No. 08-543

In the Supreme Court of the United States

LAWRENCE R. POLINER, M.D.,
LAWRENCE R. POLINER, M.D., P.A.,
Petitioners,

v.

TEXAS HEALTH SYSTEM, doing business as Presbyterian Hospital of Dallas Texas, a Texas non-profit corporation, JAMES KNOCHEL, M.D.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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REASONS FOR GRANTING THE WRIT—REPLY TO OPPOSITION

I. No Circuit Split Compels Review

There is no circuit split. This is one of the few issues on which Respondents and Dr. Poliner agree.[1] Instead of precluding this Court's review of the case, the lack of a split only strengthens the compelling reason for this Court to grant certiorari. The gulf between the law created by Congress and its existing judicial construction is so gaping, it demands this Court's attention.

But, a more basic issue should first be addressed. Respondents acknowledge (again, consistent with Dr. Poliner) that the "plain language of the statute and clear Congressional intent" should control when courts examine the four prongs of HCQIA immunity and that it is not the Fifth Circuit's role to reweigh "the balancing of interests by Congress." *See* Opp. at 20 and 26 (internal citations omitted). From the content of Respondents' Opposition, it appears Dr. Poliner must clarify his argument as to the construction of

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[1] Dr. Poliner also agrees that the documents included in Respondents' Appendix (the Amended Final Judgment dated November 20, 2006 and the Memorandum Opinion and Order dated November 17, 2006, Opp. App. 1-11) should be considered by the Court. Dr. Poliner appreciates Respondents including such documents (their omission was inadvertent), but maintains that these filings should be considered with the Final Judgment and the Memorandum Opinion dated October 13, 2006 (Pet. App. 38a-65a), especially given the numerous references made by the trial court to these documents in the amended final judgment and opinion.

Congress's "reasonable belief test" as well as why the current judicial construction (while uniform) is erroneous.

A. Of Three Possible Standards for the "Objectively Reasonable" Test, Only One is Correct.

There are three possible constructions for the "reasonable belief" test under the first and fourth prongs of section 11112(a): (1) a purely good faith or "subjective" test that inquires solely as to state of mind; (2) a "more" objective test that considers and weighs both objective and subjective motivations (but does not allow subjective motivations to trump objective motivations,[2] thus evaluating the totality of the circumstances surrounding the belief behind the peer review action[3]); and (3) a purely "objective" test that turns a blind eye to subjective intent. The first test (purely good faith) was rejected by Congress in favor of a "more objective" standard. The third "purely objective" standard is the one being judicially employed and is the standard urged by Respondents. *See* Opp. at 16-18.

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[2] Contrary to Respondents' understanding of Dr. Poliner's position. *See* Opp. at 20.

[3] Respondents, the Fifth Circuit, and other courts assert that the "totality of the circumstances" should be considered. *See* Opp. at 17-18. How the "totality of the circumstances" can be analyzed when bad faith and malice are completely ignored is beyond reason.

B. If the Second Standard is Correct, Review is Necessary.

Respondents take the position that the lack of a split in the federal circuit courts on the question presented means this Court cannot grant the Petition. However, if the standard being uniformly applied by the courts is erroneous and obviously contrary to the plain meaning of the statute, the Court is not so constrained. The Court's task is to construe what Congress enacted, beginning with the language of the statute. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001) (internal citations omitted). The Court has ample authority to control the administration of justice in the federal courts—particularly in their enforcement of federal legislation. *See Danforth v. Minnesota*, 128 S.Ct. 1029, 1046 (2008). If in fact the appropriate measure of "reasonable belief" under HCQIA immunity is the second "more objective" reasonable belief test, then the Court must correct the improperly stated rule of law that applies the third "purely objective" test, no matter how many courts have utilized this standard.[4]

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[4] An improperly stated rule of law is grounds for the Court to accept certiorari as implied by Supreme Court Rule 12 (providing that a "petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

C. The Second Standard is Correct, Making the Third Erroneous.

The second "more objective" standard is far different from the third "purely objective" standard.[5] Dr. Poliner urges the Court to examine closely his argument in the Petition that the second "more objective" standard is correct. Dr. Poliner set forth for this Court the explicit statutory language of the first and fourth prongs of immunity. Pet. at 14-15. His detailed discussion of the statutory language, which Respondents fail to address much less even refute, reveals that the erroneous third standard applied by the courts gives the words "reasonable belief" (used in two of the four immunity prongs) no operative effect.[6] Analysis of the specific language stands alone without the need for any examination of Congressional intent.[7] But in the event more is needed, Dr. Poliner cites the legislative commentary behind HCQIA and the explicit

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[5] Respondents correctly observe that the use of the term "more objective" by Congress is the primary lynchpin of Petitioner's argument. See Opp. at 21 n. 28. The language that Congress used to convey its intent is crucial to determining how to interpret the immunity it created. Its importance should be recognized, not marginalized.

[6] The Court has engaged in this same type of detailed analysis of statutory language, and is especially reluctant to construe a clause, sentence, or word as "surplusage," especially when it occupies a pivotal place in the statutory scheme. See *Duncan v. Walker*, 533 U.S. at 174-75 (internal citations omitted).

[7] Dr. Poliner agrees with the AAPS that an examination of legislative intent is not necessary, given the clear language of the term "reasonable belief" in the statute. *See* AAPS Br. at 7, 12 and Opp. at 19, n. 25.

Congressional references to anticompetitive motivations.[8] Pet. at 17-19. Dr. Poliner also specifically points to the Congressional history that makes it clear Congress wanted to "fill in the gap" for immunity where federal antitrust lawsuits circumvented state immunity laws, but did not want to override these laws. Pet. at 15-16. Dr. Poliner points to other places in the Congressional record (including the actual title of the bill—Encouraging Good Faith Professional Review Activities) that make it clear Congress did not intend for peer review resulting from bias, anticompetitive, and other subversive motivations to be immune. Pet. at 16-19. Dr. Poliner maintains that only one conclusion can follow—the second standard is correct and the third standard is erroneous.[9] And if Dr. Poliner is correct

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[8] Defendants seem to confuse "anticompetitive motivations" with "antitrust claims." See Opp. at 20 n. 26. Given the onerous and complex body of law relating to antitrust claims (including the specific legal requirements that there exist an "antitrust injury" and plaintiff be an "efficient enforcer" of the antitrust laws), the fact that Dr. Poliner's antitrust claims were dismissed at summary judgment has no bearing on whether there existed "anticompetitive motivations" for his peer review actions. Instead, anticompetitive (also termed "economic") motivations are a type of subjective motivations (other types include personal and political motivations) and so can exist even though a valid legal antitrust claim may not.

[9] Without analysis of any real substance, Respondents claim the second standard is erroneous. In particular, Respondents state that "Petitioners' proposed hybrid standard that somehow combines objective reasonableness with subjective motivation" is "contrary to the statute and the legislative history, [and is] illogical." Opp. at 21. Dr. Poliner requests that the Court determine which standard (the second or the third) fits this description. Further, Dr. Poliner wholly disagrees with

(and this can only be determined if the Court accepts this case), then this is exactly the type of recurring judicial error the Court should address. Simply put, this Court is the only venue that can correct such a recurring judicial misinterpretation.[10]

D. The Issue is of Great Importance.

The Court thus faces the question of importance (i.e., whether there exist "compelling reasons" for this Court to exercise its "supervisory powers" to consider the merits of this case). Dr. Poliner described, throughout his Petition, the grave importance of this issue to his profession, the health care system, and patients themselves.[11] The amicus briefs filed by the AAPS and SSI (which are both physician groups) prove that this issue is of utmost concern to physicians across the country.[12] The fact that powerful groups

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Respondents' claim on that same page that the standard is "unworkable." The fact that an immunity standard employed by the courts may not always result in favor of the defendants does not make the standard "unworkable." It instead makes it what it was intended by Congress to be—qualified immunity.

[10] Respondents appear to claim that Dr. Poliner should look to the legislative process instead of requesting certiorari from the Court. See Opp. at 4 and 22 n. 29. Dr. Poliner disagrees that the vital role of this Court should be diminished in this way. If the current judicial interpretation is erroneous and the issue is of great importance, this Court should step in irrespective of the status of legislative action or inaction.

[11] *See*, e.g., Pet. at 10-12 and 32-34.

[12] The articulation by these physician groups of the importance of qualified immunity in medical peer review and the devastating effects to the profession that have and will continue to occur if the

such as hospital associations and systems, insurance companies, and large hospitals[13] joined in an amicus brief supporting Respondents at the Fifth Circuit appellate level confirms that the HCQIA immunity issue raised by Dr. Poliner is an issue of national importance to hospitals, physicians, and patients.

Peer review is being soundly abused across the country under the guise of quality control. In some circumstances, it is being used as a weapon to silence whistle-blowing physicians or to quell economic threats.[14] This is a direct result of the flawed existing judicial construction of HCQIA immunity. If *Poliner* stands, abuse of peer review for malicious motives will remain unchecked and hospitals, health care systems, and those in control of the peer review system will act accordingly. Plainly, the question presented by Dr. Poliner is compelling and this Court's attention is overdue.

E. Respondents Dismiss the Alarming Effects.

In his Petition, Dr. Poliner details the specific devastating effects that the current judicial interpretation has on the medical profession and the medical peer review system as a whole. Respondents

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Poliner case stands is essential to the Court's understanding of this matter. Although Dr. Poliner does not necessarily agree with the legal arguments contained in the amicus brief filed by SSI, Dr. Poliner will consent to the filing of the SSI's amicus brief as long as the Court considers the SSI's brief for this limited purpose only.

[13] *See* Opp. at ii-iii.

[14] For example, *see* AAPS Br. at 18-20.

merely skim the surface of these effects. For example, Respondents fail to address with any substance Dr. Poliner's clear arguments that the jury's fact finding role has been usurped in cases where immunity is not determined as a matter of law.[15] Respondents instead weakly conclude that the argument "proves too much and nothing at all" and merely repeat their reference to the "Fifth Circuit's faithful application of existing law."

As for Dr. Poliner's specific argument that state peer review laws have been rendered meaningless despite clear Congressional intent to the contrary, Respondents mischaracterize Dr. Poliner's argument as a preemption argument,[16] fail to provide any meaningful discussion regarding how state laws are being affected, and instead provide only superficial discussion of cases containing random analyses of Texas state immunity as proof that qualified peer review immunity under state law is alive and well in Texas.[17]

And as to Dr. Poliner's argument regarding the most alarming effect—that absolute immunity now

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[15] With their statement that immunity can "almost always be determined as a matter of law," Respondents admit that there will at least be some cases where the facts underlying the immunity determination are determined by a jury. *See* Opp. at 23.

[16] *See* Pet. at 27.

[17] Respondents wholly fail to address the scenario where malice is actually proven with the Texas cases they cite, which is the scenario in which the Texas immunity laws would be rendered ineffective and meaningless.

exists—Respondents accuse Dr. Poliner of (among other things) being "hyperbolic" and "conveniently ignor[ing]" the handful of cases in which physician-plaintiffs have prevailed or defeated summary judgment." Opp. at 25. The "handful of cases" cited by Respondents (only two—*Brown* and *Islami*) are not ignored but are specifically discussed in Dr. Poliner's Petition. *Brown* focuses on the third prong as dispositive, making it inapposite to Dr. Poliner's argument. Pet. at 20 n. 12. *Islami* was a district court case that survived summary judgment as did *Poliner,* but had it been appealed, it would have likely suffered the same fate. Pet. at 25 n. 15. Using *Islami* as proof that the presumption of "reasonable belief" can actually be rebutted is simply laughable.[18]

It is striking that Respondents never answer the crucial question posed on page 21 of Dr. Poliner's Petition—what type of evidence can be used to rebut the presumption of "reasonable belief"? Respondents' silence on this issue is deafening.

II. The Fifth Circuit Sanitized the Facts

Respondents claim that the Fifth Circuit correctly set forth the facts of the case and properly applied HCQIA immunity. But Respondents use the same sanitized version of the facts against which Dr. Poliner argues. They set forth a one-sided version of the medicine, which was the version that the federal court

[18] The other citation, an ALR article lacking even a pinpoint cite, fails to furnish any cases holding a physician to be successful in rebutting the first and fourth prongs, as would be relevant to the issues at hand, making it a useless reference in this analysis.

jury rejected. Respondents also recite "facts" (medical and otherwise[19]) in the Opposition that are simply not true or are misleading.

Dr. Poliner purposefully did not address the factual details of the medical cases in his Petition, mindful that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous fact findings. . . " Supreme Court Rule 12. However, to demonstrate to the Court that the "facts" stated in the Opposition and in the Fifth Circuit's opinion were clearly controverted at trial and not accepted by the jury, Dr. Poliner again refers to the specific yet concise descriptions of these medically complex interventional cardiology cases in the Petitioners' Appendix—the real story: Patient No. 10 (Pet. App. at 186a-187a); Patient No. 18 (Pet. App. at 189a-190a); Patient No. 9 (Pet. App. at 190a-191a); Patient No. 3 (Pet. App. at 191a-192a); Patient No. 39 (Pet. App. at 188a n.3); and Patient No. 36 (Pet. App. at 193a-196a). The facts relating to the May abeyances and the June summary suspension also are far different than Respondents' version (Pet. App. at 196a-202a).[20]

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[19] Respondents' Opposition contains inaccuracies too numerous to address in this Reply. For example, Respondents claim that no economic damages were proven (*see* Opp. at 13) when in fact the jury findings clearly show that economic damages were found. *See* Pet. App. at 143a-144a, 158a. Further, Respondents' statement that Dr. Poliner's professional association "took in more than $1,200,000 in 2000" (*see* Opp. at 13 n. 19) is erroneous. To the contrary, the professional association had gross receipts of approximately $477,000, its income was $33,746, and wages to Dr. Poliner that year were approximately $34,000.

[20] Contrary to Respondents comments throughout the Opposition (Opp. at 8 n. 9, 10 n. 12, 14 n. 21, and 24), Dr. Poliner adamantly

Respondents' focus on the specific facts is a distraction. The question presented by this case does not hinge on its facts. Instead, it turns on an improper statement of the law by the Fifth Circuit—that an entire category of evidence should be wholly disregarded. Frankly, Respondents' recitation of the "facts" and its uncanny resemblance to those laid out it the Fifth Circuit's opinion only confirms Dr. Poliner's argument—that the Fifth Circuit wholly disregarded any and all evidence of subjective motivations and malice, blindly accepted Respondents' version of the "facts," and improperly sanitized the case.

III. Other Issues in No Way Diminish Need for Review.

Respondents urge the Court that the *Poliner* case is a "poor vehicle" given other grounds on appeal that could be dispositive of Petitioners' case. See Opp. at 30-31. These other issues were only briefly mentioned in passing by the Fifth Circuit. Respondents fail to establish precisely how these grounds preclude the Court's addressing the crucial question presented by Dr. Poliner. None of the other possible grounds alluded to by Respondents diminish the need for the Court to review the gravely erroneous judicial interpretation of HCQIA. Contrary to Respondents' claim, this case is not only a suitable vehicle, it is the

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disputed the ad hoc committee findings and the June suspension through the entire administrative hearing and litigation processes, but chose to drop his cross-appeal only at the appellate level.

best case to raise the issue.[21] The *Poliner* case is uniquely poised for this Court's determination on an issue of great national importance to health care.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[21] It is one of the very few, if not the only, case that has obtained factual findings by a jury of malice and behavior outside the HCQIA immunity standards.