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VIA TRUEFILING

The Honorable Tani Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
Supreme Court of the State of California
250 McAllister Street
San Francisco, CA 94102-4797

Re: Sharp HealthCare et al. v. Superior Court, No. S270410
Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The California Hospital Association ("CHA")—representing over 400 hospitals and health systems in California—writes to urge the Court to grant Sharp HealthCare and Grossmont Hospital Corporation's ("Hospital Petitioners") Petition for Review of the summary denial of their Petition for Writ of Mandate by the Court of Appeal, filed on August 16, 2021 (the "Petition").

At its heart, the Petition raises a matter of critical importance to nearly every hospital in California: Is there a right to a jury trial in lawsuits brought by peer review-disciplined physician plaintiffs under Health and Safety Code section 1278.5 ("Section 1278.5")? This Court has held that, as a statutory matter, the answer is "No." Yet the trial court here—with notable hesitation—answered "Yes," forcing Petitioners Sharp HealthCare and Grossmont Hospital Corporation ("the Hospital Petitioners") to face an unauthorized jury trial that would allow laypeople to second-guess issues related to medical staff peer review.

If permitted to stand, the trial court's ruling will directly impact physician peer review, the primary means of protecting the public against dangerous, incompetent, and impaired physicians practicing in California hospitals. The medical staff peer review system is buckling under the weight of litigation. Because the law vigorously shields whistleblowers, dangerous physicians now consistently claim to be whistleblowers and are emboldened to file baseless suits against their medical staffs and hospitals in retaliation for peer review action.

The number of peer review-based Section 1278.5 claims filed against hospitals and medical staffs in the state has skyrocketed. These lawsuits are too often frivolous, but even a frivolous lawsuit can chill peer review. Physicians are already "reluctant to join peer review committees so as to avoid sitting in judgment of their peers." (*Kibler v. No. Inyo Cnty. Local Hosp. Dist.* (2006) 39 Cal.4th 192, 201.) Adding the threat of a jury trial only exacerbates this alarming reluctance, at the expense of public safety.

Jury trials introduce a significant element of uncertainty in litigation. When weighing whether to defend peer review actions, hospitals must consider not only the righteousness of their cause, but also the inherent risks introduced by lay jurors evaluating abstruse medical concepts and processes. Most lay jurors are ill-equipped to decide whether, for example, the peer review disciplinary decision was part of "legitimate peer review activities" exempt from liability pursuant to Section 1278.5 subdivision (l), or instead, improper retaliation that justifies the remedies provided (clearly authorized by statute to be imposed by a court).

To protect peer review, the Legislature unequivocally did not authorize jury trials for Section 1278.5 claims. So held this Court in *Shaw v. Superior Court* (2017) 2 Cal.5th 983. The only remaining question is whether, notwithstanding the Legislature's intent and the statute's plain language, the California Constitution requires a jury trial in these cases. For many of the same reasons elucidated in Shaw, there is no constitutional right to a jury trial for Section 1278.5 claims. This equitable cause of action did not exist at common law when the Constitution was adopted. Just as with alleged retaliation under Title VII of the Civil Rights Act and alleged retaliation under the Americans with Disabilities Act, there is no common law right to a jury trial for alleged retaliation under Section 1278.5. (See Petition, p. 62; *Alvarado v. Cajun Operating Co.* (9th Cir. 2009) 588 F.3d 1261, 1270 ["Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available."].)

The issue of Section 1278.5 jury trial rights should be decided now—in this case. If the Court defers deciding this crucial issue, other pre-trial and trial matters may render the issue moot and the question may remain unresolved. Such a result would create unnecessary uncertainty and risk for all hospitals. There will likely be no better opportunity to decide this issue than that presented by the present Petition.

On behalf of its over 400 hospitals and health systems members in California, representing 97% of the state's patient beds, CHA urges the Court to **grant the Hospital Petitioners' Petition** and decide this important issue on behalf of all hospitals, medical staffs, physicians, and patients throughout the state that participate in and benefit from hospital peer review.

Interests of Amici Curiae

CHA advocates for California's hospitals and health systems as they work to care for all Californians. CHA's goal is for every Californian to have equitable access to affordable, safe, high-quality, and medically necessary health care. To that end, CHA supports hospitals in improving health care quality, access, and coverage; promoting health care reform and integration of services; complying with laws and regulations; and maintaining the public trust in health care.

CHA hospitals and health systems furnish vital health care services to millions of our state's citizens. CHA supports hospitals in improving health care quality, access, and coverage; promoting health care reform and integration of services; complying with laws and regulations; and maintaining the public trust in healthcare.

CHA members have an ongoing interest in the appropriate, fair, and effective application of the medical staff peer review process, which is critical to insuring health care quality. CHA is gravely concerned that without clarity from the Court, physician plaintiffs will continue to use the uncertainty surrounding Section 1278.5 jury trial rights to discourage hospitals from defending peer review actions so critical to protecting patient safety. CHA therefore wishes to submit an amicus curiae brief to assist the Court in its analysis of these critical issues.

Peer Review Is Essential to Patient Protection

California's Legislature has mandated that every hospital ensure the competency of physicians on their medical staffs. (Code Regs., tit 22, § 70701, subd. (a)(7); *Rhee v. El Camino Hosp. Dist.* (1988) 201 Cal.App.3d 477, 501.) Hospital boards owe patients a fiduciary duty to ensure safe care. (*O'Byrne v. Santa Monica-UCLA Med. Center* (2001) 94 Cal.App.4th 797, 811.)

Peer review is the sine qua non of meeting this duty. (*Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1051.) In Business and Professions Code section 809, et seq., the Legislature carefully planned a step-by-step process for ensuring that patients are protected and physicians' due process rights are respected. When a physician fails to meet basic standards of competency, the peer review process provides the mechanism by which the hospital and its medical staff can rectify the situation in a manner that is fair to the physician, yet ultimately aimed at patient care and safety.

Disciplined Physicians Often Use Section 1278.5 to Retaliate Against Peer Reviewers

The Legislature passed Section 1278.5 to protect health care whistleblowers. But following recent changes in the law, Section 1278.5 has been increasingly employed by appropriately-disciplined physicians as a tool to retaliate against peer reviewers, medical staffs, and the hospitals that undertake costly but vitally necessary peer review activities.

The Legislature first added medical staff members to the scope of Section 1278.5's protections in 2007. Not long after, physicians began objecting to peer review proceedings by claiming to have made patient safety complaints. Under Section 1278.5, physicians could sue their medical staffs and hospitals purely for conducting peer review, by claiming it was retaliatory. (See, e.g., *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 818, 831 [alleged Section 1278.5 retaliatory act was peer review]; *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, 1282, review granted [same]; *Bonni v. St. Joseph Health System* (2021) 11

Cal.5th 995 [same].) Here too, Plaintiff sued Hospital Petitioners alleging that peer review counseling (requiring him to attend an anger management course) was supposedly retaliatory action under Section 1278.5. (1 WA, p. 337.) Moreover, according to Plaintiff, he voluntarily and preemptively resigned his privileges to avoid any potential "805 report," a peer review communication. (1 WA, pp. 343-344.)

Section 1278.5 contains several presumptions in favor of plaintiffs. For example, if the alleged retaliatory act (often peer review investigations or discipline) occurs within 120 days of when the physician claims to have complained about patient safety, the court will presume retaliatory intent. (Health & Saf. Code, § 1278.5(d)(1).) Plaintiffs use this presumption to their advantage. In *Bonni*, the physician was summarily suspended for almost causing a patient's death; after this discipline he claimed to have raised oral patient safety reports a few days earlier, entitling him (so he claims) to the presumption of retaliation.

Recent court decisions have made Section 1278.5 lawsuits even faster and easier for "sham whistleblowers" to pursue. *Fahlen v. Sutter Cent. Valley Hosp.* (2014) 58 Cal.4th 655 and *Armin* (2016), *supra*, held that plaintiffs need not wait for peer review to finish before suing hospitals and medical staffs under Section 1278.5 based on peer review. We now see Section 1278.5 lawsuits and peer review proceeding simultaneously, which dramatically increases the risk of chilling participation in peer review and intimidating witnesses who would otherwise testify in peer review hearings.

All of these developments have tipped the balance in favor of disciplined physicians at the expense of peer review and ultimately at the expense of patient safety. (See, e.g., *Kibler*, *supra*, (2006) 39 Cal.4th 192 [recognizing the risks to patient safety of "allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate"].)

Adding Jury Trial Rights to Section 1278.5 Lawsuits Will Further Chill Peer Review

Physicians are already "reluctant to join peer review committees so as to avoid sitting in judgment of their peers." (*Kibler*, supra, 39 Cal.4th at p. 201.) Empowering disciplined physicians to force their peer reviewers to testify in Section 1278.5 jury trials will only make matters worse.

Permitting juries to second-guess peer reviewers would further discourage hospitals from defending peer review discipline. "Candid and frank participation in peer review proceedings is encouraged by assuring peer review activities will not be put to adverse use in a damages action." (*California Eye Institute v. Superior Court* (1989) 215 Cal.App.3d 1477, 1484.) A looming Section 1278.5 jury trial may even chill peer reviewers from imposing appropriate discipline at the outset. (Cf. *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1167 ["If an

employee gains a reputation as a complainer, supervisors might be particularly afraid to impose discipline on that employee or make other lawful personnel decisions out of fear the employee might claim the action was retaliation for the complaining."].)

This Court Has Held That Section 1278.5 Does Not Authorize Jury Trials

This case involves solely a cause of action pursuant to Section 1278.5(g). The trial court ruled, albeit with great ambivalence, that the plaintiff is entitled to a jury trial. That decision runs contrary to the Court's decision in *Shaw*, holding that Section 1278.5, on its face, does not authorize a jury trial.

In *Shaw*, the plaintiff was a hospital employee. (*Shaw*, *supra*, 2 Cal.5th at p. 988.) She alleged that the hospital terminated her for complaining about patient safety and demanded a jury trial. (*Ibid*.) The Court held that, as a matter of statutory construction, Section 1278.5 contemplates a bench trial, not a jury trial. (*Id*. at p. 987.)

The Court observed that Section 1278.5 authorizes courts to fashion "any remedy deemed warranted by the court," including reinstatement. (Health & Saf. Code, § 1278.5(g).) Section 1278.5's legislative history confirms that this provision was added to permit "a court to fashion whatever remedy would fit the retaliatory act." (See *Shaw*, supra, 2 Cal.5th at p. 1002.) "This language strongly suggests that the intent was to authorize the court, rather than a jury, to determine the appropriate remedy." (*Ibid*., emphasis in original.) The Court thus held that "as a matter of statutory interpretation, section 1278.5(g) does not afford a plaintiff the right to a jury trial in such an action." (*Id*. at p. 1003.)

This conclusion was the right one. The Legislature never intended for physicians to use Section 1278.5 claims as a cudgel against their peer reviewing colleagues. Section 1278.5(l) instructs courts: "Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities …." (Health & Saf. Code, § 1278.5(l).) Section 1278.5 also empowers the court—not a jury—to protect peer review during the litigation. Under Section 1278.5(h), a medical staff "may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section …." (Health & Saf. Code, § 1278.5(h).) The court's watchful eye is a necessary safeguard throughout the litigation to prevent Section 1278.5 lawsuits from becoming a potential intimidation tool wielded by dangerous physicians attempting to avoid necessary discipline.

There Is No Constitutional Right to a Jury Trial for Section 1278.5 Claims

The Court's decision in *Shaw* resolves most of the jury trial rights question. The only remaining issue not yet decided is whether, notwithstanding Section 1278.5's plain language and

the Legislature's intent, courts must afford plaintiffs a jury trial as a constitutional matter. But for many of the very same reasons identified in *Shaw*, there is no constitutional right to a jury trial for Section 1278.5's equitable claims.

"[T]he state constitutional right to a jury trial 'is the right as it existed at common law in 1850, when the [California] Constitution was first adopted.'" (*Shaw*, *supra*, 2 Cal.5th at p. 995.) Section 1278.5 was first enacted in 1999. Physicians generally had no right to sue under the statute until it was amended in 2007, at the urging of the physicians' lobbying group. (Assem. Com. on Health Analysis of Assem. Bill No 632 (2007-2008 Reg. Sess., April 9, 2007; see Petition, p. 21.) Moreover, the Legislature did not codify the peer review system, by enacting Business and Professions Code section 809, until 1989. (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 988.) Even under the common law, no case had held that physicians were entitled to fair procedure rights (the basis for peer review hearings) until 1977. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 271.) In sum, no element of a Section 1278.5 retaliation claim based on peer review existed in 1850, and thus there is no pre-existing constitutional right to a jury trial for such claims.

Recognition by this Court that Section 1278.5 does not contemplate a jury trial, either as a statutory or constitutional matter, will not leave plaintiffs without recourse. Under *Shaw*, the vast majority of non-physician plaintiffs—hospital employees, nurses, technicians, administrators, etc.—will still be entitled to a jury trial simply by coupling their Section 1278.5 claim with a *Tamney* claim for wrongful discharge in violation of public policy. (See *Shaw*, supra, 2 Cal.5th at p. 1004.) Moreover, if a physician has a contract with the hospital, the physician will likewise be entitled to a jury trial on a Section 1278.5 claim coupled with a breach of contract cause of action. If, however, a physician alleges only a Section 1278.5 claim—as is most often the case with claims based on peer review—the court, rather than a jury, will hear and weigh the evidence. That fair result will protect both physicians' procedural rights and the peer review system.

Conclusion

Peer review's critical role should guide courts in interpreting Section 1278.5. As this Court has advised, courts must "implement both the statutory medical peer review process, and the whistleblower protections provided by section 1278.5, in a manner that serves the common aim of both schemes—the safe and competent care of hospital patients." (*Fahlen*, *supra*, 58 Cal.4th at p. 683-684.)

CHA represents more than 400 hospital and health-system members in California, including 97 percent of the state's patient beds. Practically every medical staff peer review hearing in California involves a CHA member. On behalf of these health care providers, and in the interests of preserving peer review and patient safety, CHA respectfully urges the Court to grant the Hospital

Petitioners' Petition and remove any remaining uncertainty regarding whether Section 1278.5 plaintiffs may demand a jury trial.

Respectfully submitted,

Debra J. Albin-Riley

Diane Roldán

Proof of Service attached.

PROOF OF SERVICE

I, Cristina Barring, declare as follows:

I am employed in San Francisco County, San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is Arent Fox, LLP, 55 Second Street, 21st Floor, San Francisco, California 94105. On **August 25, 2021**, I served the within **LETTER OF AMICUS CURIAE CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested party in this action addressed as follows:

Attorneys Patrick Sullivan, Real Party in Interest Lawrance A. Bohm Zane E. Hilton Bohm Law Group, Inc. 4600 Northgate Boulevard, Suite 210 Sacramento, CA 95834 Tel:(866) 920-1292 Fax: (916) 927-2046 Email: lbohm@bohmlaw.com zane@bohmlaw.com Matthew Brinegar THE BRINEGAR LAW FIRM 1901 Harrison Street, Fl 14 Oakland, CA 94612 Phone: 415-735-6856 Email: mbrinegar@brinegarlaw.com ***[1 electronic copy]***	**Superior Court** Clerk of the Superior Court San Diego Superior Court 330 West Broadway San Diego, CA 92101 ***[1 copy via U.S. Mail]***
Attorneys for Petitioners Sharp HealthCare and Grossmont Hospital Corporation Kendra J. Hall Procopio, Cory, Hargreaves & Savitch LLP 525 B Street, Suite 2200 San Diego, CA 92101	**Court of Appeal** 4th District Court of Appeal Division One 750 B Street, Suite 300 San Diego, CA 92101 ***[1 electronic copy]***

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X **(BY US MAIL)** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection. On this date, I caused the document to be placed in envelopes addressed to the persons on the attached service list and sealed and placed the envelopes for collection following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **August 25, 2021**, at Fremont, California.

C Barring

Cristina Barring