

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

RAMINENI V. RAO,
Plaintiff and Appellant,
v.
WASHINGTON HOSPITAL, et al.,
Defendants and Respondents.



A134623

(Alameda County
Super. Ct. No. HG10540985)

BY THE COURT:

The application by the Association of American Physicians & Surgeons, Inc. to file an amicus curiae brief in support of appellant, filed herein on December 19, 2012, is granted. The amicus curiae brief received by this court on December 19, 2012 is deemed filed as of the date of this order.

Any party may serve and file a response to the amicus curiae brief within fourteen (14) days of the date of this order. (See Cal. Rules of Court, rule 8.200(c)(6).)

DEC 26 2012

Dated: _____

Jones, P.J.

_____, P. J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 5

No. A134623

R. V. RAO, M.D.,
Petitioner/Appellant,

v.

WASHINGTON HOSPITAL and the BOARD OF DIRECTORS OF
WASHINGTON HOSPITAL,
Respondents/Respondents.

APPEAL FROM ALAMEDA COUNTY SUPERIOR
COURT, NO. HG10540985, HON. FRANK ROESCH
PRESIDING

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*;
BRIEF *AMICUS CURIAE* OF ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS, INC., IN SUPPORT OF
PETITIONER-APPELLANT IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, applicant and prospective *amicus curiae* Association of American Physicians & Surgeons, Inc. (“AAPS”) makes the following disclosures: (1) AAPS is a non-profit corporation, and no entity or person owns 10 percent or more of AAPS; (2) AAPS does not know of any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding, as defined such interests are defined in Rule 8.208(e); and (3) AAPS knows of no entity or person that must it must list under Rule 8.208(e)(1)-(2).

Dated: December 18, 2012

Respectfully submitted,

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TABLE OF CONTENTS

Certificate of Interested Entities or Persons	i
Table of Contents	ii
Table of Authorities.....	iii
Application for Leave to File Brief <i>Amicus Curiae</i>	1a
Interest of <i>Amicus Curiae</i>	1a
How this Brief Will Assist the Court	2a
Brief <i>Amicus Curiae</i> of Association of American Physicians & Surgeons, Inc. in Support of Petitioner-Appellant in Support of Reversal.....	1
Introduction	1
Constitutional Background.....	1
Statement of the Case	2
Summary of Argument.....	2
Argument.....	3
I. This Court Should Adopt the Precedent of <i>Springer v. Henry</i> to Protect Medical Practitioners Against Retaliation for Speech	4
II. Public Policy Requires Greater, not Less, Accountability for Public Hospitals, and Robust First Amendment Protections Are Essential to That End.....	6
III. Sham Peer Review, as Evidenced Here, Is a Growing Problem in Need of Judicial Review.....	9
Conclusion.....	11
Rule 8.204(c)(1) Certificate of Compliance.....	12

TABLE OF AUTHORITIES

CASES

<i>Brekke v. Wills</i> (2005) 125 Cal.App.4th 1400.....	4
<i>Brown v. Presbyterian Healthcare Services</i> (10th Cir. 1996) 101 F.3d 1324.....	10
<i>Harris v. Bradley Mem. Hosp. & Health Ctr.</i> (Conn. App. Ct. May 19, 2005) 2005 Conn. Super. LEXIS 1401	10
<i>Haywood v. Drown</i> (2009) 556 U.S. 729	2
<i>Horner v. Dep’t of Mental Health, Mental Retardation, & Substance Abuse Servs.</i> (Va. 2004) 268 Va. 187, 597 S.E.2d 202.....	5-6
<i>In re Berry</i> (1968) 68 Cal.2d 137	4
<i>Near v. Minnesota</i> (1931) 283 U.S. 697, 707.....	1
<i>North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court</i> (2008) 44 Cal.4th 1145.....	1
<i>Ofsevit v. Trustees of California State University & Colleges</i> (1978) 21 Cal. 3d 763	4
<i>Pickering v. Bd. of Educ.</i> (1968) 391 U.S. 563	6-7
<i>Springer v. Henry</i> (3rd Cir. 2006) 435 F.3d 268.....	1a-2a, 4-5
<i>Stenberg v. Carhart</i> (2000) 530 U.S. 914, 933	2a
<i>United States v. Rutgard</i> (9th Cir. 1997) 116 F.3d 1270	2a

STATUTES

CAL. CONST. art. 1, §2(a).....	2
U.S. CONST. amend. I	1-8, 10
U.S. CONST. amend. XIV	1

REGULATIONS AND RULES

California Rules of Court 8.200	1a
California Rules of Court 8.200(c)(1)	1a
California Rules of Court 8.204(c)(l)	12
California Rules of Court 8.208	i
California Rules of Court 8.208(e).....	i
California Rules of Court 8.208(e)(1)	i

California Rules of Court 8.208(e)(2)	i
---	---

OTHER AUTHORITIES

Roland Chalifoux, Jr., M.D., <i>So What Is a Sham Peer Review?</i> , 7 MEDSCAPE GENERAL MEDICINE (No. 4) 47 (2005)	10
Jeff Chu, <i>Doctors Who Hurt Doctors</i> , TIME 52 (Aug. 15, 2005).....	10
Lawrence Huntoon, M.D., Ph.D., <i>Abuse of the ‘Disruptive Physician’ Clause</i> , JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 68 (Fall 2004).....	10
Martin Makery, Andrew Ibrahim, MD, <i>Case Western Reserve School of Medicine, and Dominic Papandria, MD, Indiana University School of Medicine, “Rising Executive Compensation At Children’s Hospitals Threatens The Public Trust” Health Affairs Blog</i> (Sept. 14, 2012).....	7-8
John Minarcik, M.D., <i>Sham Peer Review: A Pathology Report</i> , JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 121 (Winter 2004)	10
William Parmley, <i>Clinical Peer Review or Competitive Hatchet Job</i> , 36 JOURNAL OF THE AMERICAN COLLEGE OF CARDIOLOGY 2347 (2000)	10
Scott Plantz, M.D., <i>et al.</i> , <i>A National Survey of Board-Certified Emergency Physicians: Quality of Care and Practice Structure Issues</i> , 16 AM. J. OF EMERG. MED. 1, 2-3 (Jan. 1998).....	9
Bob Stuart, “Court Rules for Whistleblower,” NEWS VIRGINIAN (June 16, 2004).....	6
William Summers, “Sham Peer Review: A Psychiatrist’s Experience and Analysis,” <i>Journal of American Physicians and Surgeons</i> 125 (Winter 2005)	10
David Townsend, <i>Hospital Peer Review Is a Kangaroo Court</i> , MEDICAL ECONOMICS 133 (Feb. 7, 2000)	10
Steve Twedt, <i>The Cost of Courage: How the Tables Turn on Doctors</i> , PITTSBURGH POST-GAZETTE, A1 (Oct. 26, 2003)	
Gail Weiss, <i>Is Peer Review Worth Saving?</i> MEDICAL ECONOMICS (Feb. 18, 2005)	9
John Zicconi, <i>Due Process or Professional Assassination?</i> , UNIQUE OPPORTUNITIES (March/April 2001).....	9-10

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APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.200, the Association of American Physicians & Surgeons, Inc. (“AAPS”) respectfully requests leave to file the attached brief in support of the Petitioner-Appellant Dr. Ramineni Vishvendra Rao in support of reversal. This application is timely made within the period set forth under Rule 8.200(c)(1).¹

Interest of *Amicus Curiae*

Founded in 1943, *amicus* AAPS is a membership association of physicians nationwide, including many in California. AAPS is dedicated to ethical standards in the practice of medicine, including the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Springer v. Henry* (3rd Cir. 2006) 435 F.3d 268, 271 [“the Association of American Physicians and

¹ No party or counsel for a party in the pending appeal authored the accompanying brief, in whole or in part, or made any monetary contribution intended to fund the costs of preparing and submitting the accompanying brief, which costs were borne solely by the *amicus curiae*, its members, and its counsel.

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 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].

This case at bar has a significant effect on the rights of AAPS and its members. Physicians in California are faced with 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. If public hospitals can terminate physicians who speak up about the shortcomings of administration, then the First Amendment loses its value and the quality of public hospitals will sharply decline.

Physicians, such as Dr. Rao, are in a unique position to observe and criticize hospital administrators as appropriate. AAPS, with its many members in California, has a strong interest in opposing a precedent that chills the ability of physicians to speak out about the administration of public hospitals.

How this Brief Will Assist the Court

The accompanying brief reviews the First Amendment protections for speech and also outlines the growing problem of “sham peer review.” Sham peer review occurs when hospitals abuse the peer-review process to punish doctors for a wide range of protected activities – *e.g.*, saving patients’ costs, 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.

For all the foregoing reasons, *amicus curiae* AAPS respectfully submits that its brief will assist the Court in weighing the First Amendment rights that protect physicians like Dr. Rao and the public.

Dated: December 18, 2012

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF ASSOCIATION OF
AMERICAN PHYSICIANS & SURGEONS, INC. IN
SUPPORT OF PETITIONER-APPELLANT IN
SUPPORT OF REVERSAL**

INTRODUCTION

For the reasons set forth in the accompanying application, *amicus curiae* Association of American Physicians & Surgeons, Inc. (“AAPS”) respectfully files this brief in support of the Petitioner-Appellant Dr. Ramineni Vishvendra Rao. For the reasons set forth here and in Dr. Rao’s filings with this Court, *amicus* AAPS respectfully submits that this Court must reverse the Superior Court.

CONSTITUTIONAL BACKGROUND

The First Amendment protects freedom of speech and freedom of the press. U.S. CONST. AMEND. I. Although initially applicable only to the federal government, the Fourteenth Amendment incorporated the same protections against intrusion by state government. *Near v. Minnesota* (1931) 283 U.S. 697, 707; *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145, 1154. The

California Constitution also protects these rights. CAL. CONST. art. 1, §2(a). California's state courts have concurrent jurisdiction to address violations of federal rights. *Haywood v. Drown* (2009) 556 U.S. 729, 735 ["state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law"].

STATEMENT OF THE CASE

Amicus AAPS adopts the facts and background as stated in Dr. Rao's Statement of the Case. Rao Br. at 3-32.

SUMMARY OF ARGUMENT

Respondent Washington Township Health Care District ("WTHD") is a public hospital, which means that there is a First Amendment right to criticize it without fear of retaliation. Yet it is painfully obvious that the motivation for WTHD in its sham peer review of Dr. Rao was retaliation for his appearing in a movie that exposed how badly WTHD is run.

At the real core of this case is the cameo appearance by Dr. Rao in a movie entitled "Life for Sale," which was unflattering to the administrators managing the public hospital WTHD. Dr. Rao appeared in the movie but was not among the persons who spoke against the administrators. No matter. All the administrators cared about was that Dr. Rao had appeared in this movie that they disliked, because it portrayed the administrators unfavorably. But like it or not, there is a First Amendment right to criticize administrators at public institutions, including hospitals. It violates the First Amendment to retaliate against someone for such criticism.

The retaliation was the equivalent of a professional death penalty for Dr. Rao: termination from the medical staff. Such action falsely connotes that a physician is so dangerous to patients that he cannot even be allowed on the premises anymore, and cannot even practice with supervision or

other restrictions. The reason for the over-the-top draconian retaliation is that WTHD wanted to send a chilling message to any other physician who dared criticize it. But such chilling effect is obviously unconstitutional under the First Amendment.

Nearly 400 years ago another American was subjected to harsh retaliation for daring to criticize the colonial governor of New York. He was John Peter Zenger, famously prosecuted for publishing harsh criticism of a powerful public official. Mr. Zenger was vindicated by the jury, setting a precedent in favor of free speech that later became part of the Constitution. Similarly, the importance to the public of physicians being able to expose inadequate hospital administration today, without a chilling effect, is equally important. But if the potentially career-ending termination from the medical staff is allowed as punishment against physicians for appearing in a movie against the hospital, then the First Amendment stands to lose nearly 400 years of progress.

ARGUMENT

It is of paramount importance that independent medical practitioners, such as Dr. Rao, can speak freely and without retaliation in order to raise public awareness about hospitals. This is clearly a First Amendment right, and hospitals are plainly matters of immense public concern. U.S. CONST., AMEND. I. This freedom is essential to preserving and improving the quality of care. The only meaningful external check and balance on the hospital system are the eyes and ears of ethical medical practitioners who work there, and their ability to speak up when they see something wrong. The counterpart of hospitals in government is public schools, which have public accountability in the form of elected school boards, detailed public disclosure and public meeting requirements, strict rules against self-dealing, and robust free speech rights of students in the system. Yet hospitals have none of these protections. The decision below should be reversed because

its effect is to allow WTHD to punish Dr. Rao because WTHD did not like his appearance in a movie critical of the hospital. This is inconsistent with the First Amendment.

On less compelling facts, the U.S. Court of Appeals for the Third Circuit held in favor of the First Amendment and the physician. *Springer v. Henry* (3rd Cir. 2006) 435 F.3d 268. That precedent should be adopted by this Court. Dr. Rao would not have been terminated by WTHD if it were not for the movie and his appearance in it. The U.S. Constitution requires greater protections for Dr. Rao, and future physicians who might do likewise, than the Superior Court provided here.

I. THIS COURT SHOULD ADOPT THE PRECEDENT OF *SPRINGER V. HENRY* TO PROTECT MEDICAL PRACTITIONERS AGAINST RETALIATION FOR SPEECH

Patient safety at public hospitals is obviously a matter of public concern. Given the impact that hospitals have on the public, it is difficult to imagine any issue that would be of greater public concern. Expressing concern about the hospital, as Dr. Rao did in an appropriate manner, must be considered fully protected speech at the core of First Amendment protections.

In disregard of the First Amendment, WTHD brought charges against Dr. Rao for appearing in the “Life for Sale” movie, which cast the administration of WTHD in unfavorable light, and for being present at a peaceful demonstration outside of WTHD. These charges, which underlie WTHD’s draconian punishment of Dr. Rao, are clear violations of Dr. Rao’s First Amendment rights. *See, e.g., Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1409; *In re Berry* (1968) 68 Cal.2d 137, 151. The First Amendment protects not only speech but also retaliation for speech. *Ofsevit v. Trustees of California State University & Colleges* (1978) 21 Cal. 3d 763, 772-73. Allowing the resultant chilling effect without overturning

those charges and the punishment is contrary to everything the First Amendment stands for.

The Third Circuit thoroughly considered the same issues presented in this case, and held on less compelling facts that the First Amendment does protect the physician against retaliation by the hospital administrators. *See Springer v. Henry* (3rd Cir. 2006) 435 F.3d 268. The *Springer* Court held:

Dr. Springer's speech (i.e., a physician's critique of patient safety and unsafe working conditions) constitute matters of public concern. In several cases cited by the District Court the courts held that statements by health care providers regarding patient care involved matters of public concern.

Id. at 275. In *Springer*, the physician was an independent contractor, while here Dr. Rao was speaking out on his own time. Dr. Rao displayed the same commitment to patient safety that Dr. Springer did, for which the Third Circuit held in his favor.

Public hospitals such as WTHD 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 does exist, and it was error for the decision below to allow the retaliation against Dr. Rao to stand.

In state court in Virginia, Dr. Harry Horner took his case all the way to the Virginia Supreme Court and won obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*

(Va. 2004) 268 Va. 187, 597 S.E.2d 202. Dr. Horner criticized the substandard care of patients, whereupon an administrator at Western State Hospital responded with pretextual allegations against him, such as absurdly accusing him of abuse and neglect because he did not wear gloves while dressing a wound on a particular patient's foot. See Bob Stuart, "Court Rules for Whistleblower," NEWS VIRGINIAN (June 16, 2004). Just as state courts and the Third Circuit have recognized the problem of retaliation by hospital administrators against physicians who stand up for patient care, this Court should likewise rule in favor of medical practitioners who are subjected to retaliation, including Dr. Rao.

II. PUBLIC POLICY REQUIRES GREATER, NOT LESS, ACCOUNTABILITY FOR PUBLIC HOSPITALS, AND ROBUST FIRST AMENDMENT PROTECTIONS ARE ESSENTIAL TO THAT END

Public hospitals like WTHD are not private businesses to operate for the benefit of their executives. Hospitals are entities justified by their obligation to the public good, which should be defined broadly. Hospitals are not entitled to judicial deference as an administrative agency or military proceeding might be. Quite the contrary: hospitals are like public parks existing for the public good, and the administrators serve as custodians with a strong duty to the public. If there is racism or infringements on the First Amendment in a public park, then greater judicial scrutiny is warranted, not less. If there is retaliation in a public park based on someone's exercise of his First Amendment rights, then greater judicial scrutiny is warranted, not less.

The First Amendment issue at stake here is analogous to that of a public school, because hospitals have a duty to broadly serve the general public good, much as public schools should. 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. Similarly, WTHD violated the free speech rights of Dr. Rao by terminating him from the staff because he exercised his First Amendment rights. The *Pickering* court discussed the importance of balancing the employee's interests "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

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.

Imagine a public school with no publicly elected school board and with a superintendent who takes millions of dollars in compensation each year. Add to that a denial of First Amendment rights to express valid concerns about the institution, even less than the First Amendment rights enjoyed by students in public schools. That is the legal context of hospital administration today – self-enrichment with access to billions in public money. Under the decision below, hospital administrators cannot even be criticized by medical practitioners without risking career-ending retaliation.

The decision below simply erred in failing to recognize how different non-profit hospitals today are from all other public entities in terms of accountability and the need for safeguards against retaliation for those who do act ethically. It might have been safer for Dr. Rao to jump in front of a moving train than for him to appear in a movie that ended up being critical of the hospital administration.

Independent medical practitioners provide the only check and balance against runaway self-enrichment by hospital administrators. Removing that restraint by allowing hospitals to retaliate against independent physicians based on their speech leaves such hospitals with no meaningful accountability to the public which, by virtue of the hospital’s non-profit status, the hospital is obligated to serve.

² Available at <http://healthaffairs.org/blog/2012/09/14/rising-executive-compensation-at-childrens-hospitals-threatens-the-public-trust/> (last viewed Dec. 18, 2012).

III. SHAM PEER REVIEW, AS EVIDENCED HERE, IS A GROWING PROBLEM IN NEED OF JUDICIAL REVIEW

Dr. Rao was subjected to a “sham peer review,” which is a procedure widely recognized to be done in bad faith by a hospital to “get” someone the administrators do not like. If it amounted to simply parting ways, then it would not be so objectionable. But WTHD, as other hospitals have done to other physicians, instead blacklisted Dr. Rao by making it appear there was something defective with his care. Such blacklisting then goes in the National Practitioner Data Bank (“NPDB”), thereby severely professionally injuring Dr. Rao as well.

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 AND SURGEONS 68 (Fall 2004); William Parmley, *Clinical Peer Review or Competitive Hatchet Job*, 36 JOURNAL OF THE AMERICAN COLLEGE OF CARDIOLOGY 2347 (2000).

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]. Such sham peer review interferes with quality medical care and impedes the benefits of competition and free enterprise. Sham peer review, motivated by an exercise of First Amendment rights, is not “peer review” at all, but rather tortious conduct masquerading as “peer review” in an attempt to escape liability for damages under immunity. *But see Brown v. Presbyterian Healthcare Services* (10th Cir. 1996) 101 F.3d 1324, 1333-34 & n.9 [no immunity under Healthcare Quality Improvement Act of 1986 (“HCQIA”) when defendants undertook objectively inadequate investigation]; *Harris v. Bradley Mem. Hosp. & Health Ctr.* (Conn. App. Ct. May 19, 2005) 2005 Conn. Super. LEXIS 1401, at *15-*16 [reversing summary judgment for the hospital on ground that fact issues existed regarding HCQIA immunity].

There is much at stake for the public in this case, and this court should not uphold the sham peer review against Dr. Rao.

CONCLUSION

For the foregoing reasons, those cited by Dr. Rao, *amicus curiae* Association of American Physicians & Surgeons, Inc. respectfully submits that the decision below should be reversed.

Dated: December 18, 2012

Respectfully submitted,

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RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for *amicus curiae* Association of American Physicians & Surgeons, Inc. hereby certifies that the foregoing “Brief *Amicus Curiae* of Association of American Physicians & Surgeons, Inc., in Support of Petitioner-Appellant in Support of Reversal” is proportionately spaced, has a typeface of 13 points or more, and contains 2,859 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate of Compliance, as calculated by using the word count feature in Microsoft Word 2010.

Dated: December 18, 2012

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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 December 18, 2012, I caused one copy of the foregoing “Application for Leave to File Brief *Amicus Curiae*” and the accompanying “Brief *Amicus Curiae* of Association of American Physicians & Surgeons, Inc., in Support of Petitioner-Appellant in Support of Reversal” to be served by priority U.S. mail, postage prepaid, on the interested parties in this action, by placing a true copy thereof in sealed envelopes addressed as indicated on the attached service list.

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 December 18, 2012, at McLean, Virginia.

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