting in the guise of interpretation.

2. The Fourth Circuit's interpretation also contravenes the "emergencies" provision's express pur-

pose. By creating a provision for "emergencies," Congress ensured that, when a hospital issues what amounts to a nationally published professional death sentence, there is an exigent reason for it—namely, that patient health "may" be in "imminent danger." § 11112(c)(2).

It is thus preposterous to suppose, as the Fourth Circuit's holding requires, that Congress intended hospitals (1) to be able to defrock doctors without warning when there is no "emergenc[y]," and (2) to cure that assault on a doctor's rights by providing him "notice and a hearing" later on. Notice of what? By then the doctor has already lost his job and livelihood—information he will have *already* learned when his summary suspension letter arrives in the mail or he arrives at the hospital only to be turned away.

This deeply flawed interpretation should not be allowed to stand. Indeed, if the Court so chose, it would be a good candidate for summary reversal.

B. The decision creates a conflict with decisions in four other circuits.

Whereas no court has taken the course of the Fourth Circuit here, four circuits squarely hold that, when a hospital such as CAMC imposes a summary suspension, a showing of "imminent danger" is required. The decision below thus creates a circuit split that subjects doctors in the Fourth Circuit to a substantial risk not faced by doctors practicing in the rest of the Nation.

1. The Ninth Circuit's decision in *Fobbs* v. *Holy Cross Health Sys. Corp.*, 29 F.3d 1439 (9th Cir. 1994), *partially overruled on other grounds in Davi-*

ton v. *Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2002), is particularly instructive. There, a doctor argued that "defendants' manner of giving him notice" of his discipline was unfair "barring an emergency 'threatening imminent danger.'" *Fobbs* v. *Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054, 1068 (E.D. Cal. 1992). But the district court ducked the question whether "imminent danger" justified the notice afforded, changing the subject by pointing out that "[t]here is no dispute that plaintiff was given notice" of *later* "hearings." *Ibid.*

The Ninth Circuit rejected the district court's attempt to rely on this later notice; instead, it published a decision holding that a finding of imminent danger *is* required. Then, in response to the doctor's argument that "the statute requires that there *be* 'imminent danger to the health of any individual' before there may be a summary restriction," the Ninth Circuit held that the statute "*requires* that the danger *may* result." 29 F.3d at 1443 (first emphasis added).

Here, by contrast, instead of ducking the question of imminent danger, the Fourth Circuit erroneously and inexplicably construed it as optional. But *Fobbs* forbids that as well. Because *Fobbs* holds that the HCQIA "requires" (*ibid.*) that danger may result, and because the decision plainly teaches that notice of a later hearing is not enough (else the opinion would not have been published), the Fourth Circuit's holding that later notice and procedures *are* enough is in plain conflict with *Fobbs*.

2. The decision below also conflicts with decisions of the Fifth, Eighth, and Third Circuits.

In *Poliner*, for example, a doctor's privileges were temporarily suspended "to allow for an investigation to determine whether other action, such as a suspension, was necessary." 537 F.3d at 382. After the investigation committee "concluded that [the doctor] gave substandard care in half of the cases reviewed, and considering the seriousness of the diagnostic error" in a "cardiac catheterization," the Fifth Circuit reasoned that "Defendants were fully warranted in concluding that failing to impose further temporary restrictions 'may result' in imminent danger." *Ibid.*

Nor was this conclusion optional: The Fifth Circuit held that a finding that "failure to act 'may result in an imminent danger to the health of any individual" was "*require[d].*" *Ibid.* (quoting 42 U.S.C. § 11112(c)(2)) (emphasis added).

The court then explained how "the process provisions of the HCQIA work in tandem":

> legitimate concerns [i.e., the possibility of imminent danger] lead to temporary restrictions and an investigation; *an investigation reveals that a doctor may in fact be a danger*; and in response, the hospital continues to limit the physician's privileges. The hearing process is allowed to play out unencumbered by the fears and urgency that would necessarily obtain if the physician were midstream returned to full privileges during the few days necessary for a fully informed and considered decision * * * *.

537 F.3d at 384 (emphasis added). When the doctor in *Poliner* countered that summary suspension was only allowed in "extraordinary cases in which a physician suddenly becomes impaired or grossly incom-

petent," the Fifth Circuit ruled that "the plain language of the statute is not so limited"—but in so doing cited multiple cases from other courts *requiring* at least the possibility of "imminent danger." *Id.* at 382-383 & n.48.

At every turn, CAMC departed from this statutory roadmap—including skipping the required judgment about imminent danger. To begin with, the Chief of Staff conducted his investigation, which paralleled an outside investigation, *without* suspending Dr. Wahi. This suggests that there was no imminent danger to anyone—a conclusion confirmed when the Chief of Staff reported that Dr. Wahi's treatments "did *not* fall outside of his delineated clinical privileges." JA 964 (emphasis added).

Then, however, as CAMC admitted, "CAMC * * * suspend[ed] [Dr. Wahi] *without* a prior finding that he posed an imminent danger." Pet. 81a (emphasis added). And on that same day, Dr. Wahi was allowed to treat two patients. JA 605-606. It was only afterward that the parties began negotiating over the hearing that became the focus of the Fourth Circuit's decision. See Pet. 27a-31a.

By that time, though, the statutory scheme described in *Poliner* had already been shredded. Albeit under protest, Dr. Wahi was negotiating for a hearing under a statutorily invalid summary suspension. Under the plain language of the HCQIA and the holding of *Poliner*, CAMC had already forfeited its immunity—by suspending Dr. Wahi *without* concluding that there was any possibility of imminent danger.

Like the doctor in *Poliner*, the doctor in *Sugarbaker* v. *SSM Health Care*, 190 F.3d 905 (8th Cir. 1999), also argued that the defendant hospital's "precautionary suspension was improper." *Id.* at 917. The Eighth Circuit upheld the suspension, however, only because "review of 24 of Dr. Sugarbaker's surgical cases raised concerns" about patient safety, and because "under the HCQIA's emergency provisions, summary suspensions * * * do not result in the loss of immunity 'where the failure to take such an action may result in an imminent danger to the health of any individual.'" *Ibid.* (quoting 42 U.S.C. § 11112(c)(2)). When the doctor objected that he had no patients at the time of the suspension and thus any supposed danger could not have been imminent, the court observed that the statute merely "*requires*" the possibility of imminent danger—a condition amply met there. *Ibid.* (quoting *Fobbs*, 29 F.3d at 1443 (emphasis added)). Chief Judge Becker reached the same conclusion for the Third Circuit in *Brader* v. *Allegheny General Hospital*, 167 F.3d 832 (3d Cir. 1999).[4]

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[4] There, a doctor challenged a hospital's decision to "summarily suspend" his privileges to repair abdominal aortic aneurisms ["AAA"] after, among other things, the director of the Division of General Surgery observed a patient die on the operating table "from bleeding from the injuries" sustained *during surgery*. 167 F.3d at 835. The doctor complained that the hospital "did not give [him] advance warning" before his AAA privileges were "summarily suspended." *Id.* at 842. The Third Circuit, however, held that the suspension was "covered by § 11112(c), which provides that the [adequate notice and hearing provisions] do not preclude an immediate suspension * * * where the failure to take such an action may result in an imminent danger to the health of any individual." *Ibid.*

In these circuits, the cases foreclose the Fourth Circuit's holding that a finding of imminent danger is optional. All four circuits have already held it is required. *Fobbs*, 29 F.3d at 1443 ("requires"); *Poliner*, 537 F.3d at 382 ("requires"); *Sugarbaker*, 190 F.3d at ("requires"); *Brader*, 167 F.3d at 842 (immunized suspension not "preclude[d]" with finding of imminent danger).

C. The decision below is an especially attractive candidate for review because CAMC concedes it did not rely on any imminent danger.

This case is a particularly good candidate for review and resolution of this issue because there is no question whether CAMC made a finding of imminent danger or relied upon any such finding in suspending Dr. Wahi. CAMC has expressly conceded it did not.

In the court below, Dr. Wahi focused extensively in his opening brief on the lack of a finding of imminent danger, noting that this destroyed CAMC's immunity under the plain language of the statute. Appellant's Br. at 20-24. In response, CAMC readily agreed that it did not rely on any imminent danger: It acknowledged that Dr. Wahi had been "suspend[ed] * * * without a prior finding of imminent danger," Pet. 81a, but argued that it did not thereby "violate * * * HCQIA." *Id.* According to CAMC, it nevertheless remained immune because the summary suspension was allowed under its *procedures manual*.

Because in the Ninth, Fifth, Eighth, and Third Circuits imminent danger is "required," CAMC's

concession that it suspended Dr. Wahi "without a finding of imminent danger" would have voided CAMC's immunity as a matter of law. The lack of a material factual question on this dispositive point makes this case an especially good candidate for review—and, indeed, summary reversal on this issue.

II. The Fourth Circuit widened a recognized circuit split over whether a hospital's federal immunity can be decided by a jury.

In addition to creating a circuit split over the proper construction of the HCQIA's "immediate suspension" provisions, this case deepens a pre-existing and acknowledged split involving an HCQIA plaintiff's access to a jury. This Court has long instructed that "[m]aintenance of the jury as a fact-finding body is of such importance that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Chauffeurs, Teamsters, & Helpers, Local 391* v. *Terry*, 494 U.S. 558, 565 (1990) (citation omitted). Yet the decision below denies that right in all cases, in conflict with decisions of the First and Tenth Circuits, but in accord with decisions of the Eleventh Circuit and Supreme Court of Colorado.

A. The decision below effectively denies all HCQIA plaintiffs a jury trial, aligning the Fourth Circuit with the Eleventh and against the First and Tenth Circuits.

As we have shown, the summary suspension was invalid as a matter of law because CAMC concededly made no prior finding that Dr. Wahi may have posed an imminent danger. See discussion. *supra*, at 17-25. The court below avoided this conclusion only by

misreading the HCQIA's "imminent danger" requirement. But in holding that CAMC avoided that requirement by *later* providing "fair" procedures, the Court brought itself into conflict with decisions of other circuits that, at a minimum, would have required a jury to decide that question.

1. According to the Fourth Circuit, whether the procedures were "fair * * * under the circumstances" (§ 11112(a)(3)) was an exceedingly close question. Rather than applauding CAMC's approach, the Fourth Circuit firmly admonished that CAMC "should have followed its Bylaws and Procedures Manual," not to mention the requirements of the HCQIA, "and provided Wahi a witness list." Pet. 30a. Likewise, CAMC should have "simply set a prompt hearing." And so, because of these "failures by CAMC," the Fourth Circuit declared that CAMC's "path to immunity in this case is not a recommended model." *Ibid.*

Rather than send this case to a jury, however, the Fourth Circuit purported to break the tie on the issue of whether Dr. Wahi received "fair" procedures by invoking the HCQIA's presumption that hospital procedures are fair. Pet. 30a-31a. But Dr. Wahi had already overcome that presumption by establishing that CAMC had never set a hearing or provided him its list of witnesses. Indeed, if Dr. Wahi's showing had been any stronger, he would have failed to receive a jury trial for a different reason: He would have been entitled to judgment as a matter of law. Under the Fourth Circuit's reasoning, then, the category of HCQIA plaintiffs who receive jury trials is an empty set.

By effectively creating this no-jury standard, the Fourth Circuit has aligned itself with the Eleventh Circuit and the Supreme Court of Colorado. In *Bryan,* the Eleventh Circuit held that "[u]nder no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury," *Bryan*, 33 F.3d at 1333.[5] The Supreme Court of Colorado reached the same conclusion in *North Colorado Medical Center* v. *Nicholas*, 27 P.3d 828, 838 (Colo. 2001) ("[i]mmunity under the HCQIA is a question of law for the court to decide").

2. At the same time that it effectively sided with these courts, the Fourth Circuit set itself against the First and Tenth Circuits, which hold that under the HCQIA jury trials may be and often are required.

For example, according to the First Circuit's decision in *Singh*, "entry of summary judgment *does* * * * *violence* to the plaintiff's right to a jury trial" unless "there are no genuine disputes over material historical facts, and * * * the evidence of reasonableness * * * is so-one sided that no reasonable jury could find that the defendant health care entity failed to meet the HCQIA standards." 308 F.3d at 36 (emphasis added). In so holding, moreover, the First Circuit recognized its square conflict with the Eleventh Circuit's decision in *Bryan*:

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[5] Indeed, the Fourth Circuit's reasoning is more extreme than the Eleventh Circuit. At least the Eleventh Circuit allows a jury to consider certain immunity-related fact questions. *Bryan*, 33 F.3d at 1333; see also *Singh*, 308 F.3d at 34 n.7 (noting overlap between fact questions related to immunity and ultimate immunity determination).

> [g]iven *Bryan*'s internal inconsistency, and its contradiction of the other circuits' holding that a jury may in principle make a HCQIA determination we decline to adopt its designation of HCQIA determinations as pure questions of law off limits to a jury.

Id. at 35. Before the decision below, then, there was already an acknowledged circuit split over whether a jury could consider the immunity question in this case.

The decision below also pits the Fourth Circuit against the Tenth Circuit, which likewise requires jury trials when merited in HCQIA cases—and indeed, has granted such a trial. In *Brown* v. *Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1994), the court awarded a jury trial where the doctor presented only one expert witness, who was contradicted by the hospital's many experts. Despite the obvious imbalance, keeping such a difference of opinion from a jury, the court held, "would be in direct contravention to Congress' intention * * * and would abrogate the jury's responsibility to weigh the evidence and determine the credibility of witnesses." *Id. at* 1334 n.9.

Responding to an argument that in light of the strength of the hospital's case the doctor's single witness could not raise a material issue, the Tenth Circuit noted that the "entire jury system is anchored to the jurors' determination of credibility of witnesses and the weight to be given to their testimony." *Ibid.* (citation omitted). And on that basis the court *granted* a jury trial to the doctor—in

clear conflict with the Eleventh Circuit, the Colorado Supreme Court, and the decision below.

Moreover, in light of Colorado Supreme Court's later rejection of jury trials in HCQIA cases (see *North Colorado Medical Center*, *supra*), a litigant in Colorado can obtain a jury trial in federal court—under *Brown*—but *not* in state court.

In sum, by using the statutory presumption to resolve the fact issues that were clearly presented in the evidence below, the Fourth Circuit effectively created a no-jury-trial rule and thus widened an established conflict.

B. This case is an excellent vehicle with which to resolve the conflict.

This case provides an effective vehicle by which to resolve the acknowledged split on the availability of a jury trial in HCQIA cases, because there is no doubt that the Tenth and First Circuits, if they had reached the issue, would have awarded a jury trial as to either (1) whether there was the possibility of imminent danger, or (2) whether CAMC's procedures were "fair" under the circumstances, or both.

1. To be sure, we believe Dr. Wahi was and is entitled to summary judgment as to his summary suspension: By failing to make any finding or showing of the possibility of imminent danger, CAMC could not, as a matter of law, invoke the immunity provided in paragraph (c)(2). And by failing to provide any notice, hearing or other procedures *before* the suspension, CAMC could not, as a matter of law, obtain immunity under the more general provision of (a)(3). See discussion, *supra*, at 17-25. But if that were not so, Dr. Wahi would certainly be entitled to

a jury trial on CAMC's immunity for his summary suspension.

The only evidence that could possibly create a fact issue on "imminent danger" came from the deposition testimony of the CAMC official who summarily suspended Dr. Wahi but allowed him to treat patients that same day. The official admitted that he would not have allowed Dr. Wahi to treat patients if he had been an imminent danger. [redacted] Pet. 18a n.18. But CAMC has never relied upon that assertion as its basis for the summary suspension, and as noted, it conceded it never made a finding of imminent danger. Pet. 81a. But even if CAMC had relied upon the Chief of Staff's assertion, that assertion *at best* creates a genuine dispute over a material historical fact and creates a question about the Chief of Staff's credibility. Both lie squarely within the unique province of the jury. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Indeed, keeping a jury from addressing this issue directly contravenes the holding of the Tenth Circuit in *Brown*, which awarded a jury trial on a far lesser showing to avoid "abrogat[ing] the jury's responsibility to weigh the evidence and determine the credibility of witnesses." *Brown*, 101 F.3d at 1334 n.9. So too under *Singh*, which declares that "entry of summary judgment *does* * * * *violence* to the plaintiff's right to a jury trial unless "there are no genuine disputes over material historical facts." 308 F.3d at 36 (emphasis added).

2. Even assuming the issue of "imminent danger" could be set aside, there are certainly material issues of fact as to whether CAMC's procedures were "fair to [Dr. Wahi] under the circumstances," 42 U.S.C. § 11112(a)(3). Here again, the Tenth and First Circuits undoubtedly would have come out the other way.

The circumstances here include multiple acknowledged "failures" by CAMC, including its refusal to provide Dr. Wahi a witness list, which is why the Fourth Circuit described its "path to immunity" as "not a recommended model." Pet. 30a. The salient circumstances also include Dr. Wahi's three exonerations—with prejudice—by the State Board of Medicine. JA 248-255.

Thus, Dr. Wahi's case is far stronger than that in *Brown*, which granted a jury trial to the doctor there. As noted, in *Brown*, the doctor had a single expert witness in his favor, and the Tenth Circuit held that a jury trial was required. 101 F.3d at 1334 & n.9. Here, by contrast, Dr. Wahi has far more than a single expert supporting his position on the key factual issues. But rather than sending this sharply disputed case to a jury, the Fourth Circuit improperly "weigh[ed] the evidence and determine[d] the truth of the matter" itself. *Anderson*, 477 U.S. at 249.

In so doing, the court allowed a *single* supposed fact—Dr. Wahi's lack of response to requests for dates for a hearing, *for which he had not been provided a witness list*—to be dispositive. Here again, the court ignored numerous countervailing issues, including the following:

- how Dr. Wahi could provide dates without knowing how many witnesses there would be, who they were, which witnesses *he* thus would need to call, and when they were available;
- that the last letter to Dr. Wahi promised that *CAMC* would set the hearing, JA 699; or
- that, according to the HCQIA, "the right to the hearing may be forfeited," but only "if the physician fails, without good cause, to *appear*." 42 U.S.C. § 11112(b)(3)(B) (emphasis added).

Whether CAMC provided procedures "fair" to Dr. Wahi under these circumstances was for a jury to decide. § 11112(a)(3); Pet. 19a. Indeed, if a physician cannot go before a jury of his peers under such circumstances, the jury trial right has become essentially worthless. Cf. *Clark* v. *Columbia/HCA Info. Serv's, Inc.*, 25 P.3d 215, 223 (Nev. 2001) (reversing summary judgment of HCQIA immunity because premised merely on "[o]ne instance of an objective basis for discipline").

In short, there is unlikely ever to be a better candidate to resolve the split between the two circuits—the First and Tenth—that require jury trials in cases like this, and the two circuits—the Eleventh and the Fourth—plus the Supreme Court of Colorado, that preclude them.

III. Left undisturbed, the decision will let hospitals run roughshod over physicians' rights, to the detriment not only of doctors, but of patients and the entire health-care system.

The decision below also merits review because it is exceptionally important to the nation's health care. As the amicus brief below by the Association of American Physicians & Surgeons ("AAPS") showed, there has long been a problem of anticompetitive manipulation of peer review to eliminate innovative or popular physicians and to retaliate against physicians deemed to provide "too much" care to high-risk or critically ill patients. AAPS Br. 14-18. The Fourth Circuit's decision will compound this problem, allowing hospitals to brand doctors with a professional "scarlet letter," which by statute they must wear in all fifty states, *before any problem is found with the doctor's competence*. Not only will this deprive patients of the services of extremely talented physicians like Dr. Wahi, it will also foil Congress' "attempt[] to balance the chilling effect of litigation on peer review with concerns for protecting physicians." *Bryan*, 33 F.3d at 1322.

1. The Fourth Circuit's holding that a hospital can suspend a doctor summarily without any justification gives hospitals enormous power. And that power is uniquely devastating, not only because it can be exercised capriciously, but because it enables hospitals to "kneecap" doctors at the very threshold of litigation—preventing them from effectively protesting both the suspension *and* any later professional review action. After all, when a doctor is summarily suspended, he loses his livelihood; and is

thus handicapped in hiring a talented lawyer who can mount a defense against a powerful and well-financed hospital or health system. This is contrary to the express purpose of the HCQIA, which, by allowing summary suspensions only on the basis of "imminent danger," forbids issuing professional death sentences where risk to patients is lacking.

By eliminating jury trials, the Fourth Circuit has done violence to HCQIA's overriding purpose. The statute is crafted not only to protect the peer review process from unmeritorious challenges, but also to guard doctors from being stripped of their professional licenses without receiving basic due process. By allowing summary suspensions without justification, the Fourth Circuit destroys this congressionally ordained balance. See *Bryan*, 33 F.3d at 1322.

2. As the AAPS brief explained, the cost of this misguided decision will include not only needlessly ruined careers and wasted expertise, but the loss of innovative and compassionate medical care. Sham peer review is already a nationwide problem, which the decision below promises to make worse. See AAPS Br. 16 (citing multiple medical journals documenting epidemic of sham peer review).

Unlike the record in this case, moreover, which is notably bereft of a single patient suffering under Dr. Wahi's care, every other leading circuit court decision involved serious wrongdoing. For example:

- "the committee concluded that 27" of Dr. Mathews' "cases evidenced a substandard level of care" and "[t]wenty-three of those cases * * * involved spine surgery," *Mathews* v. *Lancaster Gen. Hosp.*, 87 F.3d 624, 629 (3d Cir. 1996);

- "review of 24 of Dr. Sugarbaker's surgical cases raised concerns with respect to Dr. Sugarbaker's practice," *Sugarbaker*, 190 F.3d at 917;
- "of the 5 people who had done [a certain type of procedure] one surgeon accounted for 50 percent of the mortality," and "[t]hat one surgeon was Brader," *Brader*, 167 F.3d at 836.

Thus, while the Fourth Circuit characterized Dr. Wahi as "not a first-time offender" Pet. 29a, it ignored the fact that *none of CAMC's reports about Dr. Wahi was ever vindicated*. Indeed, CAMC's own investigation vindicated Dr. Wahi; and the medical board of West Virginia has investigated Dr. Wahi *three times* at CAMC's request—and has cleared him every single time. JA 248-265.

In short, if Dr. Wahi can be summarily suspended, any physician can be. "Peer review" that allows such a travesty is not worthy of the name, and it is expressly forbidden by the HCQIA. Unless this Court grants review, such misadventures will only be further multiplied—to the detriment of excellent physicians such as Dr. Wahi, and of patients nationwide. AAPS Br. 12-18.

3. Finally, the decision below can only encourage the departure of physicians from the five states within the Fourth Circuit—Maryland, Virginia, West Virginia, North Carolina, and South Carolina—and hamper efforts to recruit excellent physicians to practice in those states. Given the option, what physician would choose to practice where the local hospital—the lifeblood of her medical practice—can suspend her privileges on a whim and without any possibility of recourse to a jury?

Protecting hospitals and peer reviewers from frivolous suits is one thing, but protecting them from *any* legal challenge is quite another. "Absolute power corrupts absolutely." J. Acton, *Essays on Freedom and Power* 364 (H. Finer ed. 1948). And good doctors will be deterred from practicing in any area where the law confers such power on local hospitals.

CONCLUSION

This case gives the Court an opportunity to resolve both a new and a pre-existing circuit split on two issues of critical importance to doctors, hospitals, and our entire health-care system. It also provides an opportunity to rein in the overly deferential approach to peer-review immunity embodied in the decision below, and to prevent that approach from spreading to other circuits.

Petitioner thus respectfully urges the Court to grant plenary review of both questions presented. At a minimum, the Court should grant review of the first question and, if it believes plenary review is not warranted, summarily reverse the decision below.

Respectfully submitted,

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September 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Rakesh WAHI, *Plaintiff-Appellant*, v. CHARLESTON AREA MEDICAL CENTER, INCORPORATED, a West Virginia Corporation; Glenn Crotty; John Does I-X, *Defendants-Appellees*, and Jane Does I-X; Jamal Kahn; H. Rashid; K.C. Lee; Andrew Vaughn; John L. Chapman, *Defendants*.	No. 06-2162
Association of American Physicians and Surgeons, Incorporated, *Amicus Supporting Appellant*.	

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
Joseph R. Goodwin, Chief District Judge.

(2:04-cv-00019)

Argued: December 2, 2008

Decided: April 10, 2009

Before GREGORY and AGEE, Circuit Judges, and Rebecca Beach SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge AGEE wrote the opinion, in which Judge GREGORY and Judge SMITH joined.

COUNSEL

ARGUED: Kenneth Winston Starr, PEPPERDINE UNIVERSITY SCHOOL OF LAW, Malibu, California, for Appellant. Richard D. Jones, FLAHERTY, SENSABAUGH & BONASSO, P.L.L.C., Charleston, West Virginia, for Appellees.

ON BRIEF: John C. Yoder, Harpers Ferry, West Virginia, for Appellant. David S. Givens, FLAHERTY, SENSABAUGH & BONASSO, P.L.L.C., Wheeling, West Virginia, for Appellees. Andrew L. Schlafly, Far Hills, New Jersey, for Amicus Supporting Appellant.

OPINION

AGEE, Circuit Judge:

Rakesh Wahi, M.D., appeals the district court's judgment dismissing his numerous state and federal claims brought against Charleston Area Medical Center, Inc. ("CAMC") regarding the suspension of his medical privileges. The district court concluded most of Wahi's claims were barred because CAMC qualified for immunity from suit under the Health Care Quality Improvement Act ("HCQIA" or "the Act"), 42 U.S.C.A. § 11101, *et seq.* (West 2005). For this reason, and because the district court found Wahi's other claims failed on the merits, the court

awarded CAMC and Dr. Glenn Crotty[1] summary judgment. For the reasons set forth below, we affirm the judgment of the district court.

I.

CAMC is a privately-run hospital operating in Charleston, West Virginia. Wahi, who is licensed to practice medicine in West Virginia, began working as a cardio-thoracic surgeon at CAMC in January 1993. (J.A. 98.) The following year, Wahi started his own practice, but retained clinical privileges at CAMC. Around the same time, he began discussions with a Beckley, West Virginia medical group about the possibility of associating with them. In November 1996, CAMC temporarily suspended Wahi's hospital privileges and, as required by statute, it notified the National Practitioner's Data Bank ("NPDB"),[2] of Wahi's suspension. CAMC later reinstated Wahi's clinical privileges on a provisional basis.[3] (J.A. 49;

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[1] Dr. Crotty served as Executive Vice President and Chief Medical Officer at CAMC during the relevant period of Wahi's employment; he is now the Chief Operating Officer at CAMC. (J.A. 70, 117.)

[2] The NPDB is a national clearinghouse designed to prevent incompetent doctors from simply moving to a new state that could not discover their prior poor performance. Under the HCQIA, hospitals are generally required to report to the NPDB adverse professional review action "affect[ing] the clinical privileges of a physician." *See* 42 U.S.C.A. § 11133(a)(1)(A) (West 2005).

[3] Wahi's status and privileges changed in subsequent periods, but at all relevant times, he only possessed provisional privileges at CAMC and he was subject to numerous restrictions, such as being required to get another doctor's approval before performing certain procedures and to have a proctor present during other procedures. Wahi was also barred from performing some procedures entirely. (J.A. 516-33, 655.)

294; 511-16.) Following Wahi's reinstatement, CAMC received reports of and investigated several allegations that Wahi violated the terms of his provisional clinical privileges, which again resulted in temporary suspensions of Wahi's privileges in 1998 and 1999. From 1996 to 1999, CAMC, as required by statute, reported Wahi to the NPDB a total of five times, although the exact nature of each of the reports before 1999 is not in the record. These prior suspensions and investigations are not at issue in this appeal.[4] (J.A. 50, 517-71.)

At the time of the events in question, Wahi was exercising provisional privileges at CAMC, and had requested reappointment for "an additional year ending February 26, 2000."[5] (J.A. 532-33, 572.) In May 1999, the CAMC Credentials Committee[6] ("Credentials Committee") recommended that Wahi's request be granted, but that his privileges remain

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[4] CAMC also filed several reports regarding Wahi's professional conduct with the West Virginia Board of Medicine.

[5] Under CAMC policy, an application for reappointment automatically extends the current appointment period until the request is acted on. (J.A. 477; Procedures Manual 2.1.1.1.) Wahi's application thus extended his previous year's appointment until final disposition of his application for reappointment.

[6] The Credentials Committee is composed of "one representative from each of [CAMC's] Medical Staff Departments" and two non-physician non-voting members of the Board. It is charged with investigating the "character, professional competence, qualifications and ethical standing of" CAMC physicians who have "completed applications for appointment or reappointment to the medical Staff," as well as requests for changes in privileges. The Credentials Committee then makes a recommendation to the Board on all such matters. (Bylaws 8.3.1, 8.3.2.1.) (J.A. 464.)

restricted "as currently in place with intensified review as outlined in the Medical Staff Procedures Manual."[7] (J.A. 532.)

By letter dated July 8, 1999, the Credentials Committee notified CAMC's Chief of Staff, **[REDACTED]**, that it was rescinding its earlier recommendation to renew Wahi's provisional clinical privileges.[8] This decision was made after receiving information that Wahi performed a **[REDACTED]**, which he was not permitted to do under the terms of his provisional clinical privileges. The Credentials Committee had also been apprised that Wahi failed to notify CAMC, as required by the by-laws, that he had voluntarily relinquished his clinical privileges at another hospital. The Credentials Committee requested "an investigation and appropriate suspension of Dr. Wahi's clinical privileges" in light of this new information of Wahi's continued failure to comply with the terms of his provisional clinical privileges. The Credentials Committee informed **[REDACTED]** that its recommendation had not been communicated to the CAMC Board of Trustees, and that Wahi would be given the opportunity to meet with them "prior to any final recommendation." (J.A. 572-73.)

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[7] Three documents set forth the rights and responsibilities between CAMC and its medical staff: the Medical Staff Procedures Manual ("Procedures Manual"), Medical Staff Bylaws ("Bylaws"), and Medical Staff Rules & Regulations.

[8] The district court incorrectly identified this letter as one addressed directly to Wahi. There is no indication in the record that Wahi received a copy of this letter or was made aware of the Credentials Committee's recommendation at that time.

By letter dated July 16, 1999, **[REDACTED]** informed Wahi that he had been requested to investigate the two claims raised in the Credentials Committee's letter. **[REDACTED]** asked Wahi to "respond to each of the [allegations] in writing as soon as possible." Attached to the letter were the relevant portions of the Bylaws pertaining to the alleged violations. (J.A. 115, 575-76.)

Between July 16 and July 30, in addition to meeting with **[REDACTED]** to discuss the July 16 letter requesting additional information from Wahi, Wahi wrote to **[REDACTED], [REDACTED],** and the Chairman of the Credentials Committee in order to provide an explanation of the events surrounding the allegations against him. The Credentials Committee scheduled a meeting with Wahi for August 3, 1999 to review his performance and consider his application, which was later rescheduled for August 17, 1999, at Wahi's request. (J.A. 742.)

On July 30, 1999, **[REDACTED]** summarily suspended Wahi's hospital privileges at CAMC. (J.A. 50.) By letter on the same date, CAMC formally notified Wahi that his "clinical privileges [were] hereby summarily suspended pursuant to Section 2.4.1, *Grounds for Summary Suspension* of the Procedures Manual, 'for the best interest of patient care.' " (J.A. 117.) His suspension was to "continue until resolution of [Wahi's] request for reappointment and any appeal/hearing, if requested, has been completed." (J.A. 117.) A copy of Article III of the Procedures Manual was attached to the letter, and Wahi was informed that he "may wish to avail [himself] of any rights available to [him] under Article III." (J.A. 117, 586.)

From the time of his suspension through the Credentials Committee meeting, Wahi engaged in ongoing correspondence and discussions with CAMC regarding preparation for that meeting and his application to renew clinical privileges. (See, e.g., J.A. 118-30, 654.) On August 17, 1999, the Credentials Committee met and Wahi testified, providing his response to the allegations against him. The Credentials Committee recommended denying Wahi's application for reappointment in a detailed August 26, 1999 letter. (J.A. 644-46.) By a separate letter, also dated August 26, 1999, CAMC informed Wahi of the denial of his request for reappointment of his clinical privileges and of his right to a hearing regarding this decision under Article III of the Procedures Manual. (J.A. 644-47.)

On September 8, 1999, Wahi, by counsel, requested a hearing regarding both his suspension and the decision not to renew his clinical privileges. On September 13, 1999, CAMC reported Wahi's summary suspension to the NPDB, (J.A. 962.), and to the West Virginia Board of Medicine. (J.A. 701.)

Correspondence during the next several months indicates on-going discussions between Wahi and CAMC regarding Wahi's access to his medical affairs/quality assurance file, his dislike of the composition of the hearing panel, and other aspects of the conduct of a hearing. CAMC repeatedly asked Wahi to provide "a series of convenient dates ... for the scheduling of" the requested hearing. (J.A. 762-63, 776.) Wahi has never provided CAMC with any dates on which he would be available for a hearing, and a hearing date was never set. (J.A. 760.)

In November 2000, Wahi filed a complaint in

West Virginia state court requesting that the court intervene in the CAMC peer review process, declare certain of CAMC's actions invalid, require CAMC to withdraw its reports to the NPDB and state Board of Medicine, and require a court-administered hearing that satisfied Wahi's various demands. (J.A. 99-114.) The West Virginia court ultimately dismissed the action on December 6, 2001, after concluding that Wahi was not entitled to the relief he sought because the peer review process was still ongoing. It declined to "render advisory opinions" or accept Wahi's "speculation" that he would receive an unfair hearing. (J.A. 143, 131-46.)

For a while, discussions between Wahi and CAMC continued after the state court case ended, with both parties setting forth various parameters and details of the conduct of a hearing. Then discussions halted,[9] with the parties never reaching an agreement or conducting or scheduling a hearing. In January 2004, Wahi filed a complaint in the United States District Court for the Southern District of West Virginia.

The complaint alleged numerous state and federal claims, including Anti-Trust violations of the Sherman Act, against CAMC and other defendants.[10]

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[9] As a result of CAMC's September 1999 report to the Board of Medicine, the Board undertook an investigation into Wahi's suspension and ultimately filed a complaint against him in September 2001 to determine whether disciplinary action should be taken regarding Wahi's license to practice medicine. After protracted proceedings, the Board of Medicine ultimately dismissed the charges in November 2003 without reaching a decision on the merits of the allegations. (J.A. 147-180, 254-55, 701.)

[10] The claims against all but one of the other defendants, Dr.

(R. 3.) CAMC filed a motion for summary judgment, which the district court construed as a motion to dismiss pursuant to Rule 12(b)(6). (J.A. 48.) By order dated October 27, 2004, the district court dismissed the Sherman Act claims for failure to allege an effect on interstate commerce, but granted Wahi leave to amend to remedy that omission. (J.A. 59-61.) The district court also dismissed all but one of Wahi's § 1983 claims against CAMC, finding "utterly without merit" Wahi's assertion that CAMC acted "under color of state law" because it reported him to the NPDB. (J.A. 61-62.) Lastly, it dismissed Wahi's state invasion of privacy or wrongful disclosure claim, concluding that "a plain reading of [the HCQIA] means that only the information contained in a report to the [NPDB], and not the mere fact that a report was made, is protected as confidential." (J.A. 63-64.)

Wahi then filed an amended complaint reiterating the claims the district court had not dismissed in its October 2004 order, and amending the Sherman Act claims to include allegations of an effect on interstate commerce. (J.A. 68-93.) Wahi's amended complaint alleged the following claims: (1) Anti-Trust Conspiracy, in violation of the Sherman Act, 15 U.S.C. § 1 (2000); (2) Anti-Trust Monopolization, in violation of the Sherman Act, 15 U.S.C.A. § 2 (West 1997 & Supp.2008); (3) breach of contract and implied covenant of good faith and fair dealing; (4) conspiracy to deny his constitutional right to due process, in violation of 42 U.S.C.A. § 1983 (West 2005); (5) defamation; and (6) violation of his

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Crotty, were subsequently dismissed from the suit, see R. 12 and 88, and are not before us in this appeal.

civil rights under 42 U.S.C.A. § 1981 (West 2005).[11] Wahi also sought a declaration "that the reports made by [CAMC] to the NPDB are invalid and contrary to law," the removal of CAMC's "derogatory reports concerning [Wahi] from the NPDB," the reinstatement of Wahi's hospital privileges, actual and punitive damages, attorneys fees, and costs. (J.A. 92.) Wahi's overarching contention was that CAMC's decisions to suspend him and deny his application for reappointment were taken in bad faith to prevent competition by monopolizing the field of cardiac surgery in the region and to prevent him from practicing medicine. (J.A. 68-92.)

By order dated September 29, 2006, the district court granted motions by CAMC and Dr. Crotty for summary judgment on all counts. *Wahi v. Charleston Area Med. Ctr.*, 453 F.Supp.2d 942 (S.D.W.Va.2006). (J.A. 262-91.) The court held that CAMC qualified for immunity under the HCQIA from all of Wahi's claims for damages. In so doing, it analyzed each of the four components that a professional review action must possess in order to qualify for immunity, as set forth in 42 U.S.C. § 11112(a), and concluded that CAMC fulfilled each requirement. *Id.* at 948-55. (J.A. 266-79.) Regarding the fact that CAMC never held a hearing regarding Wahi's suspension, the district court found

> that the evidence offered by Dr. Wahi is insufficient for a reasonable jury to find that CAMC failed to fulfill its obligations under § 11112(a)(3) by a preponderance of the evidence. The overwhelming evidence is that CAMC acted

[11] Additional claims were subsequently voluntarily dismissed and are not at issue on appeal. (J.A. 12; R. 61.)

> in an objectively reasonable manner in light of the totality of the circumstances in this case and took sufficient measures to ensure Dr. Wahi received adequate notice of any hearing or meeting that was to occur in the proposed actions against him. The many letters between the parties illustrate the hospital's attempts to set a hearing at Dr. Wahi's request and give him notice of the hearing. Dr. Wahi was represented by counsel throughout the process and in the end, he was informed and fully aware of his rights, the hospital's policies, and the charges and evidence the hospital had against him. The hospital responded promptly when Dr. Wahi requested a hearing be scheduled.

Id. at 954. (J.A. 278.) The district court concluded the HCQIA immunity protected CAMC against Wahi's claims for violations of the Sherman Act, breach of contract,[12] and defamation. *Id.* at 955. (J.A. 279.) Recognizing that the HCQIA does not afford immunity from claims for injunctive relief, the district court dismissed those claims based on its conclusion that "Wahi fail[ed] to make any argument or allege any facts that would entitle him to injunctive relief."[13] *Id.* at 960. (J.A. 289-90). The

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[12] The district court also provided an alternative basis for the granting of summary judgment as to Wahi's breach of contract claim: CAMC complied with the procedures outlined in its Procedures Manual and those required by federal law, and that CAMC's Bylaws did not constitute a contract under West Virginia law, so any violation of the Bylaws could not constitute a breach of contract. *Id.* at 955-56. (J.A. 280-82.)

[13] It also held that Wahi's § 1981 claim was barred by the applicable statute of limitations and also failed on the merits because Wahi had not proven CAMC's race-neutral reason for its actions were pretextual. *Id.* at 957-60. (J.A. 282-88.) Because

district court recognized that the HCQIA does not provide immunity from claims alleging civil rights violations, but granted CAMC summary judgment on Wahi's § 1983 conspiracy to deny due process claim because "Wahi [did] not offer even a scintilla of evidence that there was communication between CAMC and the Board of Medicine beyond that required by law." *Id.* (J.A. 288-89.) Accordingly, the district court awarded summary judgment to CAMC and dismissed Wahi's case with prejudice. *Id.* (J.A. 291.)

Wahi noted a timely appeal, (J.A. 292-93), and we have jurisdiction under 28 U.S.C.A. § 1291 (West 2006).

II.

On appeal, Wahi's primary argument is that the district court erred in holding that CAMC[14] was entitled to immunity under the HCQIA even though CAMC summarily suspended Wahi "without notice or a hearing." Wahi also contends that the district court erred in dismissing his claims seeking injunctive relief because the HCQIA only provides immunity

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Wahi does not challenge the district court's disposition of this claim, it is not before us on appeal. *See* Fed. R.App. P. 28(a)(9)(A); *see also 11126 Baltimore Boulevard, Inc. v. Prince George's County,* 58 F.3d 988, 993 n. 7 (4th Cir. 1995) (en banc) (involving predecessor to Federal Rule of Appellate Procedure 28(a)(9)(A)).

[14] In his opening brief, Wahi states that he "is also appealing the dismissal of Dr. Crotty as a co-defendant," even though he refers to CAMC as the "Appellant." (Br. Appellant 3.) The district court similarly analyzed the claims against CAMC and Dr. Crotty together. We will invoke a similar convention, referring only to CAMC, but including Dr. Crotty in the analysis for the claims Wahi brought against him.

from suits for damages. In addition, Wahi challenges the district court's determination that CAMC was not a state actor and therefore was not amenable to suit under 42 U.S.C.A. § 1983 (2005). Lastly, Wahi asserts the district court erred in dismissing his state law defamation, breach of confidentiality, and breach of contract claims. We address each argument below.

A. HCQIA Immunity

Wahi asserts the district court erred in determining CAMC was entitled to immunity under the HCQIA because CAMC never held a hearing regarding Wahi's suspension, and therefore did not satisfy the requirements for claiming immunity under the Act. (Br. Appellant 18-30; Reply Br. 2-15.) However, we conclude the district court did not err in determining CAMC was entitled to immunity under the particular facts of this case.

The HCQIA provides a "professional review body"[15] with immunity from damages whenever a "professional review action"[16] is taken:

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[15] "The term 'professional review body' means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." 42 U.S.C.A. § 11151(11) (West 2005).

[16] A "professional review action" is:

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C.A. § 11112(a) (West 2005). "A professional review action shall be presumed to have met the preceding standards necessary for [immunity] unless the presumption is rebutted by a preponderance of the evidence." *Id.*

Due to the presumption of immunity under the HCQIA, a court applies an "unconventional standard in determining" whether summary judgment is appropriate-"whether a reasonable jury, viewing all facts in a light most favorable to [Wahi], could conclude that he had shown, by a preponderance of the evidence, that [CAMC's] actions fell outside the scope of section 11112(a)." *Gabaldoni v. Washington County Hosp. Ass'n*, 250 F.3d 255, 260 (4th Cir. 2001). In determining whether a health care entity has met these four requirements, the Court applies

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formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action.

42 U.S.C.A. § 11151(9) (West 2005).

an objective test that "looks to the totality of the circumstances" to determine whether the action satisfies the § 11112(a) provisions. *Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026, 1030 (4th Cir. 1994).

In a footnote in his opening brief, Wahi contends that even though the "primary focus of this appeal is the failure of CAMC to schedule a hearing," as required under subsection 3 of § 11112(a), the "first, second and fourth prongs of the test [for immunity under the HCQIA] were also not met." (Br. Appellant 29 n. 11.) Other than this declarative sentence, Wahi fails to raise any argument to support his claim that the first, second, and fourth prongs of the subsection (a) immunity criteria were not met.[17] Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of an appellant's opening brief must contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Because Wahi has failed to comply with the specific dictates of Rule 28(a)(9)(A), we conclude that he has waived his claims as to the first, second, and fourth requirements of the subsection (a) HCQIA immunity test on appeal. *See 11126 Baltimore Boulevard, Inc.*, 58 F.3d at 993 n. 7 (involving predecessor to Federal Rule of Appellate Procedure 28(a)(9)(A)). Accordingly, our review regarding the immunity issue is limited to whether the district court erred in determining that Wahi did not overcome the presumption that CAMC satisfied the requirements of subsection (a)(3).

A health care entity is "deemed to have met the

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[17] Unless otherwise indicated, references to "subsection ---" will refer to subsections of 42 U.S.C. § 11112.

adequate notice and hearing requirement of" § 11112(a)(3) when it satisfies the safe harbor provisions of § 11112(b). Wahi argues that because CAMC failed to follow the provisions of subsection (b), it does not qualify for immunity under the HCQIA. However, as the district court properly recognized, (J.A. 275), following the provisions of subsection (b) is but one way a health care entity can comply with the requirements of subsection (a)(3). While a health care entity is "deemed to have met" the subsection (a)(3) immunity requirements by following the safe harbor provisions of subsection (b), those provisions are not exclusive. "[F]ailure to meet the conditions described [in subsection (b)] shall not, in itself, constitute failure to meet the standards of subsection (a)(3)." § 11112(b)(3). Therefore, Wahi's argument that CAMC is not entitled to immunity, as a matter of law, because it did not comply with all of the provisions in subsection (b), fails under the plain language of the statute.

Wahi next asserts that CAMC is not entitled to immunity because it failed to satisfy the exceptions from immunity carved out in § 11112(c). Wahi contends that since CAMC summarily suspended him for more than 14 days without first finding that he posed an imminent danger to his patients and without conducting a post-suspension investigation, CAMC cannot claim immunity under the HCQIA. Wahi misreads the statute. Subsection (c) sets forth limited circumstances in which a health care entity can act with immunity without satisfying all of the conditions in subsection (a). Subsection (c) provides in pertinent part:

For purposes of section 11111(a) of this title,

> nothing in this section shall be construed as-
>
> (1) requiring the procedures referred to in subsection (a)(3) of this section-
>
> (A) where there is no adverse professional review action taken, or
>
> (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
>
> (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

§ 11112(c).

Subsection (c) thus sets out *distinct* ways in which a health care entity can be immune under the HCQIA *without* having complied with the usual requirements for claiming immunity. Wahi would have us read the statute by ignoring this clear purpose and instead find that the HCQIA immunity is barred by failing to meet one of the subsection (c) prongs. To the contrary, subsection (c) presents additional routes to HCQIA immunity beyond that set forth in subsection (a)(3). Although Wahi may be correct that the facts show CAMC cannot assert immunity based on (c)(1) or (c)(2), the only significance is that CAMC must meet the usual standard of qualifying for immunity set forth in

subsection (a)(3).[18]

Under subsection (a)(3), a health care entity seeking HCQIA immunity must act "after adequate notice and hearing procedures are afforded to the physician involved *or* after such other procedures as are fair to the physician under the circumstances." § 11112(a)(3) (emphasis added). Stated in the disjunctive, the statute contemplates two independent avenues by which the subsection (a) immunity prong may be obtained. The first avenue, "adequate notice and hearing procedures," is not at issue in the case at bar. CAMC makes no claim under that prong and the district court did not consider it.

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[18] **[REDACTED]**

What CAMC argues, and the district court held, is that the unique circumstances in this case show that Wahi received "other procedures as are fair to the physician under the circumstances," and entitle CAMC to the HCQIA immunity.

Wahi cites the legislative history of subsection (a)(3) to assert that the "other procedures" undertaken by a health care entity must nonetheless include a hearing. In particular, Wahi relies on this language from the 1986 House Report recommending the adoption of the HCQIA:

> The due process requirement [i.e., subsection (a)(3),] can always be met by the procedures specified in subsection (b).... If other procedures are followed, but are not precisely of the character spelled out in [subsection (b)], the test of "adequacy" may still be met under other prevailing law. The Committee is aware, for example, that some courts have already carefully spelled out different requirements for certain professional review activities or actions, such as procedures for decisions regarding applicants for clinical privileges at a hospital. In those situations, compliance with applicable law should satisfy the "adequacy" requirement even where such activities or actions require different or fewer due process rights than the ones specified under [subsection (b)]. In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices.

H.R.Rep. No. 99-903, at 10-11 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6393. Nothing in this legislative history alters the conclusion that a health

care entity can satisfy subsection (a)(3) without providing a formal hearing, as contemplated in the safe harbor provisions, depending on the circumstances of a particular case. Rather, Congress' intent-and that expressed by the plain language of the statute-is that a physician be afforded adequate and fair "procedures" with regard to professional review actions, which could be something other than a formal hearing in some circumstances. If this were not so, Congress would have no reason to have included the "other procedures appropriate ... under the circumstances" language contained in the statute in contrast to the specific "notice and hearing" language.

Wahi also contends that CAMC's failure to follow some of the procedures outlined in its Bylaws and Procedures Manual proves CAMC did not satisfy subsection (a)(3) under the alternative prong. However, as the Court of Appeals for the Fifth Circuit recently observed,

> HCQIA immunity is not coextensive with compliance with an individual hospital's bylaws. Rather, the statute imposes a uniform set of national standards. Provided that a peer review action ... complies with those standards, a failure to comply with hospital bylaws does not defeat a peer reviewer's right to HCQIA immunity from damages.

Poliner v. Tex. Health Sys., 537 F.3d 368, 380-81 (5th Cir. 2008); *see also Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 469-71 (6th Cir. 2003). Nothing in the subsection (a)(3) phrase "such other procedures as are fair ... under the circumstances" mandates by-law compliance as the

sine qua non for immunity, although from a practical standpoint, by-law compliance may often be proof of such procedures in many cases.

Having concluded that CAMC was not required to hold a formal hearing as a mandatory condition precedent to satisfying subsection (a)(3), we now examine whether the district court properly determined CAMC provided Wahi with "such other procedures as are fair ... under the circumstances." We begin that review by underscoring the unique procedural posture upon which summary judgment for a health care entity is measured under the HCQIA, as the district court properly summarized:

> In applying the test outlined in § 11112(a), we begin with the presumption that the hospital has met the necessary standards for immunity unless this presumption is rebutted by a preponderance of the evidence. § 11112(a). The applicable standard is one of objective reasonableness, viewed in light of the totality of the circumstances. *Freilich[v. Upper Chesapeake Health, Inc.*, 313 F.3d 205,] 212 [(4th Cir. 2002)] (quoting *Imperial v. Suburban [Hosp. Ass'n],* 37 F.3d 1026, 1030 (4th Cir. 1994)). Reasonableness standards have been consistently upheld in the context of qualified immunity. *Freilich,* 313 F.3d at 213.

Wahi, 453 F.Supp.2d at 950. (J.A. 270.) We find no error in the district court's determination that Wahi failed to rebut the presumption that CAMC's actions satisfied the statutory requirement when the totality of the circumstances are viewed in an objectively reasonable manner.

[REDACTED] informed Wahi of the allegations from the Credentials Committee by letter dated July 16 and further discussed them in a meeting with him on July 17. (J.A. 575-77.) Moreover, Wahi apparently learned of the unauthorized surgery allegation against him even prior to **[REDACTED]**'s letter because on July 15, he wrote to **[REDACTED]** stating he understood questions had arisen regarding his decision to perform the procedure, explaining his decision to perform the contested procedure, and setting forth why he believed it fell within his clinical privileges. (J.A. 721-28.) Although **[REDACTED]**'s July 16 letter does not mention a possible suspension, it does state that CAMC would be investigating the claims that Wahi had again exceeded his authority under his provisional privileges and not complied with the CAMC Bylaws when he failed to notify CAMC that he had relinquished his privileges at another hospital. Wahi had previously been suspended at least three times for violation of his privileges and was not unaware of the consequences.

[REDACTED] also informed Wahi that he should respond in writing as soon as possible and address his reappointment before the Credentials Committee at the August 3, 1999 hearing, (J.A. 576), which was rescheduled for August 17 at Wahi's request. Over the next two weeks, Wahi wrote to **[REDACTED]** and **[REDACTED]** several times, addressing the charges in writing, and providing documents supporting his position that he had not violated the conditions of his clinical privileges. He also requested access to certain records prior to or during the Credentials Committee meeting. (J.A. 730, 731, 732-41, and 742.) The record shows that CAMC provided Wahi with notice of the

most recent allegations against him, and an opportunity to respond to those allegations. CAMC complied with its Procedures Manual in this regard.

CAMC suspended Wahi's medical privileges by a letter dated July 30, 1999 from **[REDACTED],** which recited the "best interests of patient care" as the reason for the action. (J.A. 586.) However, the record does not support Wahi's contention that CAMC did not inform him more specifically of the reasons for his suspension. On July 30, **[REDACTED]** and **[REDACTED]** met with Wahi to inform him of the suspension pending the Credentials Committee's review of his application for reappointment. **[REDACTED]**'s memorandum of that meeting recites that they informed Wahi that the Credentials Committee and Board of Trustees both recommended he be suspended. **[REDACTED]** cited Wahi's "inability to follow procedural guidelines outlined by the Committee and the Board of Trustees which ensures adequate care and safety of patients," and also told Wahi that when he met with the Credentials Committee, he should "be prepared to defend his lack of adherence to the limitations on his privileges as well as his absence of notification of suspension from St. Francis [Hospital]."[19] (J.A. 965.) The suspension letter reiterated the rights due Wahi under Article III of the Procedures Manual for a hearing to challenge that action, and attached a copy for his use.

The Credentials Committee then afforded Wahi, by letter of August 13, 1999, the opportunity to

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[19] **[REDACTED]** and **[REDACTED]** also agreed that Wahi could continue treating two patients "currently in house" and that care of all of Wahi's patients would be transferred to another physician or discharged by August 1, 1999. (J.A. 965.)

review the file for the August 17 meeting for the "timeline of events surrounding [his] privileges" at CAMC. The letter also emphasized to Wahi that

> This meeting is your opportunity to present the Committee with additional information that is pertinent to its evaluation of your ethical behavior, clinical competence and clinical judgment in the treatment of patients; compliance with Hospital policies and the Medical Staff Bylaws and Rules and Regulations; behavior in the hospital, your cooperation with medical and Hospital personnel as it relates to patient care or the orderly operation of hospital, and your general attitude toward patients, the Hospital and its personnel; use of the Hospital facilities for your patients; your physical and mental health; your capacity to satisfactorily treat patients as indicated by the results of the Hospital's quality assessment activities or other reasonable indicators of continuing qualifications; your satisfactory completion of such continuing education requirements as may be imposed by law, the Hospital or applicable accreditation agencies; and other relevant findings from CAMC's and the Medical Staff's quality assurance activities.

(J.A. 752.) Copies of relevant portions of CAMC's Procedures Manual were attached to the letter. (J.A. 752-57.) A separate letter informed Wahi how the meeting would be conducted, and set out Wahi's rights regarding the meeting. (J.A. 719-20.)

The Credentials Committee met on August 17, 1999. Wahi appeared before it and presented his case. The Committee concluded it "was unable to identify

evidence that Dr. Wahi's clinical competence [and] professional judgment ... are sufficient to recommend ... that he be reappointed to the Medical Staff."[20] (J.A. 645-46.) In particular, the Committee cited the following

- Failure to comply with and repeated violation of clinical privileges (§ 3.7 of the Bylaws), including:
- Failure to obtain a proctor when required to do so;
- Failure to obtain a second opinion when required to do so;
- Performance of an operative procedure for which he did not have privileges.
- Marginal indications for operative procedures;
- Poor decision-making in the care of some patients;
- Multiple incident reports surrounding bizarre professional behavior and inappropriate personal behavior among nursing staff;
- Failure to comply with responsibilities set forth in the CAMC Bylaws, including providing proper quality of care (§ 3.2), maintaining proper medical records (§ 3.3), and notifying CAMC of the loss of clinical privileges at any other hospital (§ 3.6); and
- Failure to keep a current, complete, and timely record of patient care (§§ 2.1 and 2.7 of the

[20] Denial of reappointment is a NPDB-reportable event. *See* 42 U.S.C. § 11133(a) (requiring health care entities to report "professional review action[s] that adversely affect[ ] the clinical privileges of a physician for a period longer than 30 days").

> Medical Staff Rules and Regulations) (J.A. 550, 552-53).

(J.A. 645.)

On August 26, 1999, Wahi received the Credentials Committee report and was once again notified of the rights provided in Article III and that he had 30 days to request a hearing.[21] (J.A. 647.) The letter also informed Wahi his suspension remained in effect until the CAMC Board of Trustees acted on his reappointment. (J.A. 647.) On September 8, 1999, Wahi, by counsel, timely requested a hearing as well as a witness list and a number of specified documents. (J.A. 648-53.)

On October 18, 1999, CAMC notified Wahi of the members of the hearing panel and asked Wahi to "work with the presiding officer to schedule and conduct the hearing in accordance with ... Article III," and again forwarded Wahi the Procedures Manual.[22] (J.A. 654-55, 699-700.) CAMC did not give Wahi a specific witness list,[23] but afforded his counsel access

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[21] Article III of the Procedures Manual set forth Wahi's right to a hearing based on both the summary suspension and the Credentials Committee's recommendation to deny Wahi's application for reappointment. (See Procedures Manual 2.3.4.2, 2.4.3, 3.1; J.A. 484-87.)

[22] The Procedures Manual stated that once a hearing is requested, the President of CAMC "shall schedule the hearing and shall give notice of its time, place and date ... to the person who requested the hearing. The hearing shall begin as soon as practicable, considering the schedules and availability of all concerned, provided that [it] shall not begin without at least thirty days notice." (Procedures Manual 3.6; J.A. 489.)

[23] Section 3.7 of the Procedures Manual states that CAMC should have provided a list of witnesses to Wahi "within ten

to some of the files requested in the September 8, 1999 letter. CAMC repeatedly requested that Wahi provide available dates for his hearing because "the hearing will take a number of days" and it was important to "select dates well enough in advance that all involved parties can clear their schedules." (J.A. 776.) In over 8 years since his request for a hearing, Wahi has yet to provide CAMC with any dates when he would be available for a hearing.

During the following year, the parties negotiated over how the hearing would be conducted. Wahi objected to the composition of the panel, its presiding officer,[24] and the use of any incident or discipline during his medical practice at CAMC that he did not address at the August 17, 1999 Credentials Committee meeting. And while CAMC had opened many of its files to Wahi and his counsel, some items Wahi had requested had not been disclosed due to privacy disagreements, which had not been resolved. The parties also attempted to negotiate a resolution of the matter, including withdrawing Wahi's suspension based on a written statement of the basis for CAMC's actions. However, the parties were unable to reach an agreement. (J.A. 760-83, 118-30.)

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days" of his request, and that the witness list could be supplemented or amended in the discretion of the presiding officer of the hearing, provided that notice of the change has been given. (J.A. 489.)

[24] The Procedures Manual provides that the President of CAMC "shall appoint a panel of not less than three members, none of whom are in direct competition with the individual who requested the hearing," after considering the recommendations of the Chief of Staff and the Chairman of the Board. (Procedures Manual 3.8; J.A. 489.)

On November 30, 2000, Wahi filed an action in the West Virginia state court to enjoin his requested hearing unless CAMC met his pre-conditions. Wahi asked the state court to order, inter alia, that his method of selection for the hearing panel be used, that no matters of Wahi's medical practice at CAMC be considered at the hearing except those mentioned in **[REDACTED]'s** July 30, 1999 letter, and that the court maintain "jurisdiction over the administrative hearing." (J.A. 99, 112, 99-114.)

The state court rejected Wahi's arguments and dismissed the complaint, stating Wahi's arguments were speculative and "[i]t would be premature for the Court to make any determination as to whether or not the notice given to Dr. Wahi satisfies the 'fair procedures' requirement." (J.A. 141.) Furthermore, the court noted that the composition of the hearing panel was in conformity with CAMC's Procedures Manual, and that any objections about the hearing panel or the evidence to be considered should be raised before the hearing panel. The court entered its final order of dismissal on December 6, 2001.

In the meantime, the West Virginia Board of Medicine filed a complaint against Wahi on September 10, 2001, and set a hearing "to determine whether disciplinary action should be taken ... against Dr. Wahi's license to practice medicine." (J.A. 149.) Wahi and the Board of Medicine engaged in protracted litigation, which included Wahi's unsuccessful attempt to halt the proceedings by seeking a writ of prohibition against the Board of Medicine from the Supreme Court of Appeals of West Virginia. On November 10, 2003, the proceedings were dismissed, without a final disposition on the

merits of the allegations. (J.A. 147-175, 701.) Wahi made no effort during this time period to pursue a hearing at CAMC. While CAMC argues this was a deliberate choice by Wahi to prevent a hearing that would create a record that could affect the Board of Medicine proceedings, the district court made no finding in that regard, CAMC assigns no error to the lack of a finding, and we therefore do not consider it. The next action in time was the filing of Wahi's complaint in the district court.

Lastly, in considering whether the procedures provided by the health care entity are fair "under the circumstances," the July 1999 allegations against Wahi cannot be considered in a vacuum. These allegations were simply the latest in Wahi's tumultuous history with CAMC, as the August 26, 1999 Credentials Committee letter set forth. Since his reappointment in 1995, Wahi had been the subject of numerous reports and complaints calling his professional competence and conduct into question. The record shows that these complaints arose from a multitude of discrete incidents, were made by different individuals, and were known to Wahi. After all Wahi had been through the suspension process previously at CAMC, including the prior reports to the NPDB. CAMC investigated and imposed restrictions, including temporary suspensions, as a result of those investigations. Wahi was aware of the consequences for failing to abide by the Bylaws and Procedures Manual. He was not a first-time offender who was unfamiliar with the responsibilities of his position at CAMC or the consequences for his failures in July 1999. (J.A. 130-31, 248-53, 339-97, 496-571.)

While CAMC's path to immunity in this case is not a recommended model, it must be evaluated considering all the events which transpired, not just those Wahi views as favorable to him. Had CAMC simply set a prompt hearing, whatever Wahi's objections and efforts to stop it, CAMC may have been within its rights to do so and may have met the first prong of subsection (a)(3). Similarly, CAMC should have followed its Bylaws and the Procedures Manual, and provided Wahi a witness list, even if it had to be later supplemented. However, these failures by CAMC, when viewed in the totality of the circumstances against a measuring stick of objective reasonableness, do not show Wahi met his burden of proof to rebut the presumption of immunity under the HCQIA. Wahi was on notice of the many charges against him, including the detailed Credentials Committee report of August 26, 1999. He was repeatedly notified of his rights and given multiple copies of documents explaining these rights. He was repeatedly asked for dates for a hearing. While CAMC attempted to accord Wahi a hearing in conformity with the Procedures Manual, Wahi seemed more intent on forestalling a hearing than having one.

Had Wahi proceeded to a hearing, any complaint about the inadequacy of notice, defective witness list or discovery, the composition of the hearing panel, the conduct of the hearing, or other relevant issues could have been addressed and subjected to judicial review. In the face of Wahi's recalcitrance, it is at the least disingenuous to now claim his right to a hearing was infringed when he has done all he could do *not* to have a hearing. Viewing the totality of these circumstances in an objectively reasonable manner,

we cannot conclude that the district court erred in determining Wahi failed to rebut the presumption that CAMC afforded him "other procedures as are fair to the physician under the circumstances." We therefore affirm the district court's holding that CAMC is entitled to immunity under the HCQIA.

B. Injunctive Relief

Wahi also contends the district court erred in awarding summary judgment [25] as to his claims for injunctive relief because "[a]lthough the HCQIA immunize[d] [CAMC and Dr. Crotty] from claims for monetary damages, that statutory immunity does not apply to injunctive relief." (Br. Appellant 25.) He asserts he has satisfied the requirements for obtaining an injunction requiring CAMC to provide him a hearing and remove his name from the NPDB list because he cannot acquire gainful employment so long as his name is on the NPDB list, monetary damages will not restore his ability to practice, and the public possesses a strong interest in ensuring hospitals abide by the law. (Br. Appellant 25-26; Reply Br. 17-20.)

The HCQIA only provides immunity from suits

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[25] We review the district court's grant of summary judgment on this issue de novo. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted). We construe the evidence in the light most favorable to Wahi, the party opposing the Appellees' motion, and draw all reasonable inferences in his favor. *See id.*

for damages. 42 U.S.C. § 11111(a)(1); *see Imperial*, 37 F.3d at 1030-31. The district court expressly recognized this limitation, and it did not base its decision that Wahi was not entitled to injunctive relief on CAMC's immunity under the HCQIA. (J.A. 289-90.) Instead, it concluded Wahi "fail[ed] to make any argument or allege any facts that would entitle him to injunctive relief." *Wahi*, 453 F.Supp.2d at 960. (J.A. 289-90.)

The district court did not err in this determination. In order to pursue injunctive relief to redress his Anti-Trust, breach of contract, and defamation claims, Wahi must have a viable claim that CAMC committed a wrong.

> [A] remedy must be tailored to a violation [and] the nature of the violation determines the scope of the remedy. Remedies, in other words, do not exist in the abstract; rather, they flow from and are the consequence of some wrong. At its most basic, this principle limits the reach of judicial decrees to parties found liable for a legal violation.

See Bacon v. City of Richmond, 475 F.3d 633, 638 (4th Cir. 2007) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)) (internal quotation marks and citations omitted). Wahi has not made the requisite showing for any of the claims for which the district court determined the HCQIA immunity applied. The district court provided non-HCQIA-based reasons for awarding CAMC summary judgment on Wahi's breach of contract and defamation claims, which Wahi has also appealed, and which we discuss below.

Lastly, even if Wahi succeeded on the merits of his Anti-Trust claims, he would not be entitled to the injunctive relief he sought in his amended complaint. Wahi's amended complaint asked for an injunction directing CAMC "to remove its derogatory reports concerning Dr. Wahi from the NPDB" and "to reinstate Dr. Wahi's hospital privileges." (J.A. 92.) This relief is not connected to any alleged acts of anti-competitive behavior by CAMC.

C. State Actor

Wahi asserts the district court erred in determining CAMC was not a state actor, as that term is contemplated under § 1983, and therefore not amenable to suit under that statute.[26] (Br. Appellant

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[26] As noted, the district court dismissed all but one of Wahi's § 1983 claims in its October 27, 2004 order granting CAMC's motions under Rule 12(b)(6). Therefore, we conduct a de novo review of the district court's decision, *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993), accepting all allegations in Wahi's complaint as true. *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 1974, 167 L.Ed.2d 929 (2007). Moreover, the court "need not accept the [plaintiff's] legal conclusions drawn from the facts," nor need it "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Kloth v. Microsoft Corp.*, 444 F.3d 312, 319 (4th Cir. 2006) (internal quotation marks omitted).

Wahi challenges the district court's determination that CAMC was not itself a state actor, but he makes no argument related to the September 29, 2006 order dismissing his conspiracy-based § 1983 claim based on a failure to show any evidence that CAMC conspired with the state Board of Medicine. Accordingly, our review is limited to the § 1983 claims dismissed in the district court's October 2004 order.

12-15; Reply Br. 21-22.) To state a claim under § 1983, a plaintiff must aver that a person acting under color of state law deprived him of a constitutional right or a right conferred by a law of the United States. *See Dowe v. Total Action Against Poverty*, 145 F.3d 653, 658 (4th Cir. 1998). "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.' " *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). Consequently, "[t]he person charged must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions." *DeBauche v. Trani*, 191 F.3d 499, 506 (4th Cir. 1999). "[P]rivate activity will generally not be deemed 'state action' unless the state has so dominated such activity as to convert it to state action: 'Mere approval of or acquiescence in the initiatives of a private party' is insufficient." *Id.* at 507; *see also Dowe*, 145 F.3d at 659.

To support his argument, Wahi contends that by reporting him to the NPDB, CAMC "essentially decredentialed" him, a power that is "reserved exclusively to state government" and turns CAMC's conduct into state action. (Br. Appellant 14, 12-15; Reply Br. 21-22.) We previously examined, and rejected, a similar argument in *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (4th Cir. 1982). In that case, we held that a hospital's compliance with a Virginia statute requiring the hospital to report the revocation of privileges did not "authorize state officials to make privileges decisions,

or to set forth directions governing the outcome of such decisions, or attach consequences to their results." *Id.* at 1027 (footnotes omitted). For these reasons, we held the Virginia statute did not "involve the 'exercise by a private entity of powers traditionally exclusively reserved to the State.' " *Id.* at 1027 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)); *see also Freilich*, 313 F.3d at 214 n. 3 (holding private hospital was not a state actor because the state played no role in the "actual decision as to whether or not to terminate or reappoint any particular physician").

Similarly, the federal statute requiring a hospital to report credentialing decisions to the NPDB does not authorize state officials to make any decisions regarding a physician's hospital privileges, nor does it direct the hospital's actions thereafter. Instead, it simply requires hospitals to report to the NPDB adverse professional review action "affect[ing] the clinical privileges of a physician." *See* 42 U.S.C.A. § 11133. Accordingly, we find that the statute does not confer to CAMC powers traditionally reserved to the state, and it does not turn CAMC's actions into state action for a § 1983 claim.[27]

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[27] In addition, Wahi also cites CAMC's "extensive programs and merger with" West Virginia University (a public institution), CAMC's status as the "largest hospital," in the state, and a comment made in a CAMC Foundation book characterizing CAMC as an "entirely public institution." (Br. Appellant 12-15; Reply Br. 21-22.) These arguments were raised for the first time on appeal and therefore we will not consider them. *See Williams v. Prof. Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002) (stating that issues raised for the first time on appeal "are generally not considered absent exceptional circumstances"). (Compare J.A. 28-30, with R. 24 pp. 13-14.)

D. Defamation Claim

Wahi contends that the district court erred in awarding summary judgment on his defamation claim.[28] He specifically argues on appeal that "Wahi was defamed when Dr. Crotty intentionally disclosed to the local media that CAMC had reported him to the NPDB." (Br. Appellant 34.) This argument, however, was not presented to the district court and appears for the first time on appeal. Wahi's amended complaint states as the sole basis for his defamation claim that CAMC's "amended reports published by [CAMC] to the NPDB on June 10, 2003, were false and defamatory, *per se*." Wahi contends CAMC published the "defamatory reports to the NPDB with reckless disregard for the truth" and therefore "is liable to [Wahi] for defamation." (J.A. 88.) This is the argument presented and ruled upon by the district court when determining whether HCQIA immunity barred Wahi from pursuing the claim. (See R. 98, p. 75.)

Wahi's defamation claim on appeal is therefore not the one presented in his amended complaint. We have previously held, along with the Fifth, Sixth, Seventh, and Eleventh Circuits, that a plaintiff may not raise new claims after discovery has begun without amending his complaint. *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 Fed.Appx. 556, 563 (4th Cir. 2008) (unpublished) (citing *Tucker v. Union of Needletrades, Indus., & Textile Employees,* 407 F.3d 784, 788 (6th Cir. 2005); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312,

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[28] We review this claim de novo, under the traditional principles set forth *supra,* note 25.

1315 (11th Cir. 2004); *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir. 1996); and *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990)). Wahi never amended his complaint to change his existing defamation claim or add a new defamation claim based on Dr. Crotty's statement to the media. Therefore, we will not consider the claim for the first time on appeal. *See United States v. Evans*, 404 F.3d 227, 236 n. 5 (4th Cir. 2005) (stating that a party who "failed to raise [an] argument before the district court ... has ... waived it on appeal"). Furthermore, because Wahi did not argue his claim of defamation based on the filing of the NPDB report on appeal, that claim is abandoned. *See 11126 Baltimore Boulevard, Inc.*, 58 F.3d at 993 n. 7 (issue waived when not argued on appeal).

E. Breach of Contract Claim

As an alternative basis for awarding summary judgment on Wahi's state law breach of contract claim, the district court concluded CAMC's Bylaws did not constitute a contract between CAMC and Wahi. (J.A. 280-82.) Wahi asserts the district court erred because, under West Virginia law, a hospital's bylaws constitute a contract between the physician and the hospital when a physician is accused of misconduct. Citing *Kessel v. Monongalia County Gen. Hosp. Co.*, 215 W.Va. 609, 600 S.E.2d 321 (W.Va.2004), Wahi contends that because a hospital is "bound" to afford a physician the procedures set forth in its bylaws, "noncompliance with those provisions compels the conclusion that CAMC breached [its] contract" with Wahi. (Br. Appellant 37-39.) We disagree.

Wahi's argument does not properly follow the

West Virginia Supreme Court of Appeals' analysis in *Kessel*. The court clearly rejected the argument that the hospital's medical staff bylaws constituted a contract between the plaintiffs and the hospital, which the hospital allegedly breached. *Id.* at 326.

> [T]he essential element of valuable consideration is absent. This Court has held that the doing by one of that which he is already legally bound to do is not a valuable consideration for a promise made to him, since it gives to the promisor nothing more than that to which the latter is already entitled.... Because the hospital was already bound by [state] law to approve the bylaws of the medical staff, and the medical staff was bound to initiate and adopt bylaws, neither party conferred on the other any more than what the law already required. Thus, we conclude that the medical staff bylaws do not constitute a contract [absent express language to the contrary].

Id. (internal quotation marks and alterations omitted). While a hospital may be required to follow its by-laws as a due process component, there is no contractual relationship unless the by-laws specifically so provide. *Id.* at 327. There was no such provision in *Kessel,* and there is none in the case at bar. Whatever due process entitlement Wahi may claim by virtue of the CAMC by-laws, his arguments are subsumed by the foregoing analysis of his civil rights claims, which failed.

Accordingly, we hold the district court did not err in awarding CAMC summary judgment on Wahi's breach of contract claim.

F. Breach of Confidentiality

Wahi's last argument is that the district court erred in dismissing his state law "breach of confidentiality" claim because 45 C.F.R. § 60.13 prohibited CAMC from disclosing to the local news media the fact that it had reported Wahi to the NPDB.[29], [30] Br. Appellant 35-37.)

45 C.F.R. § 60.13 states, in relevant part:

> Information reported to the [NPDB] is considered confidential and shall not be disclosed outside the Department of Health and Human Services.... Persons and entities which receive information from the [NPDB] either directly or from another party must use it solely with respect to the purpose for which it was provided....

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[29] As noted, the district court disposed of Wahi's claim in its October 2004 order granting CAMC's Rule 12(b)(6) motion. Accordingly, we review the district court's decision *de novo. See supra* note 26.

[30] CAMC responds that we should not consider Wahi's argument because Wahi's complaint asserted "invasion of privacy," and not "breach of confidentiality," which are two separate torts under West Virginia law. (Br. Appellee 39-40.)

Wahi's complaint appears to merge an allegation of "invasion of privacy, ... or in the alternative, a wrongful disclosure of private facts." Wahi specifically alleges CAMC "violated the confidentiality of reports to the NPDB" by disclosing to the local media the fact that it had reported Wahi to the NPDB. (J.A. 38-39.) The district court identified the claim as one for Wahi's "inva[sion of] privacy, or in the alternative, wrongful[ ] disclos[ure of] private facts." (J.A. 63.) Although Wahi's complaint could have been much clearer in setting out a cause of action, we find that it was at least sufficient for him to have preserved the issue raised on appeal.

> Any person who violates [the above provision] shall be subject to a civil money penalty of up to $10,000 for each violation.

We find no error in the district court's conclusion that Wahi failed to allege that CAMC's conduct constituted a breach of confidentiality. Section 60.13 guarantees the confidentiality of "[i]nformation reported to" the NPDB and specifically limits the actions of individuals who "receive information *from* " an NPDB report. *Id.* (emphasis added). It therefore does not prevent the entity who reported NPDB from disclosing the mere fact that a report was filed. Accordingly, the district court did not err in granting CAMC's Rule 12(b)(6) motion as to this claim.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

FILED: May 8, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2162
(2:04-cv-00019)

RAKESH WAHI,

Plaintiff - Appellant

v.

CHARLESTON AREA MEDICAL CENTER, INCORPORATED, A West Virginia Corporation; GLENN CROTTY; JOHN DOES I-X,

Defendants - Appellees

and

JANE DOE NUMBERS 1 THROUGH 10; JAMAL KAHN; H. RASHID; K. C. LEE; ANDREW VAUGHN; JOHN L. CHAPMAN,

Defendants

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INCORPORATED,

Amicus Supporting Appellant

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Agee and Judge Smith.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

Civil Action No. 2:04-cv-00019

Rakesh WAHI, M.D.,

Plaintiff,

v.

CHARLESTON AREA MEDICAL CENTER, et al.,

Defendants.

ORDER

Pending before the court are the defendants' Motions for Summary Judgment [Docket 75, Docket 79, and Docket 81]. After a thorough review of the pending motions and responses, the court **FINDS** for the defendants and **GRANTS** their summary judgment motions on all counts.

I. BACKGROUND

A. Factual Summary

The plaintiff, Rakesh Wahi, M.D. (Dr. Wahi), has been licensed to practice medicine in West Virginia since 1993. He specializes in cardiovascular, thoracic and general surgical procedures. In January of 1993, Dr. Wahi joined the staff of the defendant Charleston Area Medical Center (CAMC), and in July of 1993 he was promoted from the defendant's probationary staff to provisional staff. CAMC is a private entity incorporated in West Virginia.

In June of 1994, Dr. Wahi started his own practice at CAMC, and also began exploring the

possibility of associating himself with a separate medical group in Beckley, WV, called the "Medsurg Group." According to Dr. Wahi, CAMC then began taking various steps to restrict the plaintiff's ability to practice medicine and to prevent the plaintiff from competing with CAMC. Between 1995 and 1999 Dr. Wahi was the subject of several peer review investigations concerning his performance as a physician. The investigations were mainly conducted internally, but at least one review was conducted by an external committee. Although the reasoning behind and validity of the investigations, as well as, the outcomes remain a point of contention and disagreement between the parties, the reviews did result in various restrictions and suspensions being placed on Dr. Wahi's privileges prior to 1999. As a result of these investigations, negative reports were sent to the National Practitioner's Data Bank (Data Bank).

The Data Bank is a national clearinghouse established pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA). *See* 42 U.S.C. §§ 11133-11134 (2004). Under the HCQIA, health care entities may qualify for immunity from civil liability for certain actions if they report information to the Data Bank following "a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days." *Id.* § 11133(1)(A). According to Congress, the purpose of the Data Bank and reporting incentives is "to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." *Id.* § 11101(2). Reported information must include the physician's name and a description

of the reasons for the adverse action. *Id*. § 11133(3)(A) and (B).

According to Dr. Wahi, negative reports were made about him to the Data Bank by CAMC on November 25, 1996; December 6, 1996; December 24, 1997; March 22, 1999; and September 13, 1999. Based on CAMC's reports to the Data Bank, the West Virginia Board of Medicine (Board of Medicine) investigated Dr. Wahi and brought charges against him on three separate occasions. The plaintiff alleges that the defendant CAMC worked closely with the Board of Medicine to bring these charges and attempted to deprive him of his license to practice medicine in West Virginia. The Board of Medicine dismissed the last charges against Dr. Wahi on November 10, 2003.

The situation between CAMC and Dr. Wahi culminated in July 1999, when the credentials committee withdrew its recommendation that Dr. Wahi's medical staff privileges at CAMC be renewed. The committee's decision was followed by an investigation which resulted in the summary suspension of Dr. Wahi's medical staff privileges at CAMC. However, during the month of July 1999, there were numerous communications between CAMC and Dr. Wahi, in which CAMC notified Dr. Wahi of the allegations, the general nature of evidence, the possible adverse recommendations that the committee was considering, in addition to Dr. Wahi's rights under CAMC medical staff bylaws. In fact, the letters sent from CAMC to Dr. Wahi often included attachments of the relevant portions of the bylaws.

At some point during the process, either before or

after the suspension of his medical privileges at CAMC Dr. Wahi obtained counsel. Following his suspension, Dr. Wahi, via counsel, requested a hearing pursuant to the hospital's bylaws. However, a hearing has never been held. Dr. Wahi alleges that a hearing was never set because CAMC failed to meet its burden of setting a hearing date. CAMC, on the other hand, alleges that a hearing was never scheduled because Dr. Wahi refused to agree to the parameters of any proposed hearing. Ultimately, Dr. Wahi alleges that he has been denied a fair hearing and that the adverse professional review actions were taken pursuant to a conspiracy by the defendants to monopolize thoracic and cardiovascular medicine and surgery in the Charleston, Beckley, Bluefield, and Parkersburg area of West Virginia.

B. Procedural History

Dr. Wahi filed an eleven-count Amended Complaint against CAMC and several other defendants, both named and unnamed. Dr. Wahi claimed that the defendants: 1) engaged in an antitrust conspiracy under the Sherman Act (15 U.S.C. § 1); 2) engaged in antitrust monopolization under the Sherman Act (15 U.S.C. § 2); 3) violated his Fifth and Fourteenth Amendment Due Process rights; 4) retaliated against him in violation of his First Amendment rights; 5) breached the contract between CAMC and Dr. Wahi; 6) conspired to deny him Due Process in violation of his rights under the Fifth and Fourteenth Amendments; 7) defamed him by reporting him to the Data Bank; 8) invaded his privacy and disclosed confidential information; 9) violated his civil rights under 42 U.S.C. § 1981; 10) conspired to obstruct justice and deny equal protection in violation of 42 U.S.C. § 1985; and 11)

neglected to prevent the conspiracy alleged in Count 10 in violation of 42 U.S.C. § 1986. Based on these claims, Dr. Wahi requests injunctive relief, actual damages, and punitive damages.

In response to Dr. Wahi's claims, the defendants moved to dismiss the Complaint for failure to state a claim upon which relief can be granted. In an opinion issued October 27, 2004, this court dismissed counts one and two without prejudice and granted plaintiff leave to amend the complaint to allege an impact on interstate commerce; and this court also dismissed counts three, four, and eight for failure to state a claim upon which relief can be granted. The court then ordered the parties to engage in limited discovery and brief the court on whether defendants are entitled to immunity from civil liability under the HCQIA for all claims except civil rights claims; and whether any issues of material fact exists regarding claims alleged in Counts Five, Six, Nine, Ten and Eleven.

An amended complaint was filed and the counts were renumbered as follows: 1) antitrust conspiracy under the Sherman Act (15 U.S.C. § 1); 2) antitrust monopolization under the Sherman Act (15 U.S.C. § 2); 3) breach of contract between CAMC and Dr. Wahi; 4) conspiracy to deny Due Process in violation of the Fifth and Fourteenth Amendments (42 U.S.C. § 1983); 5) defamation; 6) violation of civil rights under 42 U.S.C. § 1981; 7) conspiracy to obstruct justice and deny equal protection in violation of 42 U.S.C. § 1985; and 8) neglect to prevent the conspiracy alleged in Count 7 in violation of 42 U.S.C. § 1986.

Thereafter, Dr. Wahi voluntarily dismissed all

defendants except CAMC, Dr. Crotty, and Dr. Chapman. Finally, Dr. Wahi also voluntarily dismissed Counts Seven and Eight. This now leaves the Court to address the following issues: a) whether CAMC is entitled to immunity under HCQIA from civil liability for all counts except the civil rights claims; and b) whether any genuine issue of material fact remains for Counts Three, Four, and Six.

II. THE HEALTH CARE QUALITY IMPROVEMENT ACT (HCQIA)

The HCQIA was enacted in 1986 to improve the quality of medical care by restricting the ability of physicians who have been found to be incompetent from repeating this malpractice by moving from state to state without discovery of such finding. *Imperial v. Suburban Hospital Ass'n, Inc.*, 37 F.3d 1026, 1028 (4th Cir.1994) (citing 42 U.S.C. § 11101). The HCQIA establishes a national reporting system to follow bad doctors from place to place, and provides immunity from damages for persons participating in professional review activities. *Imperial*, 37 F.3d at 1028.

To assure that hospitals and doctors cooperate with the system and engage in meaningful professional review, Congress found it necessary to provide qualified immunity from damages actions for hospitals, doctors, and others who participate in the professional review process. *Id.* (citing 42 U.S.C. § 11101). "Thus, 42 U.S.C. § 11101 provides that persons participating in professional review activities that meet the standards outlined in 42 U.S.C. § 11112, 'shall not be liable in damages under any law of the United States or any State' with respect to the person's participation in such activities."

Imperial, 37 F.3d at 1028. The conditions set forth granting such immunity are set forth in § 11112(a) and are discussed below.

A. Qualifications for HCQIA Immunity

The HCQIA provides immunity from damages for those who participate in professional peer review. For HCQIA immunity to attach, however, the peer review action must comport with due process. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 211 (4th Cir.2002). To determine whether an action comports with due process, the HCQIA adopts a four pronged test. Specifically, the peer review action must be taken (1) in the reasonable belief that the action was in furtherance of quality health care; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts. 42 U.S.C. § 11112(a)(1)-(4). The standard laid out by the test is one of objective reasonableness, looking at the totality of the circumstances. *Freilich,* 313 F.3d at 212 (quoting *Imperial v. Suburban Hospital Assoc.,* 37 F.3d 1026, 1030 (4th Cir.1994)).

In meeting this test, § 11112(a) of the HCQIA provides a presumption in favor of the health care entity. It is presumed that a health care entity has met the necessary standards and is entitled to immunity unless the presumption is rebutted by a preponderance of the evidence. § 11112(a). In order for an entity to continue to qualify for immunity, § 11133 requires that the outcomes of professional

review actions be reported to state boards of medical examiners. There is no immunity from claims alleging a civil rights violation or claims for declaratory or injunctive relief. *Imperial*, 37 F.3d at 1030 (citing 42 U.S.C. § 11112).

B. Determination of Whether This is a Peer Review Action

Dr. Wahi argues that the underlying suit does not arise as the result of a professional peer review action. Under the HCQIA only actions that meet the definition of professional review are eligible for immunity. *Gordon v. Lewistown Hospital*, 423 F.3d 184, 201 (3d Cir.2005). Therefore, this court will first address whether the action qualifies as a peer review action before applying the four § 11112(a) factors to determine immunity.

The HCQIA defines professional review action as:

> [A]n action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician.

§ 11151(9). Professional review activity "means an activity of a health care entity with respect to an individual physician-(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity, (B) to determine the scope or conditions of such privileges or membership, or (C) to change or modify such privileges or

membership." § 11151(10).

In the present action, it is clear that the suit arises as a result of the recommendations and activities of a health care entity in regard to the competence and professional conduct of Dr. Wahi, and whether he will continue to have privileges at CAMC. The decisions of CAMC have, in fact, adversely affected Dr. Wahi's privileges. Furthermore, the statute does not require that the activities or actions be properly conducted or conducted in a specific manner in order to be deemed a professional review action. Thus, regardless of whether this court determines CAMC's activities to be proper, the underlying action is subject to the requirements of the HCQIA. Having determined that the current action is a suit arising as the result of a peer review activity, the court will now determine whether the actions of CAMC are entitled to immunity under the HCQIA.

C. Summary Judgment and the HCQIA

As stated above, § 11112(a) provides a presumption that a health care entity has met the necessary standards laid out by the statute, and thus is entitled to immunity unless this presumption is rebutted by a preponderance of the evidence. This presumption of immunity established by the HCQIA creates a unique summary judgment standard. *See Gabaldoni v. Washington County Hospital*, 250 F.3d 255, 260 (4th Cir.2001) (finding that due to the presumption of immunity contained in § 1 1112(a), an unconventional standard must be applied in determining whether the hospital was entitled to summary judgment). When reviewing a motion for summary judgment under the HCQIA, the plaintiff

bears the burden of proving that a reasonable jury, examining all the facts in the light most favorable to the plaintiff, would find that the plaintiff has shown by a preponderance of the evidence that the professional review process failed the test for reasonableness as laid out in the HCQIA. *Gabaldoni,* 250 F.3d at 260.

D. Application of the Test Outlined in the HCQIA: 42 U.S.C. § 11112(a) Standards

In applying the test outlined in § 11112(a), we begin with the presumption that the hospital has met the necessary standards for immunity unless this presumption is rebutted by a preponderance of the evidence. § 11112(a). The applicable standard is one of objective reasonableness, viewed in light of the totality of the circumstances. *Freilich*, 313 F.3d at 212 (quoting *Imperial v. Suburban Hospital Assoc.*, 37 F.3d 1026, 1030 (4th Cir.1994)). Reasonableness standards have been consistently upheld in the context of qualified immunity. *Freilich*, 313 F.3d at 213. Such standards are often applied in this context to afford the officials, or in this the case the doctors and hospital involved, sufficient latitude to properly perform discretionary functions. *Id*. The Fourth Circuit in *Imperial* interpreted the language of the first prong of the test, that the action be taken in the *reasonable belief* that quality health care was being furthered, as establishing a standard of objective reasonableness looking to the totality of the circumstances. *Imperial,* 37 F.3d at 1030. The Fourth Circuit reaffirmed this interpretation in *Freilich*. The Fourth Circuit then elaborated in *Freilich* stating that the objective reasonableness standard is a valid guide for peer review bodies. "The 'reasonable belief' standard embodies the discretion that health care

professionals have traditionally exercised in determining whether or not their peers meet a requisite level of professional competence." *Freilich*, 313 F.3d at 212. The test consists of four-prongs and states that:

> [t]he peer review action must be taken (1) in the reasonable belief that the action was in furtherance of quality health care; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts.

42 U.S.C. § 11112(a)(1)-(4). Each of these prongs will be discussed in turn.

1. Reasonable Belief That Action was in Furtherance of Quality Health Care

The first prong outlined in 42 U.S.C. § 11112(a)(1) requires that a peer review action be taken in the reasonable belief that it was in furtherance of quality health care. "This prong of the test is met if the reviewers, with the information available to them at the time of the professional review action would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." *Brader v. Allegheny General Hospital*, 167 F.3d 832, 840 (3d Cir.1999). The HCQIA does not require that professional review activities actually better health care, but only that review actions be undertaken in the reasonable belief that quality health care was being furthered.

Imperial v. Suburban Hospital, 37 F.3d 1026, 1030 (4th Cir.1994).

We begin with the presumption that the hospital has met this prong of the test. Dr. Wahi then has the burden of offering evidence sufficient to overcome this presumption. Dr. Wahi argues that the peer review action taken against him was not taken to further quality health care, but was an attempt by CAMC to unlawfully restrain competition in cardiac and thoracic surgery. As evidence, Dr. Wahi offers the outcomes of the investigations conducted against him. He points to the fact that in these investigations he was not found to have deviated from the standard of care.

He concludes that since he did not stray from the standard of care the actions could not have been taken in the reasonable belief of furthering quality health care, and that therefore the investigation was for anti-competitive reasons. This evidence does not rebut the presumption that the hospital acted reasonably, because it is not necessary that the actions actually improve health care or prove that Dr. Wahi provided substandard care, but instead that the hospital reasonably believe that some action is warranted. *Imperial,* 37 F.3d at 1030. As evidence of the hospital's anti-competitive motives, Dr. Wahi alleges that the investigation occurred after he met with staff from Bluefield Regional Hospital (Bluefield) and had a patient referred to him by that hospital. He states that CAMC only looked into his treatment of said patient, because he had been in touch with Bluefield about their interest in cardiac surgery. As support for this contention, Dr. Wahi cites his own deposition and his own affidavit. He offers nothing more than his personal belief that this

action had an anti-competitive motive. Self-serving opinions without objective corroboration are not considered to be probative, and thus this evidence is irrelevant. *Evans v. Technologies Applications & Service, Co.,* 80 F.3d 954, 962 (4th Cir.1996).

The evidence that CAMC's actions were taken in the reasonable belief of furthering quality health care is overwhelming. CAMC took action after numerous reports and complaints surfaced regarding Dr. Wahi's competence and inability to practice within the scope of his privileges. The hospital offers the depositions of several doctors stating that Dr. Wahi continued to act outside the scope of his restrictions, and that his actions posed a threat of danger to patients. Even a letter from St. Francis, relied on by Dr. Wahi, states that he was suspended because he failed to practice within the self imposed limits of his privileges. Plaintiff's Exhibit 18.

A reasonable jury could not find that Dr. Wahi has shown by a preponderance of the evidence that the hospital's action was not taken in the reasonable belief that it was in the furtherance of quality health care. In fact, Dr. Wahi has failed to offer even a scintilla of relevant evidence to show that the hospital acted unreasonably. Dr. Wahi has failed to rebut the presumption that the professional review action of CAMC was taken in the reasonable belief that it was in furtherance of quality health care.

2. Reasonable Effort to Obtain the Facts

The second prong in evaluating a claim for immunity is that the reviewing entity make a reasonable effort to obtain the facts. 42 U.S.C. § 11112(a)(2). This prong is met when "the totality of the process leading up to the Board's professional

review action ... evidenced a reasonable effort to obtain the facts of the matter." *Brader v. Allegheny General Hospital*, 167 F.3d 832, 841 (3d Cir.1999).

Again we begin with the presumption that CAMC has made a reasonable effort to obtain the facts of the matter. The plaintiff offers nothing to rebut this presumption.

We find that no reasonable jury could find that CAMC took action without a reasonable effort to obtain the facts of the matter. CAMC enlisted the assistance and recommendations of numerous physicians and committees in conducting several investigations and peer reviews of Dr. Wahi and his patient care. CAMC has satisfied the second prong of this test.

3. Adequate Notice and Hearing Procedures, or Other Such Procedures as are Fair Under the Circumstances

The third prong of 42 U.S.C. § 11112(a) requires that the peer review action be taken after adequate notice and hearing procedures are afforded to the physician involved, or after such other procedures as are fair to the physician under the circumstances are provided. 42 U.S.C. § 11112(a)(3). This prong can be satisfied in a number of ways. The HCQIA provides that one way to ensure this prong has been satisfied is for the hospital to fulfill the requirements of the HCQIA's safe harbor provision § 11112(b). We note, however, that failure to meet all the provisions outlined in § 11112(b) does not in itself constitute a failure to meet the adequate notice and hearing standards of subsection (a)(3). *Meyers v. Columbia/HCA Healthcare, Corp.*, 341 F.3d 461, 471 n. 6 (6th Cir.2003) (quoting language from

§ 11112(b)). The plain language of § 11112(a)(3) indicates that a hearing is not the only way to fulfill this prong. It can also be met by the provision of "such other procedures as are fair to the physician under the circumstances provided." § 11112(a)(3). This is in keeping with the test's overall standard of objective reasonableness in light of the totality of the circumstances.

We begin with the presumption that CAMC fulfilled the requirements of the third prong of this test. Dr. Wahi contends that CAMC failed to meet this prong, because it failed to comply with certain provisions of § 11112(b). In particular he alleges that CAMC did not set a hearing date, and did not provide him with a list of witnesses. We will first look at the evidence offered by Dr. Wahi to support his contention that he was not given adequate notice and hearing procedures or other such procedures fair to him under the circumstances. We will then look at the evidence provided by the hospital as to the procedures it provided. In order to rebut the presumption that the hospital met the third prong of this test, Dr. Wahi must show that a reasonable juror looking at the facts in the light most favorable to him, would find that he has shown by a preponderance of the evidence that the professional review process used by the hospital did not provide him adequate notice and hearing procedures or other procedures fair to him under the circumstances.

As evidence that CAMC failed to meet the third prong of the HCQIA immunity test, Dr. Wahi cites from the hospital's bylaws, and the HCQIA sections requiring the provision of a witness list and notice of the date of the hearing. He states in his brief to the court that this failure to follow procedures is

sufficient by itself to deny immunity to the defendants under the HCQIA. This is clearly contradicted by the plain language of the HCQIA. The Act states in § 11112(b) that "a professional body's failure to meet the conditions described in this subsection [11112(b)] shall *not*, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." *Meyers*, 341 F.3d at 471 n. 6 (quoting § 11112(b)) (emphasis added).

We now look at the procedures that were provided by CAMC to Dr. Wahi. CAMC corresponded with Dr. Wahi on numerous occasions regarding the proposed actions, his right to request counsel, a summary of his rights at any subsequent hearing, as well as, an opportunity to appear and speak at any committee meetings where concerns were raised regarding Dr. Wahi's privileges. CAMC first sent Dr. Wahi a letter on July 8, 1999, informing him that the Credentials Committee was considering denying his request for reappointment to the medical staff. In accordance with the hospital's Medical Staff Procedures Manual, this letter offered Dr. Wahi the opportunity to meet with the Credentials Committee. The letter also told Dr. Wahi when the next meeting would take place and informed him of the nature of the allegations and evidence against him. Defendant's Exhibit 27. Throughout July, CAMC kept Dr. Wahi informed of the allegations and investigations being conducted in a series of letters and meetings with Dr. Wahi. Defendant's Exhibits 55, 29, 56, 57, 58, 60; and Plaintiff's Exhibit 8. Dr. Wahi acknowledges awareness of the allegations in a letter to the Dr. Crotty dated July 15, 1999. Defendant's Exhibit 55. In it he states:

I understand questions have arisen regarding my

> treatment of this patient and whether or not the procedure performed was authorized under the privilege [sic] I currently hold at CAMC. I am writing to provide you with additional information which I ask the reviewer to consider.

Letter from Dr. Wahi to Dr. Crotty (Defendant's Exhibit 55).

In August, CAMC informed Dr. Wahi of the specific issues that would be discussed at the meeting and again invited him to attend the meeting. This letter states in relevant part:

> You will be informed of the general nature of the evidence supporting the action contemplated by the Credentials Committee at your meeting with them on August 17, 1999. You will be invited to discuss, explain, or refute it. This meeting is your opportunity to present the Committee with additional information that is pertinent to its evaluation ...

Letter from Dr. Crotty to Dr. Wahi dated August 14, 1999. (Defendant's Exhibit 64). Dr. Wahi does not dispute receiving any of the above mentioned correspondence.

Dr. Wahi's attorney, after receiving the above described correspondence, sent a letter to CAMC dated September 8, 1999, on Dr. Wahi's behalf, requesting a hearing pursuant to CAMC's Medical Staff Procedures Manual. Defendant's Exhibit 38. After a series of discussions between Dr. Wahi's attorney and CAMC, CAMC sent a letter dated December 2, 1999, with details about the hearing and stating the hearing would be held at a date convenient to all parties. Defendant's Exhibit 41. By late December CAMC was still waiting to hear of a

date that was amenable to Dr. Wahi and his counsel. On December 21, 1999, Cheryl A. Eifert, the Hearing Officer appointed by CAMC, sent a letter to Dr. Wahi's counsel stating, "I am also waiting to hear from you for the scheduling of the hearing requested by Dr. Wahi." Defendant's Exhibit 67.

In July of 2000, the hospital had a telephone conference with Dr. Wahi's counsel to resolve the matters in controversy between them, including Dr. Wahi's pending hearing request. Dr. Wahi's counsel at the time, George Guthrie, sent a letter to Cheryl Eifert attaching a proposal whose purpose was to resolve the matters without any litigation, administrative or otherwise. Defendant's Exhibit 68. These negotiations apparently fell through and in the fall of 2000, the two parties remained embroiled in discussions about the parameters and dates of a hearing. The hospital informed Dr. Wahi that it would not change the hearing procedures from those stated in the manual and that a hearing would be scheduled. In a letter dated October 11, 2000, Cheryl Eifert again requests that Dr. Wahi provide her with dates for the hearing. She writes in relevant part:

> I do request that you provide me with dates for the administrative hearing at your earliest convenience. I anticipate the hearing will take a number of days; therefore, I suggest that we select dates well enough in advance that all involved parties can clear their schedules.

Defendant's Exhibit 72.

In November of 2000, Dr. Wahi filed suit in Kanawha County Circuit Court to enjoin the proceedings. The Kanawha County Court refused to rule on the fairness of the hearing until after a

hearing was held. No hearing has been conducted and this lawsuit has proceeded from that point.

Even though a hearing was not held, this court finds that the evidence offered by Dr. Wahi is insufficient for a reasonable jury to find that CAMC failed to fulfill its obligations under § 11112(a)(3) by a preponderance of the evidence. The overwhelming evidence is that CAMC acted in an objectively reasonable manner in light of the totality of the circumstances in this case and took sufficient measures to ensure Dr. Wahi received adequate notice of any hearing or meeting that was to occur in the proposed actions against him. The many letters between the parties illustrate the hospital's attempts to set a hearing at Dr. Wahi's request and give him notice of the hearing. Dr. Wahi was represented by counsel throughout the entire process and in the end, he was informed and fully aware of his rights, the hospital's policies, and the charges and evidence the hospital had against him. The hospital responded promptly when Dr. Wahi requested a hearing be scheduled.

The court finds that in light of the evidence presented by Dr. Wahi and by CAMC a reasonable jury could not conclude that Dr. Wahi has shown by a preponderance of the evidence that CAMC failed to provide him adequate process as required by § 11112(a)(3). CAMC has fulfilled the third prong of the HCQIA test.

4. Reasonable Belief that the Action was Warranted

The fourth prong to establish immunity, 42 U.S.C. § 11112(a)(4), requires that the reviewers have a reasonable belief that the action is warranted. In

determining whether an action was warranted, the analysis is very similar to the analysis under § 11112(a)(1), thus the court does not repeat the arguments and analysis already addressed under 42 U.S.C. § 11112(a)(1). *Gabaldoni v. Washington County Hospital,* 250 F.3d 255, 263 n. 7 (4th Cir.2001).

Dr. Wahi argues that because some of the committees who reviewed his work and treatment of specific patients felt that he followed the necessary standard of care that his privileges should not have been suspended. For the action to be warranted, it is not necessary that every committee that reviews a physician come to the same conclusion. *Brader,* 167 F.3d at 843. Dr. Wahi has not put forth sufficient evidence to overcome the presumption that the hospital had a reasonable belief that its action was warranted. The hospital has satisfied the fourth prong of this test.

C. Findings

In light of the above analysis, this Court finds that defendant is entitled to immunity under 42 U.S.C. § 11111(a). The plaintiff has failed to offer sufficient evidence upon which a reasonable jury, examining all the facts in the light most favorable to him, could find by a preponderance of the evidence that the professional review process failed the test for reasonableness as laid out in § 11112(a) of the HCQIA. As such defendants are entitled to immunity from damages for Counts I, II, III, and V.

III. SUMMARY JUDGMENT ON THE REMAINING ISSUES

To obtain summary judgment, the moving party must show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgments as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor." *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

A. Breach of Contract Claims

Dr. Wahi asserts two breach of contract claims in his complaint, one alleging a breach of contract due to CAMC's violation of its Medical Staff Procedures Manual, and the other alleging a civil rights violation under 42 U.S.C. § 1981. The definition of the term contract is more narrow for the former claim than for

the latter. The court finds, for the reasons discussed below, that there was no contract between CAMC and Dr. Wahi for the purposes of the state law claim, and that a contract did exist for the purposes of his § 1981 claim. Each of these claims is discussed in full below.

1. State Law Breach of Contract Claim

Dr. Wahi claims that CAMC is contractually bound by the Medical Staff Procedures Manual as part of its agreement with him. Dr. Wahi contends that CAMC breached its contract with him by failing to provide a hearing on his summary suspensions "as soon as practicable" and by failing to provide a fair hearing. Under West Virginia law, unless there is express language to the contrary, medical staff bylaws do not constitute a contract between hospital and physician. *Kessel v. Monongalia County General Hospital*, 215 W.Va. 609, 600 S.E.2d 321, 324 Syl. Pt. 4 (2004). In *Kessel*, the West Virginia Supreme Court found that because hospitals are required by law to enact medical staff bylaws, the necessary consideration to form a contract is lacking, thus hospital bylaws cannot be considered a contract between the hospital and the physician. *Kessel*, 600 S.E.2d at 324. In the case at hand, the bylaws contained in CAMC's Medical Staff Procedures Manual do not include express language creating a contract as required by the West Virginia Supreme Court. Dr. Wahi's claim fails because the bylaws do not constitute a contract under West Virginia law.

The physician does possess due process rights. Where it is alleged that a physician is guilty of professional incompetence or misconduct, the hospital is bound by the fair hearing procedural provisions contained in the medical staff bylaws, but this does

not transform the bylaws into a contract. *Id.* at 326-27. The Supreme Court of West Virginia is concerned with whether a physician is given basic procedural due process protections. As long as a hospital's bylaws provide basic procedural protections, and these bylaws are substantially followed in a particular disciplinary proceeding, a court will usually not interfere with the committee's recommendation. *Mahmoodian v. United Hospital Center,* 185 W.Va. 59, 404 S.E.2d 750, 755-56 (1991). Finally, *Kessel* also recognizes that federal legislation has been enacted to encourage all hospitals to use the same professional review procedures. *Kessel,* 600 S.E.2d at 330.

As discussed in section II.D.3, CAMC provided Dr. Wahi with notice of upcoming committee meetings, the nature of the charges against him, and outlined the rights and remedies available to him. There is no genuine issue of material fact as to whether CAMC substantially complied with the procedures outlined in its manual and with the federal standards outlined in the HCQIA. Therefore, summary judgment is **GRANTED** in favor of the defendant on the plaintiff's breach of contract claim.

2. 42 U.S.C. § 1981

a) Existence of a Contract

The court must now determine whether a contract exists between Dr. Wahi and CAMC for the purposes of § 1981. The bylaws, as discussed above, do not constitute a contract under West Virginia law between a hospital and a physician. Dr. Wahi does not allege any contractual rights based on his status as an at-will employee. Under § 1981, Dr. Wahi does, however, have some basic contractual rights based on

his position as an at-will employee. In *Spriggs*, the Fourth Circuit held that an at-will employment relationship is contractual and can serve as the predicate contract for a § 1981 claim. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 278 (4th Cir.2000) (citing *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1018-19 (4th Cir.1999)). The definition of a contract under § 1981 simply requires that there be an offer of employment, an acceptance of that offer, and consideration in the form of labor. *Spriggs*, 165 F.3d at 1018. Dr. Wahi applied to be re-credentialed at CAMC, CAMC then offered to extend privileges to Dr. Wahi, and Dr. Wahi accepted the offer and began performing services at CAMC in exchange for pay.

b) Statute of Limitations

There are two issues to address in assessing Dr. Wahi's § 1981 breach of contract claim. The first is whether the statute of limitations has run on his claim, and if it has not whether his claim survives summary judgment. Section 1981 does not contain a statute of limitations. When this is the case, a court must determine whether the relevant section of the statute was enacted before or after December 1, 1990. If enacted before December 1, 1990, the statute of limitations should generally be determined by adhering to the most analogous state statute of limitations. For laws enacted after December 1, 1990, and not containing a statute of limitations, Congress enacted a four year catchall statute of limitations in 28 U.S.C. § 1658. *Jones v. R.R. Donnelley & Sons*, 541 U.S. 369, 371, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004).

The statute at issue here is 42 U.S.C. § 1981, first enacted in 1866. Thus it would first appear that we

should apply the most analogous state statute of limitations. For claims arising under § 1981, however, the analysis does not end here, because Congress passed a major amendment to the statute which went into effect on November 21, 1991. Civil Rights Act of 1991, Pub.L. No. 102-166, § 101, 105 Stat. 1071 (1991). In this amendment, Congress defined the term "to make and enforce contracts." This amendment added subsections (b) and (c) to § 1981. These new subsections state:

(b) For the purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

Id.

When determining the statute of limitations for a cause of action under § 1981, a court must decide whether the suit arises under the 1991 amendment or under the statute as originally enacted. If the plaintiff's claim was made possible because of the post-1990 enactment, it is governed by § 1658's four year statute of limitations. *Jones*, 541 U.S. at 382, 124 S.Ct. 1836.

In the present case, Dr. Wahi's cause of action under § 1981 was made possible by the 1991 amendment and thus is subject to the four year statute of limitations. Prior to 1991, Dr. Wahi would not have been able to bring a cause of action for the alleged harassing and discriminatory conduct that he

faced after the formation of his contract with CAMC. *See Jones*, 541 U.S. at 383, 124 S.Ct. 1836 (finding that a claims for hostile work environment were only possible under the post-1990 amendment to § 1981 and therefore the four year statute of limitations applied).

In determining when the statute of limitations begins to accrue on a § 1981 action, the "proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981). Section 1981 claims for wrongful termination accrue on the date the employer notifies the employee that he is being terminated. *Nghiem v. U.S. Department of Veteran Affairs*, 451 F.Supp.2d 599, 604-05, 2006 WL 2572658 *4 (S.D.N.Y. 2006). *See also Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) (stating that the relevant date is when the employee is denied tenure).

In the present case, Dr. Wahi was notified by letter on July 30, 1999, that his medical staff privileges at CAMC were being summarily suspended. Defendants Exhibit 32. This suspension is the alleged discriminatory act at issue in this case. Dr. Wahi alleges three later dates on which the statute of limitations could have started to run. There were no subsequent actions taken after July 30, 1999, that further affected Dr. Wahi's ability to enjoy his contractual rights under § 1981, including the rights to "enjoyment of all benefits, privileges, terms, and conditions of [his] contractual relationship." § 1981(b). Thus, this court is convinced that the relevant date for determining when the statute of limitations began to run is July 30, 1999. Therefore, the statute of limitations has run on Dr. Wahi's

§ 1981 claim, and his claim is barred.

c) 42 U.S.C. § 1981 Analysis

For purposes of this brief analysis it will be taken as true that Dr. Wahi has an employment contract with CAMC and that the statute of limitations has not run on Dr. Wahi's cause of action. Section 1981 grants all persons within the jurisdiction of the United States "the same right ... to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981(a). In order to survive a motion for summary judgment, a plaintiff under § 1981 may proceed through two avenues of proof. He can either illustrate direct evidence of discrimination or he can proceed under the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Since Dr. Wahi does not present any direct evidence of intentional discrimination on the part of CAMC, he must proffer sufficient circumstantial evidence to satisfy the *McDonnell Douglas* analytical framework. *Williams v. Staples, Inc.,* 372 F.3d 662, 667 (4th Cir.2004). Under this framework, the plaintiff must first establish a *prima facie* case of discrimination, the defendant may respond with a legitimate, nondiscriminatory reason, and then the plaintiff may adduce evidence to show that the defendant's proffered reason was mere pretext and that race was the real reason for disparate treatment. *Id.* (citing *Hawkins v. PepsiCo, Inc.,* 203 F.3d 274, 278 (4th Cir.2000)). In assessing whether the plaintiff has provided sufficient evidence such that his case may proceed to trial, this court's decision is informed by the summary judgment standard. *Hux v. Newport News,* 451 F.3d 311, 315 (4th Cir.2006).

The first prong of the framework is for the plaintiff to establish a *prima facie* case of discrimination. The test for proving *prima facie* disparate disciplinary practices consists of the following three elements: (1) the plaintiff is a member of a protected class; (2) the prohibited conduct in which the plaintiff engaged was as serious as the misconduct of employees outside the protected class; and (3) the employer imposed harsher disciplinary measures against plaintiff than against employees outside the protected class. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir.1994) (citing *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir.1993)).

Dr. Wahi is a member of a protected class. He alleges in his affidavit that Caucasian doctors have engaged in more serious misconduct, but have had no disciplinary measures taken against them. Assuming *arguendo* that Dr. Wahi has made out a *prima facie* case of race discrimination the burden now shifts to CAMC to articulate some legitimate non-discriminatory reason for its action. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (internal quotation marks omitted). Once CAMC meets this burden, Dr. Wahi must prove that CAMC's proffered reason was mere pretext and that race was the real reason for the discrimination. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 278 (4th Cir.2000).

CAMC states that it disciplined Dr. Wahi out of concern for the health and safety of his patients. CAMC offers evidence that Dr. Wahi was disciplined because his practices were not safe and exposed patients to unacceptable risk. Although Dr. Wahi disputes accepting the findings of the Third Review Committee, he voluntarily relinquished his privileges

in 1995. After additional training, Dr. Wahi was allowed to return to practice at CAMC with severe restrictions on his privileges, and when those restrictions were violated, CAMC took action. In light of these uncontroverted facts, CAMC has met its burden by providing evidence that it acted out of these health and safety concerns and not because Dr. Wahi is Indian.

Dr. Wahi now has the burden of showing that the hospital's legitimate, nondiscriminatory justifications for its actions were pretextual. The limited evidence that Dr. Wahi offers to support his contentions that CAMC's reasons were pretextual consists of his self-serving affidavit. In his affidavit he makes accusations against various colleagues pointing to instances where he believes they provided substandard health care resulting in the deaths of multiple patients. He then notes that none of these colleagues were disciplined, and concludes that this was due to race. Dr. Wahi also alleges racial discrimination on the part of the committee, because some of its members were of Pakistani descent, and he believes that they discriminated against him because he is Indian and Hindu. These allegations are not supported by objective evidence. A plaintiff cannot establish pretext by relying on criteria of his own choosing when the employer based its decision on other grounds. *Hux*, 451 F.3d at 315 (quoting *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 271 (4th Cir.2005)). Self-serving opinions, without corroborating objective evidence, are not considered to be significantly probative. *See Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir.1996) (finding district court's decision to strike portions of plaintiff's affidavit not improper as

the portions struck contained self-serving opinions and unsupported assertions of colleagues' qualifications). Generally, an affidavit filed in opposition to a motion for summary judgment must present evidence in substantially the same form as if the affiant were testifying in court. *Id.* Summary judgment affidavits cannot be conclusory or based on hearsay. *Id.* Additionally, Dr. Wahi's affidavit does not offer any evidence that these were similarly situated physicians. Dr. Wahi already had restrictions placed on his practice. He does not contend that these other physicians were operating under similar restrictions.

Plaintiff's attempt to find pretext in the hospital's neutral explanation consists of comparing himself to various physicians based on his personal observations. He cannot simply compare himself to other physicians based on his personal evaluation of their care. His evaluations of other physicians' practices are irrelevant to the validity of CAMC's explanation for its actions. *See Hux,* 451 F.3d at 315 (noting that a plaintiff cannot establish pretext by relying on criteria of her choosing when the employer based its decision on other grounds) (quoting *Anderson,* 406 F.3d at 271). The evidence presented by Dr. Wahi fails to cast doubt on the validity of CAMC's explanation, and therefore does not create a genuine dispute. Dr. Wahi's response to CAMC's neutral explanation for it's action is not sufficient to overcome the summary judgment standard. Therefore even if the statute of limitations has not run, the court would grant CAMC's motion for summary judgment on the § 1981 claim.

B. 42 U.S.C. § 1983

Dr. Wahi alleges that CAMC and the Board of Medicine conspired to deny him his medical license. "To establish a civil conspiracy under section 1983, Appellants must present evidence that the Appellees acted jointly in concert and that some overt act was done in furtherance of the conspiracy which resulted in Appellants' deprivation of a constitutional right." *Hinkle v. City of Clarksburg,* 81 F.3d 416, 421 (4th Cir.1996). "Appellants have a weighty burden to establish a civil rights conspiracy. While they need not produce direct evidence of a meeting of the minds, Appellants must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective." *Id.* In order to survive a properly supported summary judgment motion, plaintiff's evidence must, at least, reasonably lead to the inference that defendants positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. *Id.*

In the case at hand, Dr. Wahi does not offer even a scintilla of evidence that there was communication between CAMC and the Board of Medicine beyond that required by law. Each letter or meeting that he identifies is one required by the state and federal reporting laws. The HCQIA requires that any time a health care entity takes a professional review action that adversely affects the clinical privileges of a physician for a period of longer than thirty days it must report this action to the Board of Medicine. *Fobbs,* 789 F.Supp. at 1063 (quoting language from 42 U.S.C. § 11133(a)(1)).

To support his contention, Dr. Wahi states that

CAMC reported him to the Board of Medicine and the Data Bank on various occasions leading the Board of Medicine to investigate him. He notes that he was investigated three times and on all three occasions the charges were dismissed due to lack of evidence. Dr. Wahi has offered no evidence that defendants and the Board of Medicine were not meeting simply to fulfill their obligations and rights under the HCQIA 11133(a)(1) and West Virginia Code § 30-3-14(b) reporting requirements. He has offered no evidence on this issue from which a reasonable juror could return a verdict in his favor. Therefore, the court **GRANTS** CAMC's motion for summary judgment on Dr. Wahi's § 1983 claim.

IV. REQUESTS FOR INJUNCTIVE RELIEF

The HCQIA does not provide immunity from injunctive relief. *Imperial,* 37 F.3d at 1030. However, because Dr. Wahi fails to make any argument or allege any facts that would entitle him to injunctive relief this court **GRANTS** defendants' Motions for Summary Judgment on Count I, Count II, and Count V.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 29, 2006

/s/ Joseph R. Goodwin
Joseph R. Goodwin
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

CIVIL ACTION NO. 2:04-cv-00019

RAKESH WAHI, M.D.

Plaintiff,

v.

CHARLESTON AREA MEDICAL CENTER, et al.,

Defendants.

JUDGMENT ORDER

In accordance with the accompanying Order, the court orders that judgment be entered in favor of the defendants and that this case be dismissed and stricken from the docket of this court.

The court **DIRECTS** the Clerk to send a certified copy of this Judgment Order to counsel of record and any unrepresented parties.

ENTER: September 29, 2006

/s/ Joseph R. Goodwin
Joseph R. Goodwin
United States District Judge

APPENDIX E

UNITED STATES CODE

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 117: ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I. PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

42 U.S.C. § 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)--

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)--

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right--

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right--

(i) to receive the written recommendation of the

arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as--

(1) requiring the procedures referred to in subsection (a)(3) of this section--

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

(Pub. L. 99-660, title IV, §412, Nov. 14, 1986, 100 Stat. 3785.)

APPENDIX F

RECORD NO. 06-2162

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAKESH WAHI,

Plaintiff-Appellant,

v.

CHARLESTON AREA MEDICAL CENTER, INCORPORATED, a West Virginia Corporation; Glenn Crotty; John Does I-X,

Defendants-Appellees,

JANE DOES NUMBERS 1 THROUGH 10; JAMAL KAHN; H. RASHID; K.C. LEE; ANDREW VAUGHN; JOHN L. CHAPMAN,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

BRIEF OF APPELLEES – UNDER SEAL

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(JA 786-88).

Id.[13]

Wahi failed to carry his burden before the district court to demonstrate by a preponderance of the evidence that CAMA did not afford him adequate notice and hearing procedures as were fair under the circumstances. The district court properly found that CAMC is entitled to HCQIA immunity and dismissed all claims within the scope of that immunity.

2. CAMA did not violate Wahi's due process rights or HCQIA by suspending him without a prior finding that he posed an imminent danger to patients.

Wahi alleges that CAMC deviated from its procedures manual when it summarily suspended him. He argues that a finding of "imminent danger" is necessary for his suspension, and that his suspension improperly lasted longer than fourteen (14) days. These arguments lack merit.

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[13] Despite Defendants' repeated requests to jointly seek with Wahi a limited release of records from the Grant County action to use in this case, he refuses to join with Defendants. Although CAMC believes the district court had more than sufficient evidence for it to decide all material issues, an examination of the entirely of the record from the Grant County action would demonstrate that Wahi is not being candid. Certainly, Wahi knows that he had complete access to all records, obtained all records which he and his counsel sought, and knows full well the scope of the overwhelming evidence against him.