No. 21-1597

# In The Supreme Court of the United States

SEYED MOHSEN SHARIFI TAKIEH,

*Petitioner,*

v.

BANNER HEALTH, JANICE DINNER, MICHAEL O'CONNOR, M.D., PETER FINE, CHRISTOPHER VOLK, MICHAEL O'MEARA, M.D., AND STEVEN MAXFIELD, M.D.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION


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## ISSUES PRESENTED FOR REVIEW

I. Did the Ninth Circuit Court of Appeals err by concluding that Petitioner failed to plausibly allege but-for causation under *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1019 (2020)?

II. Did the Court of Appeals err in concluding that Petitioner's First Amended Complaint incorporated by reference the Arizona Superior Court decision upholding the termination of his medical staff privileges on non-discriminatory grounds, namely patient care issues, his alteration of medical records, and his disruptive behavior?

III. Did the Court of Appeals err in concluding that the allegations regarding disparate treatment of Petitioner as compared to non-Arab physicians failed to establish that race was a but-for cause of the termination of privileges because the non-Arab physicians were not "similarly situated?"

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Banner Health hereby states that it is an Arizona nonprofit corporation and as such has no parent corporation, nor is there any publicly held corporation that holds ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued



STATUTES

TABLE OF AUTHORITIES—Continued

## STATEMENT OF THE CASE

### I. Termination of Privileges at BBMC.

Petitioner Sharifi had medical staff membership and clinical privileges to practice at Banner Baywood Medical Center ("BBMC"), part of Banner Health. In March 2017, the Medical Executive Committee ("MEC") at BBMC initiated a peer review investigation of several of Sharifi's cases where he practiced interventional cardiology using thrombolytics. [ER-67 ¶¶ 233–235] The review was conducted pursuant to state statutes mandating and governing peer review investigations of medical staff members (A.R.S. §§ 36-445, *et seq*.). [2-BannerSER-3] Among other steps in the process, the MEC appointed external reviewers to investigate certain of the cases. [ER-74 ¶ 297] Sharifi sent correspondence to MEC members that caused Defendant O'Meara, in his role as President of the Medical Staff, to warn Sharifi that making harassing allegations and threatening retaliation against members of the MEC could itself result in corrective action. [ER-68–69, ER-82 ¶¶ 251–252, 364]

In August 2017, based on critical reports received by the outside reviewers, the MEC proposed that Sharifi voluntarily agree to obtain pre-approval from the medical staff before using thrombolytics. [ER-77–78 ¶¶ 321–325] Sharifi refused, and so the MEC imposed pre-approval as a corrective action. [ER-78–79 ¶¶ 326, 330–331, 338] Pursuant to the BBMC Medical Staff Bylaws ("Bylaws"), Sharifi then requested a Fair Hearing to challenge the pre-approval requirement. [ER-43

¶ 339] A hearing was set for December 2017, but Sharifi objected to the Hearing Panel because its members were appointed by the Chief of Staff, who participated in the peer review process, allegedly in violation of the 2015 Bylaws then in effect. [ER-79–80 ¶¶ 340–343] The parties could not resolve how members of the Hearing Panel should be appointed. [ER-80 ¶¶ 344–345] The MEC proposed an amendment to resolve the ambiguity in the Bylaws, and the BBMC Medical Staff voted to adopt the amendment, which applied to the medical staff as a whole, not just Sharifi. [ER-80–81 ¶¶ 347–348] Pursuant to the amended Bylaws, three physicians were appointed to the Hearing Panel and the hearing was set for June 2018.

On June 15, 2018, the MEC notified Sharifi that it recommended revocation of his medical staff membership and privileges based on three independent grounds: 1) patient care deficits; 2) improper alteration of medical records; and 3) abusive and bullying conduct. [2-BannerSER-4] The Fair Hearing was held on September 7–8, 2018 and included testimony from over a dozen witnesses and 85 exhibits. [2-BannerSER-6–7] The Hearing Panel (three doctors who had not participated in the MEC recommendation and were not economic competitors of Sharifi) recommended revocation, finding each of the three grounds independently supported termination. [2-BannerSER-8–9] Sharifi appealed to the ARC, comprised of one physician and two non-physician members appointed pursuant to the Bylaws. After considering the written record, briefing, and oral argument from Sharifi, the ARC also

recommended termination. [2-BannerSER-4–5] On December 8, 2018, the Banner Board accepted that recommendation and terminated Sharifi's privileges at BBMC. [ER-81 ¶¶ 351–353]

## II. Sharifi's State Court Lawsuit Challenging Termination of Privileges.

Sharifi challenged the termination of his privileges by filing suit against Banner in Arizona Superior Court (CV2017-055848). He asserted claims for breach of contract, violations of fair procedure, declaratory relief, and judicial review under A.R.S. § 36-445.02(B). [*Id.*] He also filed a special action regarding his request for a temporary restraining order, over which the Court of Appeals declined to exercise jurisdiction (No. 1 CA-SA 19-0005). The Superior Court granted Banner's motion to dismiss all counts except for the judicial review claim based on A.R.S. § 36-445.02(B) and decided in favor of Banner on the judicial review claim as a matter of law. [2-BannerSER-3–15] The Court later ruled that substantial evidence supported the decision to terminate Sharifi's privileges at BBMC on each of the three independent grounds and that there were no procedural errors during the Fair Hearing (the "Ruling"). On Sharifi's appeal, the Arizona Court of Appeals affirmed the Ruling. *Sharifi v. Banner Health*, No. 1 CA-CV 20-0110, 2021 WL 1921831, at *1 (Ariz. Ct. App. May 13, 2021).

## III. Sharifi's Second State Court Lawsuit Targeting Individual Defendants.

In February 2018, Sharifi filed a second action in Superior Court (CV2018-001473), this time asserting tort claims against Dinner, O'Connor, O'Meara, and Del Giorno for interference with contract, defamation, and conspiracy based on the peer review investigation and termination of privileges. The court dismissed most of Sharifi's claims and later entered summary judgment against Sharifi on his claims against Dinner and Del Giorno for defamation. [2-BannerSER-75–78] The Court also ordered Sharifi to pay Dinner's attorneys' fees as a sanction under A.R.S. § 12-349 for filing the defamation claim against her without substantial justification. After losing in all of those forums, Sharifi filed this case.

## IV. Sharifi's District Court Action Alleging Racial Discrimination.

Petitioner Sharifi filed this action in December 2019, alleging racial discrimination in violation of 42 U.S.C. § 1981 based on the termination of his medical staff membership and clinical privileges to practice at BBMC. [ER-173–174] He brought claims not only against Banner Health, but also its CEO, Senior Associate General Counsel, Chief Medical Officer, a member of the Board of Directors, the acting President of the Medical Staff, and other members of the medical staff. [ER-124–127] The initial complaint was dismissed for failure to meet the "but-for" causation test set out in *Comcast Corp. v. National Association of*

*African American-Owned Media*, 140 S. Ct. 1009 (2020), but Sharifi was granted leave to amend. [ER-121–122]

The First Amended Complaint ("FAC") parroted the *Comcast* causation standard but still lacked well-pled factual allegations sufficient to meet the standard. [ER-37–120] Sharifi's claim rested on issues that had been resolved against him in previous state court litigation, namely that the peer review investigations were without merit and that Banner Health had no valid reason to terminate privileges, violated its Bylaws, and deprived him of due process during the Fair Hearing. [*Id*.] The FAC referred extensively to the Ruling in the first state court lawsuit (No. CV2017-055848), as described above. [*Id*. ¶¶ 427–461] The FAC also offered various non-discriminatory reasons for the revocation of Sharifi's privileges, including that BBMC physicians resented Sharifi for obtaining more patient referrals and that Banner Health was retaliating against Sharifi for testifying against Banner Health in a medical malpractice lawsuit. [*Id.* ¶¶ 80, 148, 161, 202, 328, 354, 135, 143, 273, 354, 366, 367, 385]

Respondents argued that Sharifi's conclusory allegation that the termination would not have occurred but-for racial animus was implausible, given Sharifi's own allegations that there were other reasons for Respondents' alleged animus that had nothing to do with race and the allegations related to the Ruling in state court that Banner had three legitimate non-discriminatory grounds to terminate his privileges. Respondents argued that Sharifi's own allegations

combined with the state court Ruling rendered any inference of racial discrimination based on the FAC's allegations implausible, particularly in light of the but-for causation standard.

The District Court concluded that Sharifi had failed to plausibly allege that his race was a but-for cause of Banner revoking his privileges. [App. 2 17a–47a] The District Court took judicial notice of the Ruling. [App. 2 16a] The District Court reasoned that Sharifi's claims were implausible because the FAC alleged race-neutral reasons for the revocation of his privileges, and because the state court's prior determination that substantial evidence supported Banner's decision to revoke Sharifi's privileges on grounds of patient care concerns, alteration of medical records, and disruptive behavior rendered his § 1981 claims facially implausible. [App. 2 16a–22a]

The District Court also concluded that the Ruling was entitled to preclusive effect on the issue of whether the three stated reasons for Banner's decision were supported by substantial evidence. [App. 2 22a–42a] The District Court reasoned that if Banner would have revoked Sharifi's privileges due to patient care concerns, his alteration of medical records, or disruptive behavior, then his race could not be a but-for cause of Banner's decision. [App. 2 42a] The court's conclusion as to issue preclusion did not bar Sharifi from attempting to allege facts showing racial discrimination was the but-for cause of Banner's decision. [App. 2 39a–42a] However, he was unable to meet burden of doing so. [App. 2 42a–47a]

The District Court concluded that Sharifi failed to allege factual allegations as to similarly situated physicians plausibly suggesting that Sharifi's race was a but-for cause of Banner Health's decision. [App. 2 42a–44a] Sharifi alleged nothing about the procedures the other physicians performed, how their conduct compared to his, or how they were treated more favorably in peer review. [*Id*.] Sharifi also failed to make factual allegations pertaining to discriminatory remarks plausibly suggesting that race was the but-for cause of Banner's decision or any of the Defendants' actions. [*Id*.] His claim was based on comments having nothing to do with race made by persons other than the decision makers on the Fair Hearing Panel, the Appellate Review Committee ("ARC"), or the Banner Board of Directors who revoked his hospital privileges. [*Id*.] Although there was a "narrow pathway" for Sharifi to state a claim for racial discrimination, the factual allegations in the FAC were insufficient to do so.

## V. The Court of Appeals' Memorandum Disposition Affirming Dismissal of All Claims.

In a memorandum decision dated February 16, 2022, the Ninth Circuit Court of Appeals affirmed the District Court's decision that Sharifi failed to plausibly allege that race was a but-for cause of Banner's decision to terminate his privileges. First, the court concluded that the district court did not abuse its discretion by taking judicial notice of the Ruling upholding the termination of Sharifi's PSA, because the Ruling is a public record whose accuracy cannot be

reasonably questioned. [App. 1 3a ¶ 2 (citing *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings . . . ").] The court concluded that the Ruling was not entitled to preclusive effect under Arizona law. However, because Sharifi incorporated the Arizona Superior Court's decision into the FAC by referring to it extensively, the decision was relevant to the determination of whether Sharifi's claims are plausible, and any error by the district court regarding the ruling's preclusive effect was "of no consequence." [*Id.* ¶ 3] The Arizona Superior Court's decision articulated three non-discriminatory grounds for the termination of Sharifi's privileges: patient care issues, alteration of medical records, and disruptive behavior. The court concluded that these non-discriminatory reasons render the allegation that race was the but-for cause of the termination of Sharifi's PSA implausible. [*Id.* ¶ 4 (citing *Orellana v. Mayorkas*, 6 F.4th 1034, 1043 (9th Cir. 2021) (observing that "the complaint itself undermines [plaintiff's] theory of the case and renders it implausible")).]

In addition, the Court concluded that the allegations regarding disparate treatment of Sharifi as compared to non-Arab physicians fail to establish that race was a but-for cause of the revocation of Sharifi's PSA because the non-Arab physicians were not "similarly situated" to Sharifi, because none of them generated patient care issues, altered medical records, *and* exhibited disruptive behavior. [App. 1 4a ¶ 5 (citing *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641–642 (9th Cir.

2004), as amended (concluding that the plaintiff's colleagues were not similarly situated to him because one was not "involved in the same type of offense" and the other did not "engage in problematic conduct of comparable seriousness")).]

## ARGUMENT

This Court's Rule 10 advises that a "writ of certiorari is not a matter of right, but of judicial discretion." Rule 10 provides that in determining whether to grant a petition, the Court may consider circumstances involving conflicts between decisions of the federal appellate courts on the same important matter, conflicts between the federal appellate courts and state courts of last resort on an important question of federal law, a departure from the accepted and usual course of judicial proceedings, or an important question of federal law that has not been, but should be, settled by this Court. None of those circumstances are raised in the Petition.

Rule 10 also advises that a petition is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Petitioner argues that the District Court of Arizona and the Ninth Circuit Court of Appeals misapplied the law when determining that he failed to state a claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure. That is not a

compelling reason to grant his petition. Furthermore, there was no misapplication of the law in this case.

Sharifi argues that the Petition should be granted because lower courts "need guidance" on how to apply the pleading standards in *Twombly* and *Iqbal* and "struggle with the application of the but-for causation standard in this context—especially where the court is called upon to juggle competing explanations and determine the proper weight to give the various versions. . . ." [Pet. at 21–22] But neither the District Court nor the Court of Appeals weighed Sharifi's allegations against any "competing explanations" provided by the Respondents or otherwise struggled to properly apply the pleading standards in *Twombly* and *Iqbal*—Sharifi is just unhappy with the outcome of that analysis.

Sharifi argues that the courts below improperly weighed the "veracity of Banner's allegations of 'patient care issues, altered medical records, and exhibited disruptive behavior.'" [Pet. at 20] But those were not Respondent Banner's allegations—they were Sharifi's own allegations as described in his own complaint. Sharifi even devoted multiple pages of the FAC to a discussion of the state court Ruling, which found that substantial evidence supported the termination of his privileges on the grounds of patient care issues, altered medical records, and disruptive behavior.

Both the District Court and the Court of Appeals considered Sharifi's own allegations in the complaint, taking them as true and viewing them in the light most

favorable to him, and concluded that they undermined his claim and rendered the but-for causation element implausible. There is hardly a debate among lower courts as to whether a plaintiff's own allegations may undermine the plausibility of his or her claim, and there is no inconsistency or tension between the but-for causation standard set forth in *Comcast* and the pleading standards set forth in *Twombly* and *Iqbal*.

## I. The District Court properly considered Petitioner's allegations related to the Superior Court's Ruling.

When ruling on a Rule 12(b)(6) motion to dismiss, a district court may consider documents incorporated by reference in the complaint without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–908 (9th Cir. 2003). "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Id*. at 908. "The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Id*. The FAC referred extensively to the Ruling, in which the state court concluded that substantial evidence supported the findings that Banner Health terminated privileges based on patient care concerns, alteration of medical records, and disruptive behavior. [ER-91–96,

FAC ¶¶ 427–461] Petitioner devoted several pages and over thirty paragraphs in the FAC to a discussion of the Ruling, which was later upheld on appeal. The District Court properly treated the Ruling as part of the complaint for purposes of analyzing the legal sufficiency of that pleading.

Alternatively, the District Court properly took judicial notice of the Ruling. *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (a court "may take notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue"); *Reyn's Pasta Bella, LLC v. Visa USA, Inc*., 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings. . . ."). The Ninth Circuit correctly concluded that the district court did not abuse its discretion by taking judicial notice of the Arizona Superior Court's Ruling because it is a public record whose accuracy cannot be reasonably questioned.

## II. Petitioner failed to plausibly allege but-for causation under *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009 (2020).

Petitioner argues that the District Court improperly resolved disputed questions of material fact by considering the Ruling, as incorporated in the FAC. But Petitioner's own factual allegations contradicted his conclusory assertion that his privileges would not have been terminated but-for his race. The District Court did not resolve any disputed questions of fact by

taking into consideration the Ruling and all of the allegations in the FAC.

### A. Standard of Review.

The Court reviews de novo the district court's order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Faulkner v. ADT Sec. Servs., Inc*., 706 F.3d 1017, 1019 (9th Cir. 2013). All well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party. *Id*. "To survive a motion to dismiss, a complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although well-pleaded factual allegations are taken as true and construed in the light most favorable to the plaintiff, the court should not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

### B. Elements of a Section 1981 Claim.

Section 1981 "guarantees 'all persons' the same right as white citizens to 'make and enforce contracts.'"

*Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir. 2003) (quoting 42 U.S.C. § 1981(a)). Section 1981 applies only to claims of intentional, "purposeful," discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982). There are two ways to demonstrate racial discrimination under Section 1981: provide evidence of actual discrimination or satisfy the four-part test for disparate treatment. *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). To satisfy the disparate treatment test, a plaintiff must show that: (1) he belongs to a protected class; (2) he was qualified for his position; (3) he was subject to an adverse employment action; and (4) "similarly situated individuals outside [his] protected class were treated more favorably." *Bastidas v. Good Samaritan Hosp. LP*, 774 F. App'x 361, 363 (9th Cir. 2019) (quotation omitted).

### C. The District Court did not err by concluding that the FAC alleges multiple race-neutral reasons for the revocation of Sharifi's privileges, which renders his claims implausible.

In addition to the three race-neutral reasons for the termination of privileges discussed in the Ruling, the District Court concluded that Sharifi alleged four more separate and distinct race-neutral reasons for the alleged adverse action. [ER-12–14] Specifically, Sharifi alleged that Banner revoked his privileges, at least in part, because he testified against Banner in a wrongful death case; that other members of the

medical staff were motivated by professional jealousy and competition; that O'Connor was motivated by Sharifi's complaint about him to Banner's Chief Clinical Officer; and that Dinner was motivated by Sharifi's lawsuit and bar complaint against her. [ER-12–14] The District Court cited the specific paragraphs in the FAC supporting the "reasonable inference . . . that Defendants were motivated, in part, by their previous encounters with Sharifi, not his race." [ER-14]

Sharifi fundamentally misunderstands the but-for causation standard set out in *Comcast*, which reversed the Ninth Circuit's application of the "motivating factor" test for causation in a § 1981 racial discrimination claim. *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020). "To prevail, a plaintiff must initially plead and ultimately prove that, but-for race, it would not have suffered the loss of a legally protected right." *Id*. at 1019. In other words, Sharifi's race was not a but-for cause of the adverse action if the factual allegations in the FAC show that his privileges would have been terminated anyway (in the absence of any racially discriminatory animus) based on any one of the four race-neutral reasons Sharifi alleges in the FAC, or any one of the three other race-neutral reasons that were held to be supported by substantial evidence in the Ruling.

The District Court cited two decisions applying the *Comcast* but-for standard in circumstances where the complaint itself identified independent non-discriminatory reasons for the alleged contractual impairment, rendering a § 1981 claim implausible. [App. 2 19a] In *Astre*

*v. McQuaid*, 804 F. App'x 665, 667 (9th Cir. 2020), the Ninth Circuit concluded that where a plaintiff alleged that she resigned from her job after her employer lost funding due to a lack of community support, her § 1981 claims were implausible because, considering that race-neutral explanation, her other allegations did not give rise to a plausible inference that alleged racially discriminatory actions caused the alleged impairment to the contractual relationship. In *Domino v. Kentucky Fried Chicken*, No. 19-CV-08449-HSG, 2020 WL 5847306, at *2 (N.D. Cal. Oct. 1, 2020), the court noted that *Comcast* had rejected the "motivating factor" test and applied a but-for standard: "Plaintiff must plead that racial discrimination was the but-for cause of being denied service at the restaurant. Because Sharifi alleges the employees were also motivated by previous, personal interactions with Plaintiff (complaints and refusal to purchase food), he fails to state a § 1981 claim."

Like in *Domino*, the FAC alleges that Respondents harbored animus against Sharifi based on their previous, personal interactions with him, including his prior testimony against Banner in a wrongful death case, professional jealousy and competition, and retaliation for Sharifi's complaints against O'Connor and Dinner, which all had nothing to do with his race. [ER-13, citing FAC ¶¶ 80, 135, 143, 148, 161, 202, 267, 273, 328, 354, 366–367, 386, Wilson Decl. ¶¶ 15 & 19, Rose Decl. ¶ 25] Considering Sharifi's own allegations of multiple race-neutral reasons why Banner revoked his privileges, Sharifi has failed to properly plead a facially

plausible claim that racial discrimination was the but-for cause of the termination of his clinical privileges.

The District Court did not weigh any evidence proffered by Respondents, as Sharifi contends. In fact, the court noted that "this case presents an unusual scenario" because the "FAC itself contains independent, non-discriminatory reasons for Banner's decision." [ER-26] The court concluded that Sharifi failed to state a claim for relief as to his prima facie case of racial discrimination because he failed to make a facially plausible showing that race was a but-for cause of the adverse action against him. [ER-26] Therefore, Sharifi's argument that the dismissal was based on the improper consideration of affirmative defenses at the pleading stage falls flat. Not only is it entirely proper for a district court to consider a document incorporated into the complaint or subject to judicial notice on a Rule 12(b)(6) motion to dismiss, it is also proper to consider whether the factual allegations in the complaint are sufficient to support a facially plausible claim for relief.

There is no inconsistency between the but-for causation standard required by *Comcast* and the pleading standards required by *Iqbal* and *Twombly*. The District Court properly considered Sharifi's own allegations of multiple non-discriminatory reasons for the alleged adverse action, as well as the alleged patient care concerns, alteration of medical records, and disruptive conduct, when determining whether he had plausibly factual allegations showing that but-for his race, his privileges would not have been terminated.

Petitioner also argues that the District Court erred by not taking into account his allegations related to the Arizona Medical Board's determination not to revoke Sharifi's license to practice medicine in Arizona. [Pet. at ii] The FAC alleged that the Board supposedly "determined that Sharifi had done nothing wrong" with respect to certain patient care issues. [ER-93, FAC ¶¶ 437–438] Even assuming this allegation would support an inference that Banner did not terminate his privileges based on those patient care issues, it says nothing about the multiple other separate and distinct alleged race-neutral reasons that Sharifi's privileges were terminated. Sharifi still alleged that his privileges were terminated because of his improper medical record alterations, disruptive behavior, and personal animus against him based on jealousy, competition, and race-neutral retaliation. The allegation that the Board "determined that Sharifi had done nothing wrong" does not show that it is facially plausible that his privileges would not have been terminated but-for his race.

### D. Petitioner failed to allege disparate treatment because the non-Arab physicians he identified were not "similarly situated."

The District Court concluded that the FAC's allegations that five non-Arab physicians were treated more favorably than Sharifi because they were not reported to the Arizona Medical Board or the National Practitioner's Databank did not plausibly suggest that

his race was the but-for cause of Banner's decision to terminate privileges. [App. 2 42a-44a] The court correctly noted that Sharifi's § 1981 claims are not premised on any report to the AMB or the NPDB, and that the FAC did not provide any information about whether the identified physicians were subject to peer review or whether their privileges were suspended or revoked. [*Id*.] The court also correctly observed that none of the identified physicians was alleged to have presented all three concerns that supported Banner's decision to revoke privileges. [*Id*.] And the court correctly noted that Sharifi's conclusory assertion that the identified physicians were similarly situated was not supported by any factual allegations stating how the identified physicians were similarly situated or how the alleged facts established that similarity. [*Id*.]

The Ninth Circuit affirmed these conclusions, citing *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003), as amended (Jan. 2, 2004) for the proposition that employees are not "similarly situated" where they are "not involved in the same type of offense" and "did not engage in problematic conduct of comparable seriousness." [App. 1 4a] "[I]ndividuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez*, 349 F.3d at 641. The dissenting opinion in the Ninth Circuit memorandum decision, authored by the Hon. Cathy Ann Bencivengo (United States District Judge for the Southern District of California, sitting by designation), noted that the *Vasquez* decision considered the "similarly situated" analysis at the summary judgment stage, rather than

on a motion to dismiss. [App. 1 6a] However, the majority's Memorandum correctly noted that the dissent did not cite any authority that calls into question the proposition in *Vasquez* that individuals are not "similarly situated" if there were not "involved in the same type of offense" and did not "engage in problematic conduct of comparable seriousness." [App. 1 4a] Because Sharifi failed to allege facts showing that any of the identified individuals were involved in the same type of conduct and conduct of comparable seriousness, he failed to properly plead that they were similarly situated.

Sharifi argues that Respondents claimed at oral argument that the non-Arab doctors engaged in different or less culpable conduct, an assertion of fact that is outside the complaint. [Pet. at 20] But Respondents did not ask the court to consider any facts outside the complaint related to the physicians identified in the FAC; they only argued that the factual allegations in the FAC did not show that the identified non-Arab physicians had engaged in the same and equally culpable conduct as Sharifi. The District Court noted that Sharifi failed to offer any legal authority supporting his argument that the court should not consider the similarly situated element of his claim until after discovery. [App. 2 44a] Sharifi still fails to offer any legal authority to support that argument. When affirming the Rule 12(b)(6) dismissal in *Bastidas*, the Ninth Circuit considered whether the "similarly situated" element was properly pled, and it was appropriate for the District Court to do the same. *Bastidas*, 774 F. App'x at 364.

The District Court did not err in its analysis of the "similarly situated" element of Sharifi's claim. Sharifi did not allege facts plausibly showing that the physicians he identified were similarly situated because the FAC says nothing about the procedures they performed, how their conduct compared to his, or how they were treated more favorably in peer review. In *Bastidas*, the Ninth Circuit analyzed the similarly situated requirement in the context of termination of hospital privileges, and that decision is persuasive here. *Bastidas*, 774 F. App'x at 363 (citing *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)); *see also Campbell v. Knife River Corp.—Nw.*, 783 F. Supp. 2d 1137, 1152 (D. Or. 2011). The allegations of discrimination in *Bastidas* were insufficient, even though the plaintiff identified two white physicians who were purportedly treated more favorably following peer review, because he did not adequately allege that they were similarly situated. Bastidas did not sufficiently allege (i) that the white doctors had similar jobs (as there were different types of surgical procedures involved), (ii) that they engaged in conduct similar to his, or (iii) that the patient safety concerns for those physicians were similar to his. The factual allegations did not "'plausibly suggest an entitlement to relief' because they neither satisfy the disparate treatment standard nor support an inference that racial animus is the reason for the adverse employment action." 652 F.3d at 1216. In short, the failure to adequately allege that similarly situated persons were treated differently is fatal to a Section 1981 claim, regardless of whether plaintiff seeks to satisfy

the disparate treatment test or plead facts sufficient to establish a plausible inference of racial discrimination.

Sharifi alleges: "Defendants' investigations were initiated in the first instance on the basis of Sharifi's race, and then pursued relentlessly against him with the pre-determined result being the termination of his privileges, where other similarly situated non-Arabic physicians would never have been subjected to an investigation." [FAC ¶ 401] He identifies several physicians who allegedly practiced "incompetently" or caused the death of a patient (in his opinion) yet were not reported to the Arizona Medical Board ("AMB") or the National Practitioner's Database ("NPDB"). [FAC ¶¶ 419–425] But Sharifi does not and cannot allege that Banner took adverse action (suspension or termination) against any of the identified physicians and then failed to properly report such action to AMB or NPDB. He does not allege that these physicians engaged in conduct sufficiently similar to his own such that they should have been subjected to similar adverse action. Nor does he allege that they were treated differently than he was in peer review proceedings.

There are also critical differences between Sharifi and the identified physicians. For example, Sharifi alleges that "S.A.," "J.G.," and "A.A." practiced at Banner Heart Hospital, not BBMC, which has a different medical staff and a different MEC. [ER-90–91 FAC ¶¶ 419–421, 423, 425] Sharifi does not allege that these individuals had privileges or practiced at BBMC. If S.A., J.G., and A.A. had privileges at a different facility, then they are not similarly situated to Sharifi with respect

to BBMC's peer review process and the personnel who participated in that process. Sharifi alleges that patients died following treatment by "J.D.," "J.G.," and "A.A.," but he has not alleged facts showing that the procedures they performed are the same ones considered during Sharifi's peer review. Under *Bastidas*, these physicians are not similarly situated because they did not perform the same procedures. Sharifi has also not alleged facts showing that the patient safety concerns in the other cases are similar.

Furthermore, Sharifi does not allege that any of these physicians engaged in "bullying" conduct. The Superior Court's Ruling concluded that substantial evidence supported the Hearing Panel's finding that Sharifi engaged in unprofessional bullying [2-Banner SER-3–15]; Sharifi does not allege that any of the identified physicians engaged in similar conduct or that they did so without repercussions. Sharifi alleges that "L.A. [] extensively changed her preliminary consult report before it was signed and turned into a final report. She was not accused of having committed unprofessional conduct by performing 'improper alteration of records.'" [FAC ¶ 424] But Sharifi does not allege facts showing that this physician's amendments to the preliminary consult report were similar enough to constitute unethical behavior, as the Superior Court found with respect to Sharifi. The Hearing Panel and the Superior Court found that Sharifi's medical record alterations were a deliberate attempt to mislead reviewers and were unprofessional and unethical (2-Banner SER-3–15). There are no allegations showing that "L.A." engaged in similarly unprofessional conduct.

Sharifi does not allege that these physicians were treated differently with respect to the peer review process; he only alleges that they were not reported to the AMB and NPDB. Reporting of adverse actions to AMB and NPDB is required following final decisions to terminate privileges, but peer review is confidential, for important public policy reasons related to the improvement of patient care and safety. *See* A.R.S. §§ 36-445, 445.01, 445.02. Sharifi is merely speculating that these physicians were treated more favorably because there are no government reports of adverse action. Those assumptions are unwarranted and insufficient to show facial plausibility on the "similarly situated" element of his claim.

Sharifi acknowledges the legal standards applicable to the "similarly situated" element of his claim, but offers no analysis applying those legal standards to the facts alleged in the FAC. [Pet. at 19–20] Sharifi has not alleged facts showing that any of these other physicians identified in the FAC had privileges at BBMC, engaged in conduct that is sufficiently similar to his own to demonstrate that they are similarly situated, or were treated more favorably during peer review.

Finally, the Ninth Circuit Court of Appeals did not reach the question of whether the District Court erred by concluding that the FAC also failed to state claims for individual liability against each one of the individual defendants, and Sharifi has waived any argument that the court erred in its analysis of those issues. "Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief." *United States v. Kama*, 394

F.3d 1236, 1238 (9th Cir. 2005). Even if Sharifi had not waived the individual liability issues, the District Court's analysis was correct.

## CONCLUSION

The District Court did not misapply the law by dismissing Petitioner's claims for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and the Court of Appeals did not misapply the law by affirming the dismissal. Sharifi has had more than adequate opportunity to challenge the revocation of his privileges, and no issue worthy of certiorari is presented. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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