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IN THE SUPREME COURT OF PENNSYLVANIA

No. 19 WAP 2020

JAMES E. LEADBITTER & TAMMY M. LEADBITTER, his wife,
v.
KEYSTONE ANESTHESIA CONSULTANTS, LTD., a corporation, CHRISTOPHER MERCK, M.D., AJOY KATARI, M.D., JOHN P. WELDON, M.D., LAURA V. McNEILL, M.D. and ST. CLAIR HOSPITAL
v.
CARMEN PETRAGLIA, M.D., and SOUTH HILLS ORTHOPAEDIC SURGERY ASSOCIATES, a corporation.

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, UNIVERSITY OF PITTSBURGH MEDICAL CENTER, CURI, THE DOCTORS COMPANY, AND THE PENNSYLVANIA ORTHOPAEDIC SOCIETY

On Petition for Allowance of Appeal from the Opinion and Order of the Superior Court of Pennsylvania Entered on February 12, 2020, at No. 1414 WDA 2018, Affirming the Order of Court Entered on September 17, 2018, in the Court of Common Pleas of Allegheny County, Civil Division, at G.D. No. 16-10700

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, bipartisan organization representing businesses, health care, and other perspectives. PCCJR is dedicated to improving Pennsylvania's civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts. PCCJR files this *amicus* brief in its own right and on behalf of its members.

Curi is a premier provider of products, services, and experiences for physicians and those who support them. From professional liability and other lines of insurance to wealth management and advisory services, and health policy consulting, Curi—built by doctors for doctors—has been passionate about identifying ways to meet the evolving needs of physicians since its founding as the Medical Mutual Insurance Company of North Carolina in 1975. Since then, Curi's insurance offerings have expanded to 46 states and the District of Columbia, with concentrations of customers in the Southeast and Mid-Atlantic regions. Curi files this *amicus* brief in its own right and on behalf of its members.

Founded in 1976, The Doctors Company ("TDC") is the nation's largest physician-owned medical malpractice insurer and is guided by its central mission of advancing, protecting, and rewarding the practice of good medicine. TDC also serves as a strong advocate for its members in both the political and legal arenas, to

ensure that doctors' voices are heard. TDC files this *amicus* brief in its own right and on behalf of its members, in order to ensure that the evidentiary privilege afforded by the Pennsylvania Legislature and Congress is not further abridged.

The University of Pittsburgh Medical Center ("UPMC") is a Pennsylvania nonprofit, non-stock corporation. A $21 billion health care provider and insurer, UPMC and its subsidiaries are the Commonwealth's largest nongovernmental employer. UPMC integrates more than 90,000 employees, 40 hospitals, 700 doctors' offices and outpatient sites, and a 3.9 million-member Insurance Services Division. In the most recent fiscal year, UPMC and its subsidiaries contributed $1.4 billion in benefits to the communities it serves. UPMC files this *amicus* brief in its own right and on behalf of its employees and affiliates, in order to ensure that the evidentiary privilege afforded by the Pennsylvania General Assembly and Congress is not curtailed in a manner contrary to the public interest.

The Pennsylvania Orthopaedic Society ("PAOrtho") is a non-profit organization founded in 1956 and represents over 1,200 orthopaedic surgeons, residents, and fellows practicing throughout Pennsylvania. This membership includes Additional Defendant, Carmen Petraglia, M.D., and many of the orthopaedic surgeons who practice with him at South Hills Orthopaedic Surgery Associates, P.C. PAOrtho's mission is to enhance our members' ability to provide the highest quality musculoskeletal care, and its vision is to be the primary

organization that promotes quality musculoskeletal health for the citizens of Pennsylvania. PAOrtho is recognized as a credible source of information and data by decision makers in Harrisburg and throughout the Commonwealth, including the General Assembly, the Governor's Office, and state regulatory agencies.

PAOrtho has an intense interest in the outcome of this case. Its members perform surgeries at hospitals and ambulatory care organizations where clinical peer review is routinely required for granting and retention of surgical privileges. Peer review documentation, as Plaintiffs/Appellees brazenly seek in this case, must be fully shielded in order to foster ongoing, everyday improvements to patient care. Without rigid protection of the peer review process, the quality of patient care throughout this Commonwealth will undoubtedly suffer.

Pursuant to Pa. R.A.P. 531(b)(2), PCCJR, Curi, TDC, UPMC, and PAOrtho state that no person, other than their respective members, and their respective counsel, paid for or authored this brief, in whole or in part.

QUESTIONS PRESENTED

This Court granted allocatur on the following issues:

(1) Whether the Superior Court's holding directly conflicts with the Pennsylvania Peer Review Protection Act, 63 P.S. §§ 425.1, et seq., and misapplies *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018), by ordering the production of acknowledged "peer review documents" solely because they were maintained in a physician's credentialing file?

(2) Whether the Superior Court's holding directly conflicts with the Federal Healthcare Quality improvement Act, 42 U.S.C. § 11137(B)(1), and federal regulations which protect from disclosure, responses to statutorily-required inquiries of the national practitioner data bank, by ordering the production of such documents solely because they were maintained in physician's credentialing file?

Leadbitter v. Keystone Anesthesia Consultants, Ltd., 86 WAL 2020, 2020 WL 5524849, *1 (Pa. Sept. 15, 2020) (*per curiam*).

SUMMARY OF ARGUMENT

The Pennsylvania Peer Review Protection Act, 63 P.S. §§ 425.1-425.4 ("PRPA"), ensures that frank, probing assessments of physicians by their peers—those most qualified to conduct such reviews—can be made confidentially, thereby ensuring that patients receive the best quality of healthcare achievable. Similarly, the federal Healthcare Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 ("HCQIA"), provides limited immunity from liability from antitrust and most other types of claims for physicians who, in good faith, participate in medical peer review processes, by protecting information contained in the National Practitioner Data Bank ("NPDB") from disclosure. These protections represent a legislative effort to balance the needs of plaintiffs in civil actions against the needs of health care facilities in order to improve health care through careful review of standardized health care operations and of the performance by doctors and staff.

In light of this declared public policy, courts have repeatedly recognized the breadth and necessity of the protections afforded under the PRPA and HCQIA. For instance, in *Young v. Western Pennsylvania Hospital*, 722 A.2d 153 (Pa. Super. Ct. 1998), the Superior Court aptly observed that:

> The Peer Review Protection Act represents a determination by the legislature that, because of the expertise and level of skill required in the practice of medicine, the medical profession itself is in the best position to police its own activities. As noted in prior cases, the need for confidentiality in the peer review process stems from the need for

> comprehensive, honest, and sometimes critical evaluations of medical providers by their peers in the profession. Without the protection afforded through the confidentiality of the proceedings, the ability of the profession to police itself effectively would be severely compromised.

Young, 722 A.2d at 156 (citations and quotation marks omitted).

However, this appeal and other recent decisions of the Pennsylvania appellate courts have threatened to shrink the statutory protections provided by the PRPA and HCQIA to the point of nonexistence. This is a dangerous and misguided trend that this Court must reverse.

Here, the Superior Court panel hewed to dicta in this Court's decision in *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018), that refused to confer protection to peer review materials in the possession of a credentialing committee—not because of the substance of those materials, but because they had been used by credentialing committee that was a "review committee" rather than a "review organization," the former being a statutorily undefined term coined by the *Reginelli* Court. Notwithstanding its holding, however, the panel questioned the judicially-created distinction between a "review committee" and a "review organization" for purposes of shielding peer review documents from public disclosure, writing:

> We share the observation of the Dissent in *Reginelli* that the Majority's distinction between a review "organization" and review "committee" will result in the same chilling effect upon free and frank

> discussions aimed to ensure and improve an appropriate quality of care that PRPA strives to vitiate. This chilling effect will also occur when a credentialing committee is reviewing whether it should grant hospital privileges to a physician with no relationship to the hospital.

Leabitter v. Keystone Anesthesia Consultants, Ltd., 229 A.2d 292, 297 (Pa. Super. Ct. 2020) (citation and quotation marks omitted).

The panel's concerns are well-founded. The categorical distinction between a "review committee" and a "review organization" is unworkable for many reasons, two of which *Amici* PCCJR, Curi, TDC, UPMC, and PAOrtho are particularly well-equipped to address: (1) because peer review is undeniably and inextricably linked to the credentialing process and work performed by a credentialing committee; and (2) because the artificial distinction is inconsistent with the text and broad legislative purpose of the PRPA.

Likewise, the information sought by the Plaintiffs/Appellees includes information that is expressly and independently protected by the HCQIA. Again, compelling disclosure of this information—in addition to subjecting the disclosing and receiving parties to civil penalties—circumvents the purpose of the statute and undermines the public good, by abrogating the confidentiality protections that ensure frank, honest peer evaluations from by practitioners.

The practical consequence of the judicial erosion of these statutory protections is predictable: physicians will cease to provide the "comprehensive,

honest, and sometimes critical evaluations" of their peers that is so vital to assuring quality healthcare to the public. Ironically, this may well result in *less* qualified physicians attaining or retaining credentials they should not possess and, in turn, lead to **more** medical malpractice.

This is not what the General Assembly intended in enacting PRPA, nor what Congress intended in passing the HCQIA and limiting access in litigation to information submitted to the NPDB. Moreover, such a deleterious result cannot be what this Court intended to accomplish via dicta in *Reginelli*. For these reasons, this Court should reverse the Superior Court's decision and clarify that peer review documents used in the credentialing process are protected from discovery under the PRPA and HCQIA.

ARGUMENT

I. The Panel Committed Reversible Error By Ordering The Production Of Acknowledged "Peer Review Documents," In Violation Of The PRPA

In refusing to extend the peer review privilege to acknowledged "peer review documents" considered by a credentialing committee, the panel followed dicta in this Court's decision in *Reginelli* that "documents in a credentialing file are not peer review documents." *Leadbitter*, 229 A.3d at 297 n.7 (citing *Reginelli*, 181 A.3d at 304-305 & n.13). In doing so, the panel failed to recognize a critical, fundamental reality: that effective peer review is an indispensable component of the credentialing process. *Cf. Estate of Krappa v. Lyons*, 222 A.3d 372, 374 (Pa. 2019) (Wecht, J., Concurring Statement) (noting that "the marked difference [between peer review and credentialing] posited by the *Reginelli* Court will prove more difficult to discern in practice than it is to describe in the pages of a judicial opinion").

Moreover, the artificial, judicially-created distinction between a "review committee" and "review organization" is inconsistent with the text and broad legislative purpose behind the PRPA. Reversal is warranted on both grounds.

A. Peer Review is Inextricably Linked to the Credentialing Process and Work Performed by a Credentialing Committee

1. The necessity of peer review in the medical profession

As with all professions, the medical profession is comprised of individuals with extensive specialized education, training, and knowledge. However, because of the constantly changing technology and scientific advancements, the medical profession is uniquely susceptible to a "knowledge disparity" between those who practice the profession and outside bodies—like a legislature or other regulatory body—that seek to regulate that profession. Rodney H. Lawson, *et al.*, *Credentialing And Peer Review Of Health Care Providers: The Process And Protections*, TSTC03 ALI-CLE 7, *9-10 (Apr. 19, 2012).

Because of this disparity, effective and efficient self-evaluation of the medical profession is critical. The primary means by which this self-regulation occurs is through peer review, whereby physicians evaluate the qualifications and clinical performance of colleagues. *See*, *e.g.*, *Bryan v. James E. Holmes Regional Med. Ctr.*, 33 F.3d 1318, 1321 (11th Cir. 1994) ("Peer review . . . has become an integral component of the health care system in the United States."). One of the "fundamental rationale[s] behind the peer review process is efficiency—practicing physicians are in the best position to determine the competence of other practicing physicians." George E. Newton II, *Maintaining the Balance: Reconciling the*

Social and Judicial Costs of Medical Peer Review Protection, 52 ALA. L. REV. 723, 723 (2001).

To be effective, however, the peer review process requires "comprehensive, honest, and sometimes critical evaluations of medical providers by their peers in the profession." *Young*, 722 A.2d at 156. This honesty is necessary so that the peer review process can achieve its ultimate aim of maximizing patient safety and lowering overall health care costs by preventing medical malpractice and accompanying lawsuits. Laurie K. Miller, *Defending the Peer Review Privilege: Guidance for Health Care Providers and Counsel After Wheeling Hospital*, 120 W. VA. L. REV. ONLINE 34, 35-37 (2017).

By securing a critical analysis of the competence and performance of physicians and other healthcare providers by their peers, better medical care will result. *See*, *e.g.*, Lisa M. Nijm, *Pitfalls of Peer Review the Limited Protections of State and Federal Peer Review Law for Physicians*, 24 J. LEGAL MED. 541, 541 (2003) ("Peer review serves as one of medicine's most effective risk management and quality improvement tools."); *see also* Lawson, *supra*, TSTC03 ALI-CLE 7, at *8 (repeating the well-established proposition that "peer review is viewed as an essential tool in combating medical error and preventing injury and death.").

2. Medical literature and other scholarship recognize that peer review is a fundamental aspect of the credentialing process

Peer review occurs in a number of settings, including hospital quality assurance programs, medical societies, or managed care organizations. *See*, *e.g.*, Kenneth R. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157, 157 (2002). In a hospital setting, peer review committees generally consist of practicing staff physicians with the specialized knowledge necessary to make accurate medical judgments and opportunity to observe one another in the workplace routinely, but who do not directly compete with the physician under review. *See*, *e.g.*, Susan Scheutzow, *State Medical Peer Review: High Cost but No Benefit—Is It Time for a Change?*, 25 AM. J.L. & MED. 7, 12 (1999).

Peer review committees perform a variety of functions, such as review of existing medical staff members in connection with the reappointment process, which typically occurs every two years. *See*, *e.g.*, Nijm, *supra*, 24 J. LEGAL MED. at 544. Notably, while a hospital's governing body will ultimately determine whether a physician may join the hospital's medical staff, it is the peer review process that provides the basis for the medical staff's recommendation to the hospital board. *See*, *e.g.*, Scheutzow, *supra*, 25 AM. J.L. & MED. at 13.

One of the most critical functions performed by peer review committees is the process of "credentialing," through which appointments, retention, and termination from hospital medical staffs are determined. *See*, *e.g.*, Nijm, *supra*, 24 J. LEGAL MED. at 543 ("Peer review committees analyze the qualifications, training, and experience of medical staff applicants in a process known as credentialing."); Andrew R. deHoll, *Vital Surgery or Unnecessary Procedure? Rethinking the Propriety of Hospital Liability for Negligent Credentialing*, 60 S.C. L. REV. 1127, 1127 (2009) (describing credentialing as the "detailed review of a private physician's skills, education, and experiences, medical peer review"); Eleanor D. Kinney, *Hospital Peer Review Of Physicians: Does Statutory Immunity Increase Risk Of Unwarranted Professional Injury?*, 13 MICH. ST. U. J. MED. & L. 57, 60 (2009) ("[H]ospital medical staff credentialing through peer review is the primary means of regulating physicians who practice in hospitals."). This process is termed "credentialing," because it is based, in large part, on a physician's credentials, such as training, certifications, and demonstrated competence. *See*, *e.g.*, Scheutzow, *supra*, 25 AM. J.L. & MED. at 13.

Over time, governmental entities and industry organizations have implemented both requirements for peer review committees and accompanying

standards in the credentialing context.[1] One of the most developed and significant set of standards has been issued by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO),[2] the country's chief hospital accrediting body. First issued in 2007, these standards require hospitals to engage in peer review to retain accreditation and credential its medical staff, and were issued with the aim "to minimize bias and discrimination because credentialing and privileging historically have been granted based on personal judgments, and the process lacked standardized methods to ensure the impartiality of the assessment." Martin Makary, MD, MPH, *et al.*, *PPE, OPPE, and FPPE: Complying With the New Alphabet Soup of Credentialing*, AMA ARCH. SURG., Vol. 146, No. 6 at 642 (June 2011).

The standards require hospitals to implement a program called "Professional Practice Evaluation" (PPE) that assesses six areas of general competence before

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[1] Establishing a peer review committee is also a requirement for a hospital to participate in the Medicaid and Medicare programs, 42 C.F.R. §§ 482.21-22 (2008), and many states require hospitals to use a peer review committee as a requirement for licensure.

[2] In 1952, the American College of Surgeons, the American Medical Association, the American Hospital Association, and the American College of Physicians joined in an effort to improve the standard of care in hospitals and established the Joint Commission on Accreditation of Hospitals, now the Joint Commission on Accreditation of Health Care Organizations. Murray G. Sagsveen & Jennifer L. Thompson, *The Evolution of Medical Peer Review in North Dakota*, 73 N.D. L. REV. 477, 478 (1997). The purpose of the JCAHO was and remains "to establish hospital accreditation standards." *Id.* Under JCAHO accreditation standards, hospital medical staffs must establish "peer review guidelines, which require uniform criteria for evaluating persons applying for medical staff jobs and for current medical staff members." *Id.*

the initial credentialing. "To set up a PPE program, institutions can begin by formalizing a department-level or even a division level PPE credentialing committee." *Id.* at 643. Two primary types of PPE exist: (1) new PPE (NPPE), which applies to new staff members with active privileges; and (2) ongoing PPE (OPPE), which applies to all active staff members, as measured every three to six months. *Id.* at 642. To fulfill the requirement for NPPE, new health care providers "must be observed and/or have medical records for their patients **reviewed by a peer** in their field for at least 3 cases [and a] log of the medical record numbers of these patients should be kept in the credentialing file of the health care professional." *Id*. (emphasis added).

This table, originally found in *PPE, OPPE, and FPPE: Complying With the New Alphabet Soup of Credentialing*, shows how integral peer review is to the process of credentialing:

Table. PPE by Type

Type	Evaluation Method	Trigger	Frequency
NPPE[a]	Peer observation and medical record review of 3-5 cases	Initiation of new privileges[b]	Once
OPPE	Committee review of locally defined metrics of ongoing performance	Regularly scheduled	Every 3-6 mo
FPPE	Peer observation and medical record review of 3-5 cases	Failure to pass NPPE or OPPE, serious preventable adverse event or pattern of preventable harm[c]	As needed

Abbreviations: FPPE, focused professional practice evaluation; NPPE, new professional practice evaluation; OPPE, ongoing professional practice evaluation; PPE, Professional Practice Evaluation.

[a] Also referred to as initial PPE.

[b] NPPE is required for each new privilege bundle at initiation of hospital privileges or to add a new privilege bundle.

[c] Related to health care professional skill, judgment, or professionalism and deemed appropriate for review by leaders.

As the table notes, "peer observation" (*i.e.*, peer review) is a primary component of the "Evaluation Method" of NPPE (*i.e.*, the initial credentialing process). Thus, every hospital seeking to retain JCAHO accreditation must engage in peer review when credentialing its medical staff.

3. Courts across the country uniformly recognize that credentialing committees engage in peer review

Consistent with the medical literature and other scholarship, courts across the country uniformly recognize that credentialing committees engage in peer review. For instance, in *Whittington v. Altmann*, 2012 WL 3104607 (Conn. Super. Ct. June 27, 2012), the Connecticut Superior Court addressed whether peer review materials in the possession of a credentialing committee were subject to disclosure under Connecticut's "peer review" statute. Similar to the PRPA, Connecticut's

"peer review" statute provides that "[t]he proceedings of a medical review committee conducting a peer review shall not be subject to discovery or introduction into evidence in any civil action for or against a health care provider arising out of the matters which are subject to evaluation and review by such committee." Conn. Gen. Stat. Ann. §19a-17b(d).

Notably, Connecticut's "peer review" statute defines a "medical review committee" similar to a "review organization" under the PRPA. *Compare id.* §19a-17b(a)(4) ("'Medical review committee' includes any committee of a state or local professional society or a committee of any health care institution established pursuant to written bylaws, and any utilization review committee established pursuant to Public Law 89-97, and a professional standards review organization or a state-wide professional standards review council, established pursuant to Public Law 92-603, engaging in peer review, to gather and review information relating to the care and treatment of patients for the purposes of (A) evaluating and improving the quality of health care rendered; (B) reducing morbidity or mortality; or (C) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. 'Medical review committee' also means any hospital board or committee reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto." (footnotes omitted)), *with* 63 P.S. § 425.2 (definition of "review organization").

In answering the question in the negative, the Connecticut Superior Court acknowledged the immutable truth that a credentialing committee engages in peer review. *Whittington*, 2012 WL 3104607, at *4-5 ("That 'peer review' is performed by a credentialing committee finds support not only in decisions of our Superior Court but also in our sister state of California." (citations omitted)). The Connecticut Superior Court then rejected the nearly identical statutory analysis that this Court credited, albeit in dicta, in *Reginelli – i.e.*, that the second sentence of the definition of a "medical review committee" means that the documents in the possession of a credentialing committee are <u>not</u> protected from disclosure:

> Further analysis of subsection (4) leads to the conclusion that there is another reason why the work of a credentialing committee is the work of a "medical review committee." The last sentence of this subsection provides as follows: "It shall also mean any hospital board or committee reviewing the professional qualifications or activities of its medical staff **or applicants for admission thereto**." (Emphasis added.)
>
> The plaintiffs argue that only a "medical review committee" that is engaged in peer review is entitled to the shield provided by subsection (4)(d) and because the last sentence stands separate from the earlier reference to "peer review" it is not therefore peer review. As stated above, common sense must be used in construing a statute and the court must assume that the legislature intended to accomplish a reasonable and rational result. Further, when two constructions are possible courts will adopt the one which makes the statute effective and workable and not one which leads to bizarre results.
>
> **It would be illogical to extend the privilege created by Sec. 19–17b to existing staff members but not newly admitted staff. There is no rational basis for the distinction**. There is no less salutary a

purpose in endeavoring to elevate the professional quality of newly admitted physicians than there is in maintaining that level among existing physicians. The purpose of the legislation is entirely consistent with this result.

A structural parsing of subsection (4) leads to the same result. Because the last sentence begins with the pronoun "it," it is necessary to determine the antecedent of that word. The plaintiffs interpret "it" to refer to a "medical review committee" which may or may not be engaged in peer review. They argue further that when a medical review committee is credentialing candidates for admission it is not performing "peer review." The antecedent of "it" cannot be so limited. **Because "it" begins a new sentence it must be construed to apply to the entirety of the proceeding sentence and should not be limited to the words "medical review committee."**

In so doing, "it" is construed to refer to a "medical review committee ... engaging in peer review." Therefore, when such a committee is vetting applicants it is engaged in peer review.

Whittington, 2012 WL 3104607, at *4-5 (emphasis added; citations and footnote omitted).

Various other courts have recognized that a credentialing committee engages in peer review. Examples include:

- *Larson v. Wasemiller*, 738 N.W.2d 300, 302 (Minn. 2007) ("The decision to grant hospital privileges to a physician is made by the hospital's governing body based on the recommendations of the credentials committee. **A credentials committee is a type of peer review committee**. Minnesota, like most other states, has a peer review statute that provides for the confidentiality of peer review proceedings and grants some immunity to those involved in the credentialing process." (emphasis added);

- *Mem. Hosp.-The Woodlands v. McCown*, 927 S.W.2s 1, 3-4 (Tex. 1996) (rejecting the argument that the initial credentialing process of a

medical peer review committee is not protected from discovery under Texas' "peer review" statute, adding that "[i]t is apparent from the federal [HCQIA] that the initial credentialing process is a critical juncture in improving the quality of medical care **and that peer review should occur at that point**" (emphasis added));

- *W. Fl. Regional Med. Ctr., Inc. v. See*, 79 So.3d 1, 11 (Fl. 2012) (observing that "the actual records of a credentialing committee involved in a peer review process may be excluded from discovery" under Florida's "peer review" statute);

- *Ex parte Krothapalli*, 62 So. 2d 836, 839 (Ala. 2007) (following the lead of the Supreme Courts of Florida and South Carolina, and holding that "the purpose of a peer-review statute is to encourage full candor in peer-review proceedings and that this policy is advanced only if all documents considered by the committee or board during the peer-review **or credentialing process** are protected" (emphasis added));

- *Riggs Nat'l Bank v. Boyd*, No. C.A. 96C-05-122-WTQ, 2000 WL 303308, at *5-6 (Del. Super. Ct. Feb. 23, 2000) ("[T]his Court has already ruled, at least in effect, that hospital credentialing committees are included under [Delaware's 'peer review'] statute. The Court said: Absent a contrary ruling from the Supreme Court of Delaware, there does not seem to be any doubt that the records and proceedings of hospital credentialing committees are not available for court subpoena or subject to discovery. Indeed, the Court has so held in this case. **It is hard to suggest that credentialing committees of hospitals do not come within the statute and it is hard for this Judge to understand why initial applications for staff privileges should be treated differently than other peer review functions**." (emphasis added; citations and quotations marks omitted));

- *Johnson v. Detroit Med. Ctr*., 804 N.W.2d 754, 755 (Mich. App. 2010) (noting that, by statute, "[h]ospitals are required to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care. Included in their duties is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications. Thus, **a**

credentialing committee is a peer review committee." (emphasis added; citations and quotation marks omitted));

- *Missouri ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852 (Mo. 1986) (holding that a credentials committee falls within the statutory definition of a "peer review committee," because a credential committee is generally composed of hospital medical staff members and is "normally endowed with the power and the responsibility of reviewing, through procedures which are designed to give a fair and objective evaluation of each physician under study, the credentials of medical staff applicants; (2) making recommendations for membership; and (3) defining the scope of clinical privileges accorded both old and new staff members," adding that "[t]he credentials committee also typically reports to the executive committee with regard to each applicant, makes periodic reviews of the competence of staff members, investigates reports of violations of ethics, and reviews reports referred to it by other committees");

- *Cousino v. Mercy St. Vincent Med. Ctr.*, 111 N.E.3d 529, 537-38 (Ohio App. 2018) (hospital's credentialing committee was a peer review committee because it reviewed the doctor's professional qualifications for credentialing purposes); and

- *Whisenhunt v. Zammit*, 358 S.E.2d 114 (N.C. Ct. App. 1987) (non-party hospital's records relating to credentialing of defendant physician were privileged under North Carolina's "peer review" privilege statute).

In short, the broad, if not universal, consensus outside of the dicta in *Reginelli* is that credentialing invariably requires peer review. *See also Estate of Krappa*, 222 A.3d at 374 (Wecht, J., Concurring Statement) (noting that it is "hardly an unforeseeable result" that "the credentialing committee, as part and parcel of the credentialing process, accepted peer review from other physicians" and that "there is no clear reason why a committee engaged in assessing a

physician's fitness to affiliate, or continue to affiliate, with a given provider would not seek out peer assessments or consider prior or current peer reports concerning the quality of the physician's care").

Simply put, as a practical matter, the artificial distinction this Court has drawn, in dicta, between credentialing committees and peer review committees does not exist in reality. To the contrary, credentialing committees are merely a type of peer review committee. There is a vital need for the peer review information provided to a credentialing committee, in order for sound credentialing recommendations to be made. The panel's decision, together with this Court's dicta in *Reginelli*, threaten whether candid and forthright peer review information will be provided to credentialing committees, thereby threatening these committees' capacity to assure quality healthcare to patients.

B. The Artificial, Judicially-Created Distinction Between a "Review Committee" and "Review Organization" is Inconsistent With the Text and Broad Legislative Purpose of the PRPA

For as long as peer review has existed, there have been powerful disincentives to participate in the process. Many physicians have been reluctant to serve on peer review committees due to the risk of involvement in related future litigation, such as a defamation lawsuit filed by a physician whose staff privileges have been revoked, or a medical malpractice lawsuit against a physician under review. Charles David Creech, *The Medical Review Committee Privilege: A*

Jurisdictional Survey, 67 N.C. L. REV. 179, 179 (1988). Other, equally effective deterrents include fears of personal or professional retaliation—losing friends and jeopardizing personal relationships with colleagues or losing patient referrals. Jeanne Darricades, *Medical Peer Review: How Is It Protected by the Health Care Quality Improvement Act of 1986?*, 18 J. CONTEMP. L. 263, 271 (1992).

Recognizing these impediments to meaningful peer review, as well as the critical importance of peer review to ensuring quality healthcare to the public, every state legislature and Congress have provided "protection to the participants and work product of peer review committees in the form of statutory privilege, confidentiality requirements, and limited immunity from legal liability or some combination of these." Newton, *supra*, 52 ALA. L. REV. at 723.

In Pennsylvania, this protection is manifested in the peer review privilege established by the PRPA. The PRPA provides two key protections: (1) immunity from legal liability; and (2) an evidentiary privilege which protects the confidentiality of "proceedings and records of a review committee" from discovery in litigation. 63 P.S. §§ 425.3, 425.4.

As this Court recognized in *Reginelli*, the PRPA's immunity and confidentiality provisions reflect the legislature's efforts "to foster free and frank discussion by review organizations." 181 A.3d at 300. This is consistent with the stated purpose of the PRPA, articulated even more broadly as to provide "for the

increased use of peer review groups by giving protection to individuals and data who report **to any review group**." 63 P.S. § 425.1, Historical and Statutory Notes (emphasis added).

Although evidentiary privileges are typically construed narrowly, this Court has recognized that, when created specifically by the Legislature, such privileges are not to be constrained unless a clear basis for doing so can be found. *See*, *e.g.*, *Commonwealth v. Moore*, 584 A.2d 936, 940 (Pa. 1991) ("[T]he general powers of the courts do not include the power to order disclosure of materials that the legislature has explicitly directed be kept confidential."); *see also Reginelli*, 181 A.3d at 309 (Wecht, J., dissenting) ("[O]ur view of evidentiary privileges becomes less restrictive when the General Assembly has created the privilege.").

In fact, "[p]rior to *Reginelli*, Pennsylvania state courts had . . . construed the PRPA rather broadly, aligned with the overriding intent of the Legislature to protect peer review records." Samuel C. Nolan, *The Gutting of the Peer Review Protection Act: How Reginelli v. Boggs Weakened the Protection of Medical Peer Review in Pennsylvania and Why the General Assembly Must Act to Restore That Protection*, 58 Duq. L. Rev. 175, 182 (2020) (quotation marks omitted). Accordingly, the peer review privilege created by the General Assembly should be applied broadly—as opposed to narrowly—provided the application is consistent with the statute's purpose and its language.

Plaintiffs/Appellees' contrary position is fundamentally flawed. They asserted before the Superior Court panel that "[t]he evidentiary privilege of PRPA is narrow and only extends to committees performing the very specific function of peer review," "[c]redentialing is a separate and distinct process from peer review," and "[t]he credentialing process is not one to which the evidentiary privilege extends." (Super. Ct. Br. of Appellees at 25). Plaintiffs/Appellees are wrong on all counts.

As noted above, credentialing is most accurately described as one type of peer review—not a "separate and distinct process." Moreover, the Legislature weighed the competing interests of fact-finding and effective peer review, and such weighing led to the evidentiary privilege found in PRPA. Further, the sweeping, inclusive language used by the General Assembly is not "narrow" in any sense, thus necessitating a broad construction of the peer review privilege. *See*, *e.g.*, 63 P.S. §425.2 ("'Review organization' means any committee engaging in peer review . . ..").

In addition, denying protection of the peer review privilege for peer review documents simply because they were considered by a credentialing committee effectively manufactures a novel exception to the privilege that was not intended

by the Legislature and which is plainly inconsistent with the statutory language.[3]

"Peer review" is defined broadly as:

> [T]he procedure for **evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers,** including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review, and the compliance of a hospital, nursing home or convalescent home or other health care facility operated by a professional health care provider with the standards set by an association of health care providers and with applicable laws, rules and regulations. …

63 P.S. § 425.2 (emphasis added).

"Review organization" is likewise defined broadly as:

> **any committee engaging in peer review**, including a hospital utilization review committee, a hospital tissue committee, a health insurance review committee, a hospital plan corporation review committee, a professional health service plan review committee, a dental review committee, a physicians' advisory committee, a veterinary review committee, a nursing advisory committee, any committee established pursuant to the medical assistance program, and any committee established by one or more State or local professional societies, to gather and review information relating to the care and treatment of patients for the purposes of (i) evaluating and improving the quality of health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean **any hospital board, committee or individual reviewing the**

[3] To be clear, *Amici* PCCJR, Curi, TDC, UPMC, and PAOrtho do not advocate for a categorical privilege to apply to credentialing committee materials as part of this appeal. To the extent that materials not constituting peer review materials are contained in credentialing committee files, *Amici* take no position as to whether those materials are discoverable. Here, however, it is undisputed that the materials in question are "peer review" documents, and therefore, not subject to disclosure under the PRPA.

> **professional qualifications or activities of its medical staff or applicants for admission thereto**. It shall also mean a committee of an association of professional health care providers reviewing the operation of hospitals, nursing homes, convalescent homes or other health care facilities.

63 P.S. § 425.2 (emphasis added).

Confidentiality is then granted to "proceedings and records of a review committee" as follows:

> The proceedings and records of a **review committee shall be held in confidence** and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of **evaluation and review by such committee** and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof….

63 P.S. § 425.4 (emphasis added).

Reading these provisions together, a credentialing committee falls squarely within the statutory definition of a "review organization," because it is a "committee [that] engag[es] in peer review" <u>and</u> "review[s] the professional qualifications or activities of its medical staff or applicants for admission thereto." Even accepting the Court's restrictive view of the privilege and its arbitrary decision to protect only peer review materials used by "review organizations," peer

review materials in possession of a credentialing committee fall within the privilege provided by the PRPA and should be protected from discovery.

However, a restrictive view of the peer review privilege provided by the PRPA is not consistent with how it should be read. Where a privilege is "established by constitution, common law or statute," such privilege is "designed to protect weighty and legitimate competing interests." *V.B.T. v. Family Servs. of W. Pa.*, 705 A.2d 1325, 1335 (Pa. Super. Ct. 1998).

Thus, where the Legislature has "considered the interests at stake and has granted protection to certain relationships or categories of information, the courts may not abrogate that protection on the basis of their own perception of public policy unless a clear basis for doing so exists in a statute, the common law, or constitutional principles." *Id.* In other words, and as Justice Wecht aptly noted in dissent, "it is precisely because the General Assembly's judgment is presumptively embodied in the specific statutory provisions that, where the statute provides for certain specific exceptions to the privilege, [the Court] generally may not manufacture additional exceptions to that privilege by judicial fiat." *Reginelli*, 181 A.3d at 309 (Pa. 2018) (Wecht, J., dissenting).

The definitions of "peer review" and "review organization" in the PRPA are worded broadly—containing non-exhaustive lists of examples for each. Likewise, the legislative history of the PRPA indicates an intent to provide unrestricted

protection to facilitate "the **increased use of peer review groups** by giving protection to individuals and data who report **to any review group**." 63 P.S. § 425.1, Historical and Statutory Notes (emphasis added).

Creating an exception to the evidentiary privilege for review committees—where no such distinction is made in the language of the PRPA itself—is thus inconsistent with this Court's own view of statutory evidentiary privileges. It is also inconsistent with the general view of that peer review privilege statutes protect peer review information, regardless of the source. *See*, *e.g.*, Kohlberg, *supra*, 86 MASS. L. REV. at 161 (2002) ("[T]he purpose of peer review statutes is to protect the confidentiality of an ongoing peer review process, not simply to protect records produced by formally defined peer review committees.").

By drawing an artificial distinction between the activities of credentialing committees and those of a PRPA "review committee," both *Leadbitter* and *Reginelli* have created an exception to the peer review privilege that is inconsistent with the core purpose of the PRPA: to enact confidentiality protections that would "serve the legitimate purpose of maintaining high professional standards in the medical practice for the protection of patients and the general public." *Cooper v. Del. Valley Med. Ctr.*, 630 A.2d 1, 7 (Pa. Super. Ct. 1993); *see also Sanderson v. Frank S. Bryan, M.D., Ltd.*, 522 A.2d 1138, 1140 (Pa. Super. Ct. 1987) ("The

purpose of the bill is to provide protection to those persons who give testimony to peer review organizations.").

This novel exception threatens to swallow the rule, as uncertainty over whether the peer review privilege will apply will undoubtedly diminish the quality of participation in the peer review process as a whole. Nolan, *supra*, 58 Duq. L. Rev. at 191 (noting that *Reginelli*'s holding "not only weakens the protection of the PRPA, but also weakens the security upon which physicians have been able to conduct thorough, candid reviews of their peers" and "physicians and other individuals who participate in the peer review process can no longer rely on the belief that their good-faith actions will remain confidential and privileged."). This novel exception should be eliminated, once and for all.

CONCLUSION

Meaningful medical peer review is an indispensable way in which physicians and healthcare providers ensure that patients receive healthcare that meets critical standards of quality. As practitioners, industry groups, and courts widely recognize, peer review is broad term that encompasses many review functions, including the credentialing process.

The Superior Court panel's decision erodes the privilege afforded to peer review to the point of rendering it a nullity. Protecting peer review information in one context (when used by a review organization) but not in another (when used by a review committee)—and eliminating protection entirely if reported to a national database—creates a level of uncertainty that affords no protection at all. The decision essentially reinstates the barriers to effective professional peer review that the General Assembly enacted the Peer Review Protection Act to eliminate, and will inevitably threaten patient safety. This Court should not allow these grim consequences to materialize.

For these reasons, *Amici Curiae* Amici Curiae, the Pennsylvania Coalition for Civil Justice Reform, University of Pittsburgh Medical Center, Curi, The Doctors Company, and the Pennsylvania Orthopaedic Society respectfully request that this Court reverse the February 12, 2020 decision of the Superior Court affirming the September 17, 2018 decision of the Court of Common Pleas of

Allegheny County, and vacate the Court of Common Pleas order mandating disclosure of the peer review documents at issue.

Respectfully submitted,

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Date: November 9, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amici Curiae* the Pennsylvania Coalition for Civil Justice Reform, University of Pittsburgh Medical Center, Curi, The Doctors Company, and the Pennsylvania Orthopaedic Society complies with the word-count limit set forth in Rule 531(b)(4). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required under Rule 2135(b), (d)), contains 6,875 words.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 9, 2020

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PROOF OF SERVICE

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