No. _____

In the Supreme Court of the United States

C. G.,

Petitioner,

v.

DEBORAH HEART AND LUNG CENTER, LYNN MCGRATH, M.D., JOHN ERNST and JILL T. OJSERKIS, ESQ.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court New Jersey

PETITION FOR A WRIT OF CERTIORARI

Michael Confusione
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
(888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

To what extent does the federal Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101 *et seq.*, preempt state laws governing a hospital's immunity for reports allegedly made about a doctor's patient care?

PARTIES TO THE PROCEEDINGS

Petitioner was the appellant in the New Jersey Supreme Court and Superior Court, Appellate Division, and the Plaintiff in the Superior Court, Chancery (trial-level) Division. Respondents were the respondents (or appellees) in the New Jersey Supreme Court and Superior Court, Appellate Division, and defendants in the Superior Court, Chancery Division. The New Jersey State Board of Medical Examiners was a Defendant below and is no longer a party to the proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the orders of the New Jersey Supreme Court and New Jersey Superior Court, Appellate Division.

OPINIONS BELOW

The Order and Memorandum Opinion of the New Jersey Superior Court, Appellate Division, appears at Appendix 1 and is unpublished. The Order of the New Jersey Supreme Court appears at Appendix 32 and is unpublished. The unpublished Orders of the New Jersey Superior Court, Chancery Division, appear at Appendix 26 and 29.

JURISDICTION

The Order and Decision of the New Jersey Superior Court, Appellate Division was entered on November 22, 2017. (App. 1). Petitioner sought review by the New Jersey Supreme Court. The New Jersey Supreme Court denied review on March 26, 2018. (App. 32). This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C.A. § 11111 of HCQIA provides in part as follows:

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989 except as provided in paragraph (2), subsection (a) of this section shall

> apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

42 U.S.C.A. § 11112 of HCQIA provides in part as follows:

> § 11112. Standards for professional review actions
>
> (a) In general
>
> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

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

(1) Notice of proposed action

The physician has been given notice stating--

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

(ii) reasons for the proposed action,

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

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

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

(2) Notice of hearing

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

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

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

42 U.S.C.A. § 11115 (a) of HCQIA provides as follows:

> Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter.

42 U.S.C.A. § 11134 of HCQIA provides as follows:

§ 11134. Form of reporting

(a) Timing and form

> The information required to be reported under sections 11131, 11132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.

(b) To whom reported

> The information required to be reported under sections 11131, 11132(a), and 11133(b) of this title shall be reported to the Secretary, or, in the Secretary's discretion, to an appropriate

private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of the information under this subchapter.

(c) Reporting to State licensing boards

(1) Malpractice payments

Information required to be reported under section 11131 of this title shall also be reported to the appropriate State licensing board (or boards) in the State in which the medical malpractice claim arose.

(2) Reporting to other licensing boards

Information required to be reported under section 11133(b) of this title shall also be reported to the appropriate State licensing board in the State in which the health care entity is located if it is not otherwise reported to such board under subsection (b) of this section.

42 U.S.C.A. § 11151 of HCQIA provides in part as follows:

… (4)(A) The term "health care entity" means--

(i) a hospital that is licensed to provide health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of

furthering quality health care (as determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 1395x(e) of this title.

* * *

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an

action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on--

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician--

> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of such privileges or membership, or
>
> (C) to change or modify such privileges or membership.
>
> (11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity. …

STATEMENT OF THE CASE

Factual Background

Petitioner (Plaintiff below) is a board-certified interventional cardiologist who worked for respondent Deborah Heart and Lung Center. At no time during her nearly ten years and over 8,200 cases performed at Deborah was plaintiff ever under any review of her patient care. After ten years, however, and faced with an ailing mother, plaintiff sought another interventional cardiologist position and decided to leave Deborah for a position with another hospital. On the morning she resigned, plaintiff met with CEO Ernst and submitted her resignation. They discussed plaintiff's reasons for leaving and the challenges of caring for an aging parent. Ernst welcomed the possibility of plaintiff returning to Deborah in the

future and thanked plaintiff for the work she had done. App. 3-13.

Then, six weeks later, Deborah filed a report with the State Board of Medical Examiners claiming that at the time plaintiff resigned, Deborah was "reviewing" her "patient care." Plaintiff learned of this from the Board nearly two months after her resignation. Plaintiff responded to the Board that there was never any "review" of her patient care, at any time. Deborah's report was false. Deborah did not tell plaintiff she was under this claimed review at any time -- before or after she resigned, when she met with CEO Ernst, etc. (Deborah ultimately acknowledged during the ensuing litigation below that its claimed review was "kept secret" from plaintiff).

Deborah went beyond just making a report to the state Medical Board, moreover. Deborah began providing information to health care providers in response to routine credentialing inquiries, and to other hospitals and doctors in the field, stating that not only was plaintiff's "patient care" "under review," but that plaintiff had resigned from Deborah "upon being made aware" of the claimed review – lies that were very damaging to plaintiff's professional reputation. App. 3-13.

Proceedings in the state court below

In November 2008, per the New Jersey Board of Medical Examiners' directive, Petitioner filed a Verified Complaint against Respondent and the Board seeking injunctive relief prohibiting the Board from changing Petitioner's physician profile and ordering Respondent to rescind its defamatory report. In February 2009, the

state chancery (trial) court granted Petitioner a preliminary injunction prohibiting any change to Petitioner's profile, acknowledging that any change would cause Petitioner irreparable harm, and stating "due process considerations require some cognizance by the physician in order for the statute to impose the significant sanctions its operation imposes." The Board of Medical Examiners determined that it would maintain the information provided by Deborah as confidential without public disclosure and without change to petitioner's public profile.

Despite this, Deborah continued to falsely advise other health care entities and physicians that Petitioner had resigned while under "review" and "upon being made aware" of the purported review. So petitioner continued her lawsuit against her former employer for defamation. Petitioner alleged that Respondent's actions violated Petitioner's rights under both state and federal law regulating "peer reviews" of physicians. Petitioner charged that no "review" was ever conducted by Respondent and that Respondent and its agents made their alleged report and subsequent reports to other health care providers not per state and federal law but maliciously and in bad-faith – to damage Petitioner's reputation and hinder her from competing with Respondent in the marketplace.

Petitioner stressed that "review" is a term governed by the federal HCQIA statute. Respondent's claimed "report" about Petitioner did not meet the federal standard under HCQIA, nor did Deborah comply with any of HCQIA's notice and due process requirements. Respondent made an end run around the federal law by

concocting a review that had never actually occurred and was propagated for malicious, profit-driven purpose -- not patient safety. Respondent tried to stimulate a negative decision against Petitioner by credentialing at each hospital to which Petitioner applied, in order to obtain a report to the National Practitioner Databank indirectly – achieving indirectly something that HCQIA precluded Respondent from doing directly. Even if Respondent had conducted a legitimate "professional review" with notice and due process to Petitioner, Petitioner could readily have defended herself from the false accusations about her patient care because of the notice and hearing that HCQIA mandates be afforded to the affected physician. Petitioner was not given this opportunity because there was no legitimate, good faith review of her patient care conducted in the first place. Deborah concocted the "review" as a vehicle to damage Petitioner's reputation as she left for a competing provider.[1]

The state court decision below

The issue in the state court arose at the summary judgment stage. There was no question that Deborah had made the statements about plaintiff, and that a jury could find the statements capable of a defamatory meaning. And it was undisputed that Deborah did not comply with the federal HCQIA law. But Deborah claimed that it was immune as a matter of *state* law

[1] Physicians rely upon their reputations to make a living. Any "blacklisting" through reporting about a physician's patient care – whether the report is true or not – has the grave potential to shut the physician out of a network of patients, of credentialing within a hospital, or by managed care, or Medicare.

under New Jersey's Cullen Act, N.J.S.A. 26:2H-12.2b and -12.2c. Deborah argued that it was immune because the Act requires a "health care entity" to notify the Board and inquiring providers whether the entity was "reviewing" the departing employee's patient care at the time of resignation. Even though Deborah's actions did not constitute a "professional review action" as defined by the federal HCQIA statute, Deborah claimed it made the reports and provided the information about plaintiff per its duty under the state Cullen Act and was immune from plaintiff's defamation claims under this state law.

The state courts agreed, granting summary judgment for Deborah and ruling that Deborah was immune as a matter of law under New Jersey's Cullen Act. The trial (chancery) court, citing the state Cullen Act, ruled, "The court rejects plaintiff's contention that she was not under review when she resigned. Here, it is clear that Deborah undertook to review p1aintiff's practices and patient care" – despite that Deborah's claimed review did not constitute a "professional review action" as defined by the federal HCQIA statute. The chancery court said that plaintiff was not "entitled to notice of the hospital's reporting under the Cullen Act or the Health Care Quality Improvement Act" – despite the notice and due process protections afforded to affected physicians by the federal HCQIA statute. The state appellate court affirmed (and the Supreme Court denied review), ruling, "Deborah's actions leading to the review of [plaintiff's] patient care were objectively reasonable and entitles defendants to the immunity provided by the Cullen Act." App. 24. The "McKeever Memo [which Deborah sent to inquiring providers] and McGrath's response [telling providers, falsely, that

plaintiff resigned upon being told she was under review] were good faith attempts at compliance with those statutory requirements," the state appeals court said. The state Cullen Act insulated Deborah from plaintiff's lawsuit as a matter of law, the appeals court ruled, despite Deborah's failure to comply with the reasonable basis, notice, due process, and related requirements for such reports mandated by the federal HCQIA law. App. 1-25.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition to determine the extent to which the federal HCQIA statute preempts state laws, like New Jersey's Cullen Act, that address a hospital's immunity for reports made about a doctor's alleged patient care. There is no clear precedent on the extent to which HCQIA preempts state laws addressing a hospital's immunity in making such reports, see, e.g.,

- Hoffman v. Spring Valley Hosp. & Med. Ctr., 126 Nev. 720, 367 P.3d 779 (2010) ("we conclude that the district court erred by dismissing Hoffman's entire lawsuit because the HCQIA does not preempt his cause of action for rescission.")

- Diaz v. Provena Hosps., 352 Ill. App. 3d 1165, 1172, 817 N.E.2d 206 (2004) ("Dr. Diaz's decision not to renew her privileges triggered the Hospital's reporting obligation under the HCQIA. Because it was impossible for the Hospital to comply with the HCQIA without being fined and held in contempt of court, the doctrine of implied preemption applies. *** We

also hold that the trial court's orders requiring the Hospital to submit a void report would impede the accomplishment of Congress's objectives in enacting the HCQIA. The HCQIA is intended to protect patients, not doctors.")

- Doe v. Cmty. Med. Ctr., Inc., 353 Mont. 378, 388, 221 P.3d 651 (2009) ("we have not been presented with evidence of an express declaration in the HCQIA of its intent to preempt state law")

- Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236 (Fla. Dist. Ct. App. 2009) (HCQIA does not impliedly preempt Florida law governing disclosure of reports of adverse medical incidents)

- Compare DeKalb Med. Ctr., Inc. v. Obekpa, 315 Ga. App. 739, 740, 728 S.E.2d 265 (2012) (HCQIA does not preempt "Georgia's peer review statute [covering] claims for equitable relief"), with Wood v. Archbold Med. Ctr., Inc., 738 F. Supp. 2d 1298, 1373 (M.D. Ga. 2010) ("Georgia' peer review immunity statute, O.C.G.A. § 31–7–132, was preempted, and the issue of immunity would be determined under the framework of HCQIA")

- Parks v. Alabama State Bd. of Pharmacy, No. 2160988, 2017 WL 4856283, at *7 (Ala. Civ. App. Oct. 27, 2017) ("circuit court's order impedes the accomplishment of Congress's objectives in enacting the HCQIA and the legislative scheme Congress developed to carry out those objectives. Therefore, we agree with the Illinois appellate

court's rationale in *Diaz* that, in the face of such a conflict, federal law preempts the circuit court's order.")

- Zamaniam v. Christian Health Ministry, No. CIV. A. 94-1781, 1994 WL 396179, at *2 (E.D. La. July 22, 1994) (""express language of the HCQIA does not clearly manifest Congressional intent to 'completely preempt' state law.")

The Court should clarify HCQIA's preemptive reach. The New Jersey court below ruled that Deborah was immune as a matter of state law from both injunctive and monetary relief sought by plaintiff even though Deborah admittedly did not comply with the federal HCQIA statute defining a "professional review action." Does HCQIA permit this? The HCQIA statute, 42 U.S.C.A. § 11115 (a), provides that HCQIA's provisions do not "preempt[] or overrid[e] any State law which provides incentives, immunities, or protection … that is in addition to or greater than that provided by" HCQIA, but the statute specifies, "for those engaged in a professional review action…" Deborah was not engaged in a "professional review action" as HCQIA defines it, because, per Section § 11112 of HCQIA, Deborah's actions were not taken "in the reasonable belief that the action was in the furtherance of quality health care," "after a reasonable effort to obtain the facts of the matter, "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances," and "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts…" Nor did Deborah provide the notice and due process to plaintiff

(the affected physician) that HCQIA mandates. Yet the state court granted immunity to Deborah as a matter of *state* law. Does HCQIA's prescription of a "professional review action" preempt such state court rulings because they infringe the due process and related rights afforded to affected physicians under the superior federal law? Is a state court permitted to apply a state statute to immunize reporting entities even though they were not "engaged in a professional review action" as HCQIA defines it? See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); 28 U.S.C.A. § 1257(a) (providing for Supreme Court review of final state court decisions "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the … laws of the United States").

Lower courts have applied HCQIA with the singular concept that "HCQIA is intended to protect patients, not doctors." See, e.g., Hoffman, supra, 367 P.3d 779. But Congress also intended to protect good doctors and nurses from being harmed by a hospital's misuse of such reporting requirements. This is reflected in HCQIA's strict requirements of notice and due process that must be afforded to affected physicians, and HCQIA's definition of what constitutes a legitimate "professional review action" (one with a reasonable basis, etc.) The Court should clarify that this, too, is an interest that HCQIA protects, and that state laws, like New Jersey's Cullen Act, cannot be applied in a manner that eviscerates the protections that HCQIA affords to good doctors and nurses in our Country. Cf. Johnson v. Nyack Hosp., 169 F.R.D. 550 (S.D.N.Y. 1996) (Congress, in enacting the HCQIA "not only considered the importance of maintaining the

confidentiality of the peer review process, but took the action it believed would best balance protecting confidentiality with other important interests.") Courts have applied HCQIA's requirements to protect an affected physician's rights in this regard, ruling that the professional review action must – as the statute requires -- be taken "in the reasonable belief that the action was in the furtherance of quality health care," after a reasonable effort to obtain the facts of the matter, and after adequate notice and hearing procedures are afforded to the physician. Reyes v. Wilson Mem'l Hosp., 102 F. Supp. 2d 798 (S.D. Ohio 1998); see Brader v. Allegheny Gen. Hosp., 64 F.3d 869 (3d Cir. 1995) (if physician's allegations of failure of hospital to provide him with fair hearing procedures were true, hospital not entitled to immunity under HCQIA); Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324 (10th Cir. 1996) (physician sufficiently demonstrated that peer review panel's review was not taken after reasonable effort to obtain facts to establish that hospital and peer review participants were not immune under HCQIA from defamation); Simpkins v. Shalala, 999 F. Supp. 106 (D.D.C. 1998) (review initiated by 2 colleagues, not health care entity itself, negated immunity under HCQIA); Peper v. St. Mary's Hosp. & Med. Ctr., 207 P.3d 881, 888–89 (Colo. App. 2008) (hospital performed secret review of surgeon's 19 cases then revoked privileges; hospital and officers not entitled to immunity under HCQIA because they revoked surgeon's privileges without providing notice that his conduct was under review).

The Court should grant this Petition to clarify whether a state law may immunize a hospital, like Deborah, who completely disregarded HCQIA's federal

requirements and, a jury can find, reported false information not for patient safety but for profit. The New Jersey court's ruling below is repugnant to the superior federal law in this regard. Consider the following HCQIA legislative history:

> Section 101. Professional Review
>
> Subsection (a) provides limited, but essential, protection from liability for persons conducting professional review actions based on the competence or professional conduct of individual physicians.... The Committee feels that the purposes of this bill require protection for persons engaging in professional review. Under current state law, most professional review activities are protected by immunity and confidentiality provisions. A small but growing number of recent federal anti-trust actions, however, have been used to override these protections. Because the reporting system required under this legislation will most likely increase the volume of such suits, the Committee feels that some immunity for the peer review process is necessary**. Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection**. **As redrafted, the bill now provides protection only from damages in private actions, and**

> **only for proper peer review, as defined in the bill.**

[H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, 8-9 (1986) (emphasis added)]

This language shows that Congress carefully limited the amount of protection to be accorded the peer review process to account for competing interests. By regulating what a legitimate, good-faith peer review is and what an employer can do with such information, HCQIA both encourages review and oversight of physicians who are suspected of being negligent in their patient care, but at the same time protects physicians from ill-motivated actions by their employer under the guise of concern for patient care. While HCQIA finds "an overriding need to provide incentive and protection for physicians engaging in effective professional peer review," 42 U.S.C. § 11101(5), HCQIA extends its protection of immunity only to those who comply with the strict requirements of the federal law per 42 U.S.C.A. § 11112 of HCQIA. By immunizing Deborah under the state Cullen Act as a matter of law, and granting Deborah summary judgment on this ground, the New Jersey courts have undercut the good-faith basis and due process rights that HCQIA affords to affected doctors, nurses, and other health care professionals. The New Jersey court's application of the state Cullen Act is repugnant to the language, purpose, and rights provided by HCQIA and, therefore, is at least impliedly preempted because it "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the supreme federal law. Gade v. Nat'l Solid Wastes

Mgmt. Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Michael Confusione
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550; (888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Petitioner

Dated: June 25, 2018