No. 18-1

# 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 Superior Court Of New Jersey, Appellate Division**

## BRIEF IN OPPOSITION OF RESPONDENTS DEBORAH HEART AND LUNG CENTER; LYNN MCGRATH, M.D.; AND JOHN ERNST


WILLIAM M. HONAN
*Counsel of Record*
JACOB S. PERSKIE
*On the Brief*
FOX ROTHSCHILD LLP
1301 Atlantic Avenue
Suite 400
Atlantic City, NJ 08401
T: (609) 348-4515
F: (609) 348-6834
bhonan@foxrothschild.com
jperskie@foxrothschild.com

*Counsel for Respondents Deborah Heart and Lung Center; Lynn McGrath, M.D.; and John Ernst*



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## 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?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Deborah Heart and Lung Center hereby states that it is a New Jersey not-for-profit 501(c)(3) corporation and as such, has no parent corporation nor is there any publicly held corporation that holds ten percent or more of its stock.

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## STATEMENT OF THE CASE

When Petitioner resigned her employment with Respondent, Deborah Heart and Lung Center ("Deborah"), while under investigation for performing medically unnecessary cardiac catheterizations, Deborah complied with the New Jersey Health Care Professional Responsibility Act ("Cullen Act") and reported that resignation to the New Jersey Division of Consumer Affairs ("Division"). Pet. App. 3, 5-8; *N.J.S.A.* 26:2H-12.2b(a)(3).

When Petitioner sued Deborah for injunctive relief, malicious prosecution, defamation, and tortious interference with prospective economic advantage, the trial court dismissed Petitioner's claims on summary judgment because the Cullen Act provides immunity for required reportings made in good faith and without malice.[1] Pet. App. 22-23. In so doing, the trial court found that:

- Deborah's investigation was "objectively reasonable," Pet. App. 21;
- Petitioner resigned during a review of her clinical practices, Pet. App. 22;
- the Cullen Act required Deborah to report that resignation whether or not Petitioner was aware of the review at the time of her resignation, Pet. App. 22;
- Petitioner offered no evidence of malice, Pet. App. 22; and,

[1] *N.J.S.A.* 26:2H-12.2b(g).

- the record reflected that Deborah recognized and neutralized the threat of mal-intent by engaging external reviewers.

Pet. App. 22-23. The intermediate appellate court ("Appellate Division") affirmed,[2] and the Supreme Court of New Jersey denied certification. Pet. App. 32.

Now, in an argument not raised below, Petitioner seeks a writ of certiorari to determine whether the HCQIA—a similar federal statute, on which Respondents did not rely for immunity below—preempts application of the Cullen Act here. It does not.

## REASONS FOR DENYING THE WRIT

As a threshold matter, the decision below was correct. The Cullen Act both requires the reporting and immunizes Deborah's conduct from suit. Unable to overcome those truths, Petitioner seeks a writ of certiorari to clarify a preemption question that does not exist. None of Petitioner's arguments have merit and the Court should deny the petition.

### I. The Decision Below Was Correct

The Appellate Division was correct to conclude that Deborah is immune from liability for damages alleged to arise from mandatory reporting and disclosure under the Cullen Act.

[2] Pet. App. 1a.

The Cullen Act requires a health care entity to notify the New Jersey Board of Medical Examiners when a physician resigns during review of their patient care or conduct adversely affecting patient care or safety. *N.J.S.A.* 26:2H-12b(a)(3). The Cullen Act requires the report whether or not the physician is aware of the review at the time of her resignation. *N.J.S.A.* 26:2H-12.2b(h). A health care entity that fails to make the required report is subject to penalties. *N.J.S.A.* 26:2H-12.2c(d); *N.J.S.A.* 26:2H-12.2b(f). Critical here, where the health care entity makes the report "in good faith and without malice," the entity will not be "liable for civil damages in any cause of action arising out of the provision or reporting of the information." *N.J.S.A.* 26:2H-12.2b(g); *N.J.S.A.* 26:2H-12.2c(c).

Applying the Cullen Act here, the Appellate Division was "satisfied that [Deborah] acted 'in good faith and without malice,' and [discerned] no reason to reverse the grant of summary judgment." Pet. App. 21. More particularly, the Appellate Division found that Deborah's actions leading to the review of Petitioner's patient care "were objectively reasonable," and that the Cullen Act did not require Deborah to disclose the review to Petitioner, but did require Deborah to report Petitioner's resignation or be subject to penalty. Pet. App. 22.

Moreover, because Plaintiff "failed to show actual malice" and because "Deborah acted with due care[,] . . . acknowledged that the accusations could have been motivated by personal animosity[,] and engaged an external reviewer to eliminate the possibility of a tainted

peer review" Deborah was "protected by . . . the immunity provided by the Cullen Act."[3] Pet. App. 22-23.

Separate and apart from her preemption argument, Petitioner asserts several false claims in respect of the proceedings below. First, Petitioner's claim that she was not "under any review of her patient care" during her employment at Deborah is false. Pet. Br. 8, 10, 11. As the Appellate Division found, in late 2007 and early 2008, Deborah initiated a review of Petitioner's patient care following reports of unnecessary cardiac catheterizations. Pet. App. 4-8, 22. Petitioner may have been unaware of the review at the time she resigned, but that does not mean that the review did not occur and was not ongoing at the time of her resignation.

Second, Petitioner's suggestion that a false reporting "has the grave potential to shut the physician out of a network of patients" or "credentialing within a hospital," ignores the Appellate Division's finding that no hospital denied Petitioner privileges, Petitioner was in good standing at another hospital at the time of the trial court decision, and Petitioner had no plans to seek credentials elsewhere in the near future. Pet. App. 9, 14.

Third, Petitioner's claim that it was "undisputed" that Deborah "did not comply with the federal HCQIA law" is a straw man. Pet. Br. 11. Deborah did not seek

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[3] Separately, the Court held that Deborah is immune from liability under the litigation privilege. Pet. App. 23-24.

immunity on the basis of the HCQIA and Deborah's compliance with the HCQIA is irrelevant.

Fourth, even if that were not the case, Petitioner's claim that Deborah denied her "the notice and hearing that HCQIA mandates" ignores the effect of Petitioner's resignation. Pet. Br. 11. Once Petitioner resigned she no longer held privileges at Deborah subject to any HCQIA "peer review action" or the notice and hearing rights the HCQIA provides in connection with the same.

## II. The HCQIA Does Not Preempt The Cullen Act, and There Is No Preemption Issue To "Clarify"

Petitioner's claim that "[t]here is no clear precedent on the extent to which HCQIA preempts state laws addressing a hospital's immunity" in connection with "reports made about a doctor's alleged patient care" is a red herring and Petitioner's preemption argument fails for any of several reasons.

Preemption doctrine is a product of the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme law of the land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. As a result, state law is "without effect" where it conflicts with federal law. *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L. Ed. 2d 576, 595 (1981).

Preemption comes in three flavors. "Express preemption" occurs when Congress declares its intention to preempt state law expressly. *Med. Soc. of State of N.Y. v. Cuomo*, 777 F. Supp. 1157, 1161 (S.D.N.Y. 1991) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977)). "Implied preemption" occurs where Congress impliedly precludes state regulation by "occupying the field" through the structure or objectives of federal law, such as where the scheme of federal regulation "is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 107 S. Ct. 683, 689, 93 L. Ed. 2d 613 (1987). "Conflict preemption" occurs in those areas where Congress has not completely displaced state regulation, but federal laws nonetheless preempt state law to the extent that "compliance with both federal and state regulations is a physical impossibility" or the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Med. Soc.*, 777 F. Supp. at 1161 (citations omitted).

Rather than argue that the HCQIA does, or should, or should not preempt state law, Petitioner claims that there is confusion as to when the HCQIA preempts state law like the Cullen Act. In truth, the answer to that question is clear and there is no need for clarification.

First, the HCQIA does not expressly preempt state law governing immunity for reports about a

physician's quality of care. We know this because Congress told us so:

> nothing in this subchapter shall be construed 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. § 11115.

The Cullen Act provides for immunity "in addition to or greater" than that available under the HCQIA. By its terms, the immunity provisions of the HCQIA are limited to participation in "professional review actions," 42 U.S.C. 11111, "based on the competence or professional conduct of an individual physician . . . and which affects (or may affect) adversely the clinical privileges, or membership in a professional society." 42 U.S.C. § 11151(9).

Cullen Act immunity, on the other hand, extends beyond review actions affecting privileges or membership in a professional society, and attaches where a health care entity makes a required reporting—like here—following a resignation in the face of any review of a professional's patient care or whether that professional's "conduct demonstrates an impairment or incompetence or is unprofessional" as it relates to "patient care or safety." *N.J.S.A.* 26:2H-12.2b(a)(3).

Stated differently, the HCQIA provides immunity to those who participate in or provide information to a professional review body in a professional review

action so long as the professional review action meets certain requirements relating to the reasonableness of the healthcare entity's belief in the basis for the professional review action, and the hospital provides certain process to the affected provider. 42 U.SC. § 11111(a)(1); 42 U.S.C. § 11112(a). The Cullen Act applies to the step before the initiation of a professional review action, and provides immunity from liability for any review of a professional's patient care or whether that professional's "conduct demonstrates an impairment or incompetence or is unprofessional" as it relates to "patient care or safety" conducted in good faith and without malice. *N.J.S.A.* 26:2H-12.2b(a)(3).

For the same reason, there is no basis to argue implied or field preemption because 42 U.S.C. § 11115 makes clear that Congress anticipated the existence of "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."

This leaves only conflict preemption, and Petitioner's authority demonstrates that state and federal courts are adept at identifying those circumstances where conflict preemption arises.

For example, in *Diaz v. Provena Hosps.*, 352 Ill. App. 3d 1165, 1172, 817 N.E.2d 206 (2004), the Appellate Court of Illinois addressed a trial court order holding the defendant hospital in contempt for failing to retract a report to the National Practitioner Data Bank ("NPDB"), which the HCQIA required when the

plaintiff physician voluntarily surrendered her privileges during a peer review action. *Id.* at 208-10. Because the hospital was unable to satisfy the HCQIA without violating the lower court's order to retract that reporting, the Appellate Court of Illinois held that the HCQIA preempted the state trial court order. *Id.* at 213. The court in *Parks v. Alabama State Bd. of Pharmacy*, No. 2160988, 2017 WL 4856283 (Ala. Civ. App. Oct. 27, 2017) reached a similar conclusion for similar reasons.

In other cases, courts held that the HCQIA does not preempt state law for a multitude of reasons. *See Hoffman v. Spring Valley Hosp. & Med. Ctr.*, 126 Nev. 720, 367 P.3d 779 (2010) (HCQIA does not preempt state law claim for recission of settlement agreement regarding agreed-upon language for NPDB reporting); *Doe v. Cmty. Med. Ctr. Inc.*, 353 Mont. 378, 388, 221 P.3d 651 (2009) (HCQIA does not preempt claim for injunctive relief against NPDB reporting of summary suspension prior to completion of peer review action); *Columbia Hosp. Corp. of S. Broward v. Fain*, 16 So. 3d 236 (Fla. Dist. Ct. App. 2009) (HCQIA did not preempt state law governing discovery of self-critical analysis materials in medical malpractice action); *DeKalb Med. Ctr., Inc. v. Obekpa*, 315 Ga. App. 739, 740, 728 S.E.2d 265 (2012) (HCQIA does not preempt state law providing immunity from equitable claims arising from peer review activities); *Zamaniam v. Christian Health Ministry*, No. CIV A 94-1781, 1994 WL 396179 (E.D. La. July 22, 1994) (HCQIA does not preempt state law such that a defense to state law claims predicated on the HCQIA gives rise to federal question jurisdiction).

Synthesized, these cases stand for the proposition that the HCQIA does not expressly or impliedly preempt state law, but may preempt state law where compliance with both the HCQIA and state law is impossible. There is no rift in outcomes predicated on similar facts, there is no split in authority or among states or circuits, and there is no need for further clarification.[4]

## CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM M. HONAN
*Counsel of Record*
JACOB S. PERSKIE
*On the Brief*
FOX ROTHSCHILD LLP
1301 Atlantic Avenue
Suite 400
Atlantic City, NJ 08401
T: (609) 348-4515
F: (609) 348-6834
bhonan@foxrothschild.com
jperskie@foxrothschild.com

*Counsel for Respondents*
*Deborah Heart and Lung Center;*
*Lynn McGrath, M.D.; and John Ernst*

[4] *Wood v. Archbold Med. Ctr., Inc.*, 738 F. Supp. 2d 1298, 1373 (M.D. Ga. 2010) does not stand for the proposition cited. The case provides only that pursuant to a prior order, and "limited to the circumstances of this case" the HCQIA preempted some aspect of Georgia's peer review statute.