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VIA FEDERAL EXPRESS

Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Young v. Tri-City Healthcare Dist.*, No. S207243 (Cal.)

Application for Leave to File Out-of-Time Response under Rule 8.1125 and Response of Association of American Physicians & Surgeons, Inc. to Requests to Depublish *Young v. Tri-City Healthcare Dist.*, No. D059605 (Cal. Ct. App.)

To the Honorable Tani G. Cantil-Sakauye, Chief Justice of California, and the Honorable Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court 1.10(c) and 8.1125(b), the Association of American Physicians & Surgeons, Inc. ("AAPS"), respectfully seeks this Court's leave to submit a response in opposition to the several hospital-industry requests to depublish the Fourth Appellate District's decision in *Young v. Tri-City Healthcare Dist.*, No, D059605 (Cal. Ct. App.).

I. APPLICATION FOR LEAVE TO FILE OUT-OF-TIME RESPONSE UNDER RULE 8.1125

Under Rule 1.10(c), this Court has the discretion to "extend or shorten the time within which a party must perform any act under the rules." Under Rule 8.1125, anyone may request depublication of a decision within 10 days of the decisions' becoming final; similarly, within 10 days, any interested person can file a response to support or oppose depublication. The rules do not provide the original requester the opportunity to file a reply.

The hospital industry filed several timely requests to depublish *Young*, and one party – Sharp HealthCare – submitted an untimely request, which this Court nonetheless filed. AAPS seeks leave to file this out-of-time response to the central

theme of all of the requests for depublication. Significantly, this Court's granting AAPS leave to file an out-of-time response would not prejudice any party or person. Even without good cause for a delay, an extension that does not prejudice the opposing party can be granted. *See, e.g., People v. Mitchell* (Cal. Ct. App. 2005) 127 Cal.App.4th 936, 946, 26 Cal.Rptr.3d 163, 170; *People v. French* (1939) 12 Cal.2d 720, 774, 87 P.2d 1014, *overruled in part on other grounds People v. Valentine* (1046) 28 Cal.2d 121, 169 P.2d 1.

Here, AAPS was unaware of the requests to depublish *Young* until well into the end-of-year holidays, and AAPS did not receive copies of the depublication requests until this week. Once armed with the material needed to prepare this response, AAPS has proceeded expeditiously. Moreover, by providing the position of physicians as a counterweight to the hospital-industry requests, AAPS respectfully submits that its response will aid the Court in evaluating the issues presented here.

For all of the foregoing reasons, therefore, AAPS respectfully requests leave to file the following response to the various hospital-industry requests to depublish *Young.*

II. AAPS RESPONSE TO HOSPITALS' REQUEST TO DEPUBLISH *YOUNG*

Under Rule 8.1125, a non-court responder must state its interest and provide up to ten pages supporting or opposing a depublication request. The following two sections identify AAPS's interest in the *Young* decision and explain why this Court should deny the industry's request to depublish *Young.*

A. Interest of AAPS in the *Young* Decision

As Dr. Young explained in opposing depublication, the hospital's motion to strike Count 5 of his complaint under California's law against Strategic Lawsuits against Public Participation (the "Anti-SLAPP law") would have cost him over $175,000 in attorneys' fees paid to the hospital under the hospital's initial motion for attorneys' fees. With due respect to the important legislative policy behind the Anti-SLAPP law, AAPS respectfully submits that Anti-SLAPP motions themselves can become strategic motions against vindication of important First Amendment rights. As *Young* correctly held, the Anti-SLAPP law does not apply

to mandate proceedings that simply seek to challenge unlawful or arbitrary government action, such as when a physician challenges the results of a medical peer review proceeding.

By way of background, AAPS is a membership association of physicians nationwide, including many in California. Founded in 1943, AAPS is dedicated to ethical standards in the practice of medicine, including the sanctity of the patient-physician relationship. In addition to participating at the legislative and administrative levels in national, state, and local debates over healthcare, AAPS also participates in litigation, both as a party and as *amicus curiae. See, e.g.*, *Springer v. Henry* (3rd Cir. 2006) 435 F.3d 268, 271 ["the Association of American Physicians and Surgeons, argues that the issue transcends the relationship between the parties and instead impacts thousands of patients damaged as a result of hospital errors, incompetence, wrongdoing, and cover-ups"]; *United States v. Rutgard* (9th Cir. 1997) 116 F.3d 1270 [in an appeal of convictions and a sentence of a San Diego physician, the Ninth Circuit agreed with AAPS in part and reversed several of the convictions and vacated the sentence]. AAPS also has been cited in decisions of the U.S. Supreme Court. *See, e.g.*, *Stenberg v. Carhart* (2000) 530 U.S. 914, 933 [citing an AAPS *amicus* brief]; *District of Columbia v. Heller* (2008) 128 S. Ct. 2783, 2860 [Breyer, Stevens, Souter and Ginsburg, JJ., dissenting].

The *Young* decision could have a significant effect on the rights of AAPS members. Physicians are in a unique position to observe and, as appropriate, to criticize hospital administrators. AAPS, with its many members in California, has a strong interest in opposing any attempts to chill the ability of physicians to speak out about the administration of public hospitals. Physicians in California and nationwide often face the dilemma of whether to speak out about failures in the administration of hospitals or to keep quiet in fear of retaliation. The public is entirely dependent on the ability of physicians to speak freely about public hospitals such as this one.[1] If public hospitals can terminate physicians who speak

[1] AAPS does not suggest that the hospital in *Young* engaged in sham peer review, and indeed that is irrelevant to whether this Court should depublish *Young*. Instead, the issue is whether the *Young* precedent will aid the ***next*** physician who faces sham peer review by allowing him or her to seek judicial review of the hospital's actions, without facing an Anti-SLAPP motion's chilling effect.

up about the shortcomings of administration, then the First Amendment loses its value and the quality of public hospitals will sharply decline.

As explained in the next section, bad-faith peer review by hospitals – known as "sham peer review" – is a growing problem. Sham peer review occurs when hospitals abuse the peer-review process to punish doctors for a wide range of protected activities – *e.g.,* standing up for better care for patients, speech about issues of public concern, or even competition in medical practices – that offend powerful hospital administrators for reasons other than (and often, antithetical to) medical competence and ethics. By pressuring the peer reviewers – whose careers the hospitals control – hospital administrators can achieve their own biased ends through the peer review process. The direct victims of sham peer review include physicians – including AAPS members in California – who practice innovative medicine or simply stand up for their patients against hospital and other bureaucracies. The indirect victims of sham peer reviews include the patients, competition, and the medical profession as a whole.

For the foregoing reasons, AAPS has a direct and vital interest in preserving the *Young* precedent.

B. This Court Should Deny the Requests to Depublish *Young*

As Dr. Young demonstrates, most of the reasons that the hospital industry proffers to depublish *Young* are makeweight arguments. The real issue here is that the hospitals want to preserve the ability to file special motions to strike under the Anti-SLAPP law against physicians who simply wish to seek judicial review of hospitals actions in peer review proceedings. The following sections argue that granting the industry's requests would empower scorched-earth litigation tactics against physicians, in violation of physicians' First Amendment rights. The Anti-SLAPP law was never intended to provide that relief or that chilling effect. Indeed, the hospital industry's position turns the Anti-SLAPP law on its head, empowering their strategic litigation tactics for evading review.

1. This Court Must Recognize the First Amendment Protects Against Sham Peer Reviews by Hospitals

Public hospitals have a duty to serve the public good, but unlike public schools and other analogous government-funded institutions, hospitals have no

meaningful oversight or external accountability. There are typically no publicly elected "hospital boards." There are no restraints on the multi-million-dollar compensation packages that many hospital administrators pay themselves. There are no meaningful limits on the runaway self-enrichment by hospital administrators, as there are in other governmental entities. The First Amendment is the only "check and balance" against hospitals that still exists, and it is critical that physicians "on the ground" not face retaliation for speaking out.

For example, in *Pickering v. Bd. of Educ*. (1968) 391 U.S. 563, a high school teacher was fired from his job by the defendant after he sent a letter critical of the defendant's past handling of proposals to raise more money for the schools to a newspaper. *Id*. at 564. The U.S. Supreme Court held that the plaintiff's free speech rights were violated by the defendant's actions. *Id*. at 565. The Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id*. at 574.

Nonprofit hospitals are analogous to public schools, as both are obligated to serve the public good, and both spend roughly a half a trillion dollars or so in public money each year. As indicated above, however, public schools have elected school boards, open meetings, recognized rights of free speech by teachers and students, and a variety of other checks and balances. By contrast, hospitals have none of these safeguards, and there is runaway abuse of power for the self-enrichment of the hospital executives. Indeed, respected academicians have explained that hospital administrators are increasingly enriching themselves at the expense of the public trust:

> Children's Hospital of Los Angeles provided a top executive with the unprecedented compensation of $3.9 million, and the CEO of Children's Hospital of Philadelphia was paid $3.4 million [in 2009].

Martin Makery, *Andrew Ibrahim, MD, Case Western Reserve School of Medicine & Dominic Papandria, MD, Indiana Univ. School of Medicine*, "Rising Executive Compensation At Children's Hospitals Threatens The Public Trust" *Health Affairs*

Blog (Sept. 14, 2012).[2] Recognizing First Amendment rights of hospitals' volunteers and other staff would provide essential accountability for these hospital administrations.

Hospitals (acting through their administrators) frequently have a strong self-interest in eliminating physicians in order to set an example for other physicians not to criticize the administrators. Unchecked, this retaliation against innovators and outspoken physicians is a growing problem. Nearly 25% of physicians who told their hospitals about their concerns with patient care suffered threats to their jobs in one study. Scott Plantz, M.D., *et al.*, *A National Survey of Board-Certified Emergency Physicians: Quality of Care and Practice Structure Issues*, 16 AM. J. OF EMERG. MED. 1, 2-3 (Jan. 1998). Steve Twedt of the PITTSBURGH POST-GAZETTE has reported on the same problem in his series beginning Oct. 26, 2003, entitled "Cost of Courage." His articles shows how retaliation occurs nationwide, describing in detail the experiences of 25 physicians and a nurse who suffered from actions adverse to their careers after they tried to improve care at their respective institutions. Steve Twedt, *The Cost of Courage: How the Tables Turn on Doctors*, PITTSBURGH POST-GAZETTE, A1 (Oct. 26, 2003).

Medical literature is replete with examples of this devastating phenomenon. *See, e.g.*, Gail Weiss, *Is Peer Review Worth Saving?* MEDICAL ECONOMICS (Feb. 18, 2005); John Zicconi, *Due Process or Professional Assassination?*, UNIQUE OPPORTUNITIES (March/April 2001); David Townsend, *Hospital Peer Review Is a Kangaroo Court*, MEDICAL ECONOMICS 133 (Feb. 7, 2000). Medical journals also describe the often successful attempts by peer reviewers to cloak their sham peer review under federal immunity. *See, e.g.*, William Summers, "Sham Peer Review: A Psychiatrist's Experience and Analysis," *Journal of American Physicians and Surgeons* 125 (Winter 2005); Roland Chalifoux, Jr., M.D., *So What Is a Sham Peer Review?*, 7 MEDSCAPE GENERAL MEDICINE (No. 4) 47 (2005); John Minarcik, M.D., *Sham Peer Review: A Pathology Report*, JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 121 (Winter 2004); Lawrence Huntoon, M.D., Ph.D., *Abuse of the 'Disruptive Physician' Clause*, JOURNAL OF AMERICAN PHYSICIANS

[2] Available at http://healthaffairs.org/blog/2012/09/14/rising-executive-compensation-at-childrens-hospitals-threatens-the-public-trust/ (last viewed Jan. 11, 2013).

AND SURGEONS 68 (Fall 2004); William Parmley, *Clinical Peer Review or Competitive Hatchet Job*, 36 JOURNAL OF THE AMERICAN COLLEGE OF CARDIOLOGY 2347 (2000). Thus, the peer review "system is too open to manipulation and needs reform." Jeff Chu, *Doctors Who Hurt Doctors*, TIME 52 (Aug. 15, 2005) [citing the Association of American Physicians and Surgeons]. In short, without impugning in any way the hospital's peer review in *Young*, it is clear both that sham peer review is a national problem and allowing hospitals to subject physicians to attorney-fee liability under the Anti-SLAPP law would chill physicians' efforts both to speak out against hospital administrators in the first place and then to seek judicial review of peer review proceedings under a mandate proceeding in Superior Court.

2. This Court Should Not Read *Any* Law, Much Less the Anti-SLAPP Law, to Chill First Amendment Rights

As a general rule, courts do not read statutes to create a constitutional violation if another interpretation avoids that violation. *See, e.g., Kopp v. Fair Pol. Practices Committee* (1995 11 Cal.4th 607, 646, 905 P.2d 1248, 1273-74. As Dr. Young explained, when the hospital initially prevailed in its Anti-SLAPP motion to strike, the hospital sought over $175,000 in attorneys' fees under the Anti-SLAPP law's asymmetric attorney-fee provision. Young Resp. at 9 (Dec. 20, 2012). Especially for a physician whose very livelihood may be under attack, that type of liability obviously would chill a decision to seek judicial review in the first place. AAPS respectfully submits that to read the Anti-SLAPP law in this manner would violate the First Amendment.

Significantly, the "right of access to the courts is indeed but one aspect of the right of petition" under the First Amendment. *Cal. Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, 510. Moreover, chilling that right of petition would violate the First Amendment. *McDonald v. Smith* (1985) 472 U.S. 479, 482-83. Indeed, AAPS respectfully submits that the type of review that Dr. Young sought in his mandate proceeding is the very "rule of law" itself:

> [T]hat the King's courts… could order his officers to account for their conduct [] was the essence of… "the rule of law." Whatever the logical contradictions between this doctrine and sovereign immunity, [it] had

> become firmly established [and] as much a part of the law as… sovereign immunity."

Louis L. Jaffee, *The Right to Judicial Review I* (1958) 71 HARV. L. REV. 401, 433. This Court should not read the Anti-SLAPP statute as seeking to interfere with the First Amendment right of review.

Just like the "SLAPP" suits that the Anti-SLAPP law seeks to limit, hospitals' efforts to quash judicial review via an Anti-SLAPP special motion serve a strategic deterrent effect against the public's exercising their First Amendment rights: "Many SLAPPs are legally unsuccessful but can serve the purpose of intimidating or bankrupting those that speak out in the public interest." Jennie R. Romer & Shanna Foley, *A Wolf in Sheep's Clothing: the Plastics Industry's "Public Interest" Role in Legislation and Litigation of Plastic Bag Laws in California* (Spring 2012) 5 GOLDEN GATE U. ENVTL. L.J. 377, 434. This Court should not read the Anti-SLAPP law to allow the very same types of harms that the Legislature designed the Anti-SLAPP law to prevent.

To be sure, Anti-SLAPP motions might have a legitimate role in peer review proceedings if they protect First Amendment rights of peer-review participants as outlined in *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 201. But this Court should not read the Anti-SLAPP law to chill the rights of physicians to seek judicial review.

III. CONCLUSION

This Court should deny the requests to depublish *Young.*

Respectfully submitted,

Lawrence J. Joseph (Cal. Bar #154908)

Counsel to Association of American Physicians & Surgeons, Inc.

PROOF OF SERVICE

I, Lawrence J. Joseph, hereby declare: I am a resident of the Commonwealth of Virginia, over the age of eighteen, and not a party to this action; my business address is 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

On January 11, 2013, I caused one copy of the foregoing document to be served by U.S. mail, postage prepaid, on the interested parties in this action, by placing a true copy thereof in sealed, postage-prepaid envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on January 11, 2013, at McLean, Virginia.

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