IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RYAN NOVOTNY, Plaintiff and Appellee, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation, d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Appellants, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Appellees. - CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID	**Amicus Curiae Brief of Public Citizen** No. 27615

WITHROW, Defendants and Appellants, and ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES AND VARIOUS JANE DOES, Defendants and Appellees. - CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendant and Appellant,	No. 27626

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Appeal from the First Judicial Circuit
Honorable Bruce V. Anderson, Circuit Court Judge
Petition for Intermediate Appeal granted December 15, 2015

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Interest of Public Citizen

Public Citizen, Inc. and Public Citizen Foundation, Inc. (collectively "Public Citizen") are non-profit consumer advocacy organizations with a strong record as proponents of patient health and safety. With members and supporters in South Dakota and nationwide, Public Citizen appears before Congress, administrative agencies, and the courts to advocate for health and safety regulations, consumer protections, and corporate and government accountability, among other issues. Public Citizen's Health Research Group focuses on research and advocacy concerning health products and health-care delivery. Public Citizen serves as a watchdog over the Food and Drug Administration's regulation of drugs and medical devices, and it advocates before the Occupational Health and Safety Administration for reduction in worker exposures to hazardous chemicals. Public Citizen also educates the public about dangerous drugs and drug interactions, through its monthly newsletter Worst Pills, Best Pills News and the website WorstPills.org.

A vital component of Public Citizen's approach to enhancing patient safety is encouraging states to protect patients from doctors who do not satisfy reasonable standards of care. Public Citizen works for enhanced accountability in the medical field by analyzing trends in state disciplinary actions across the United States and seeking greater disclosure of disciplinary actions taken against doctors and other health-care workers. Public Citizen has published numerous reports on physician discipline including *Hospitals Drop the Ball on Physician Oversight* (2009) and *State Medical Boards Fail To Discipline Doctors With Hospital Actions Against Them* (2011).

Introduction

At issue in this case is whether the crime-fraud exception, which is well-recognized in other evidentiary privileges including the attorney-client privilege, should apply to South Dakota's peer review privilege. Without that exception, the circuit court explained, plaintiffs who assert injuries at the hands of Dr. Allen Sossan will be obstructed in their efforts to prove the truth despite significant evidence that defendants knew of

and willfully ignored Dr. Sossan's abysmal record. The court concluded that in the absence of a crime-fraud exception to the state peer-review privilege, "imprudent decisions and wrongdoing in the peer review process would never be brought to light and patient safety and the delivery of medical care would suffer." App. 21.

This Court should affirm. The peer review privilege exists to encourage candor in the credentialing process. But no privilege is absolute. There are limits to the types of communications the privilege should protect. Where otherwise confidential credentialing communications bear directly on allegations of serious wrongdoing—such as credentialing decisions that intentionally disregard a doctor's dangerous past, or put medical providers' financial interest ahead of public safety, thereby endangering the people of South Dakota—the privilege must yield.

As Public Citizen has documented, the peer review system nationally and specifically in South Dakota has underperformed in screening out doctors who should be subject to discipline or denied

credentials. Shining a light on that process in the face of good-faith allegations of fraud, negligent credentialing, and bad faith is crucial to introducing a measure of accountability into credentialing decisions, and fixing a system that does not adequately protect patient safety.

Argument

Adequate health care is a matter of life and death for each of us; for our loved ones; and for every American. Peer review is a critical tool for upholding the standard of patient care in the American health-care system. But the system's importance does not justify permitting it to operate beyond all scrutiny. To the contrary, transparency is necessary to ensure accountability and improve a system that is not living up to its promise of improving health-care quality.

I. The Peer Review System Is Not Functioning Properly

As Public Citizen has documented, peer review has not kept patients safe from substandard doctors. *See* Alan Levine & Sidney Wolfe, Public Citizen, *Hospitals Drop the Ball on Physician Oversight* (May 27, 2009)

(hereinafter "*Hospitals Drop the Ball*"), *available at* http://www.citizen.org/Page.aspx?pid=585.

A useful measure of the efficacy of the peer review system is the frequency with which hospitals discipline and report doctors to the National Practitioner Data Bank (NPDB), a resource maintained by the Health Resources and Services Administration of the United States Department of Health and Human Services. The NPDB receives and maintains records of medical malpractice payments, as well as disciplinary actions against health care practitioners by state medical boards, hospitals, and other health care organizations. *Id.* at 6. Federal law requires hospitals to report a doctor to the NPDB when the hospital revokes or restricts the doctor's privileges for more than 30 days because of the doctor's incompetency or improper professional conduct, or when the hospital accepts a physician's surrender of clinical privileges while the physician is under investigation for possible incompetence or improper professional conduct, or in return for not conducting such an investigation. 42 U.S.C. § 11133.

In its report, Public Citizen found an "extremely large state-by-state variation in the rate of non-reporting hospitals." *Hospitals Drop the Ball* 9. *Among all states, South Dakota had the highest rate of hospital non-reporting to the NPDB*; Public Citizen found that in the 17 years since the NPDB was created, 75 percent of South Dakota hospitals (42 out of 56) had *never* reported a *single* physician. *Id.* at 9, 38. By contrast, only 19 percent of hospitals (3 of 16) in Rhode Island, 24 percent of hospitals (7 of 29 hospitals) in New Hampshire, 25 percent of hospitals (10 of 40) in Connecticut, and 29 percent of hospitals (68 of 239) in New York had *not* done so. *Id.* at 38.

If reporting is measured by the number of reports per number of hospital beds rather than the number of hospitals, South Dakota fares no better. Reporting per 1,000 hospital beds ranged from a high of 8.5 per 1,000 beds in Nevada down to South Dakota's rate, a *national low* of 0.7 per 1,000 beds. *Id.* at 10. In most states, Public Citizen found a reporting rate between 1.5 and 4.0 per 1,000 hospital beds—about two to six times South Dakota's rate. *Id.*

Although reporting rates vary widely, there is no evidence that the overall quality of medical practice differs dramatically from state to state. Or to put it differently, there is no evidence that medical practice in South Dakota is so vastly superior to practice in the other 49 states as to account for the dramatic numerical disparity in reporting. The most likely explanation for the variation is that medical cultures differ from state to state in their willingness to impose and report discipline for misconduct or incompetence. *Id.* at 12. This conclusion is shared by the Health Resources and Services Administration (which operates the NPDB) and the Office of Inspector General at the Department of Health and Human Services. *Id.* at 11-12.

A study of physician attitudes published in the Annals of Internal Medicine supports the conclusion that some states underreport physician misconduct. In that study, "although 96 percent of respondents agreed that physicians should report impaired or incompetent colleagues to relevant authorities, 45 percent of respondents who encountered such colleagues had not reported them." Eric G. Campbell et al., *Professionalism*

in Medicine: Results of a National Survey of Physicians, Annals of Internal Medicine, vol. 147, at 795 (Dec. 2007).

Additionally, state medical boards lag behind hospitals in terms of disciplinary actions against doctors: Public Citizen has determined that more than 5,000 physicians have had one or more clinical privilege reports but no state licensure actions. So the public cannot rely on state licensing boards as an independent check against doctors who should not be credentialed. *See* Alan Levine, Robert Oshel & Sidney Wolfe, Public Citizen, *State Medical Boards Fail To Discipline Doctors With Hospital Actions Against Them* 1-2 (Mar. 15, 2011), *available at* http://www.citizen.org/hrg1937.

The failure of peer review can result in disastrous consequences for patients. The facts of the cases before this Court show this. Other cautionary tales abound:

At the Redding Medical Center in northern California, more than 600 patients received unnecessary cardiac surgery over a seven-year period; some suffered debilitating injuries or death. *Hospitals Drop the Ball*

19. One of the physicians involved should have been suspended years earlier based on his failure to complete medical records. Gerald N. Rogan et al., *How Peer Review Failed at Redding Medical Center* 8 (June 1, 2008), *at* http://roganconsulting.com/docs/Congressional_Report-Disaster_Analysis_RMC_6-1-08.pdf. But "motivated by income generated by its rainmaker physicians, Redding Medical Center . . . preferred to support them rather than identify quality problems." *Id.* at 31.

During a back surgery in Cambridge, Massachusetts, an orthopedic surgeon left a patient under anesthesia on the operating table with an open incision in his back for thirty-five minutes while the surgeon went to cash his paycheck. *Hospitals Drop the Ball* 20-21. The *Boston Globe* reported that despite a history of disruptive behavior and two brushes with the law, no peer review intervention occurred before the surgery walk-out. *Id.* at 21.

In Hawaii, a surgeon could not find the titanium rod he needed to insert into a patient to stabilize a disc injury, so the surgeon used a nearby screwdriver instead. *Id.* The patient required three more surgeries to correct the problem, and ended up a bedridden, incontinent paraplegic. *Id.*

At the time of the original surgery, the surgeon had been charged with drug addiction and incompetence and had his medical license suspended in two other states, yet he was still practicing in Hawaii, apparently without his surgery being monitored by peers. *Id.*

Physicians, administrators and executives at the Edgewater Medical Center in Chicago engaged in a scheme to defraud Medicare of tens of millions of dollars that involved hundreds of unnecessary heart surgeries, two of which led to deaths. *Id.* A report concluded that the scheme would not have been possible with effective peer review. Rogan et al., *How Peer Review Failed, supra*, at 5.

These data and examples suggest that the peer review system is not doing its job to protect patients. This case requires the Court to consider which approach to peer review will ameliorate the problem: total secrecy or some transparency under appropriate circumstances?

II. Transparency Will Improve the Peer Review System by Increasing Accountability

Transparency in the peer review process in instances of criminal or fraudulent conduct will improve the system by deterring decisionmaking

that is adverse to patient safety, and by enhancing accountability for wrongdoing in the peer review process. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). This Court and the United States Supreme Court have applied this principle to ensure that our nation's most important systems are subject to public oversight. *See Rapid City Journal v. Delaney*, 2011 S.D. 55, ¶¶ 18-20, 804 N.W.2d 388, 395 (recognizing the public's First Amendment right to access civil trials, because open trials "protect the integrity of the system and assure the public of the fairness of the courts and our system of justice"); *Doe v. Reed*, 561 U.S. 186, 199 (2010) ("Public disclosure [of referendum petitions] . . . promotes transparency and accountability in the electoral process to an extent other measures cannot."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion) (explaining that the public nature of a criminal trial "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality"); *National Labor Relations Board*

v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (explaining that the Freedom of Information Act exists to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

The crime-fraud exception adopted by the circuit court here introduces needed transparency into the peer review process. The exception applies in limited circumstances and, as is true with exceptions to other privileges, can root out wrongdoing. In particular, the crime-fraud exception to the peer review privilege will shed light on—and thereby deter—hospital cover-ups on behalf of incompetent doctors. The possibility that wrongdoing in the peer review process will come to light is the best deterrent against participants in the process engaging in criminal or fraudulent conduct in the first place. Knowing that such acts could be uncovered raises the stakes for committing them, and puts the medical community on notice that the courts are available as checks on unlawful behavior. By contrast, blanket privilege creates both immunity and impunity for wrongdoing.

The fear of transparency expressed by amici South Dakota Association of Healthcare Organizations and South Dakota State Medical Association is unwarranted, for two reasons. First, transparency will not chill participation by honest reviewers in the peer review process, because they are not committing fraud. The exception at issue is narrowly targeted at wrongful conduct that is not a legitimate part of the peer review process to begin with. As the American Bar Association has explained in the analogous context of the crime-fraud exception to the attorney-client privilege, "the client can, of course, prevent such disclosure by refraining from the wrongful conduct." Model Rules of Professional Conduct R 1.6, cmt. 7, *at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html; *see also In re Grand Jury Proceedings*, 183 F.3d 71, 76 (1st Cir. 1999) (explaining that "statements made in furtherance of a crime or fraud have relatively little (if any) positive impact on the goal of promoting the administration of justice").

Second, the value of encouraging candor must be balanced against other values, including the search for truth, which is promoted when courts temper privileges with legitimate exceptions that make relevant evidence available to litigants and courts. As Judge Selya explained on behalf of the First Circuit, "the crime-fraud exception reflects a policy judgment" that the benefit of secrecy "does not justify the costs of shielding highly probative evidence of antisocial conduct from the factfinders' eyes." *In re Grand Jury Proceedings*, 183 F.3d at 76. Relatedly, the societal interest in protecting peer review communications, like the interest in protecting attorney-client communications, dissipates when the process is misused. *See In re Green Grand Jury Proceedings*, 492 F.3d 976, 980 (8th Cir. 2007) ("Although there is a societal interest in enabling clients to get sound legal advice, there is no such interest when the communications or advice are intended to further the commission of a crime or fraud."); *accord In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (same); *see also In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) ("While there is a societal interest in enabling clients to obtain complete and accurate legal

advice, which we serve by sheltering confidential communications between client and attorney from public consumption, there is no such interest when the client consults the attorney to further the commission of a crime or fraud.").

Finally, transparency is vital to holding hospitals accountable and compensating patients injured by wrongful conduct. As the circuit court found here, without the crime-fraud exception, "there is no way for a plaintiff, or anyone else for that matter, to determine if the peer review committee members acted without malice; if the peer review committee made a reasonable effort to obtain the facts of the matter under consideration; or if the peer review committee acted in reasonable belief the action taken was warranted by those facts." App. 21. As in this case, without the exception, patients throughout South Dakota will not be able to bring to light instances in which botched medical procedures could have been prevented but for a compromised peer review process, because plaintiffs will lack access to the evidence needed to show that the process was compromised.

Conclusion

The peer review system is not operating as effectively as it should. The credentialing of negligent physicians puts patients' lives at risk—and all of us will be patients sooner or later. Transparency in the peer review process in instances of criminal or fraudulent conduct will improve the system by deterring decisionmaking that is adverse to patient safety and by enhancing accountability for wrongdoing.

This Court should affirm the decision of the circuit court to apply a crime-fraud exception to the peer review privilege.

Dated: April 18, 2016

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As required by SDCL 15-26A-66(b)(2), and excluding the matters not counted under SDCL 15-26A-66(b)(3), this brief contains 2,665 words.

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I certify that on April 18, 2016, I served this document on all parties by e-mailing it to:

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