No. _____

In The
Supreme Court of the United States

HAMID SAFARI, M.D. AND MARK FAHLEN, M.D.,

Petitioners,

v.

KAISER FOUNDATION HEALTH PLAN, INC., *ET AL.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In California, physicians have a fundamental vested property interest in their privileges to practice in private hospitals. In 1989, the State adopted a statutory scheme which permits hospitals in California to retaliate against physicians who report hospital conditions that endanger patients by taking their property without due process of law. California allows physicians' property to be taken through an official quasi-judicial procedure mandated by the State that is completely controlled by hospitals that have a direct, substantial pecuniary interest contrary to the physicians. In this system, the hospitals have the power to unilaterally select the judge and the jury for a quasi-judicial hearing. If the physician wins the hearing, the hospitals are empowered to disregard the results of the hearing and unilaterally take the physicians' property anyway.

The question presented is:

Can the State of California empower a private party to take another private party's property without due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

PARTIES

The parties are Petitioners Hamid Safari, M.D., and Mark Fahlen, M.D., and Respondents are Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals and Sutter Central Valley Hospitals.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Hamid Safari, M.D., and Mark Fahlen, M.D., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, after the Ninth Circuit denied a Petition for Rehearing and for Rehearing En Banc.

OPINIONS BELOW

On December 10, 2014, the Ninth Circuit denied Dr. Safari and Dr. Fahlen's Petition for Rehearing and Rehearing en banc in an unpublished order. The opinion denying Petitioners' appeal was an unpublished opinion dated September 30, 2014. The order of the United States District Court dismissing Petitioners' case was issued on May 21, 2012. The opinion of the United States District Court dismissing the case was issued on May 11, 2012. Each of these documents is reproduced in the Appendix to this Petition.

JURISDICTION

This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

STATEMENT OF THE CASE

On November 7, 2011, Drs. Safari and Fahlen filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for Northern California. They contended that California's official quasi-judicial system of medical discipline that empowered private parties to take physicians' fundamental vested property interests violated their constitutional right to due process. On May 11, 2012, the District Court dismissed their lawsuit based on a decision that there was insufficient state action to invoke the due process clause. On September 30, 2014, the Ninth Circuit issued a memorandum opinion affirming the District Court's decision.

On May 24, 2013, Dr. Safari filed a Petition for Writ of Certiorari appealing from a state court decision denying relief in a related case. That Petition was denied after Respondents Kaiser Foundation Health and Kaiser Foundation Hospitals argued that

this Court should not hear the case since the Ninth Circuit case was still pending.

STATEMENT OF FACTS

Both Dr. Safari and Dr. Fahlen were whistleblowers who reported conditions at their hospitals that endangered patients.

A. Dr. Safari's Property Interests Were Taken Without Due Process.

Dr. Safari reported to his hospital administration that substandard medical care by two physicians in his department had resulted in death or unnecessary injuries to multiple patients. He also reported that his department's quality assurance department had concealed the nature and extent of the problems of those two physicians.

The two physicians and their allies retaliated against Dr. Safari by falsely accusing him of causing a fetal death that he had not committed. The retaliation including taking those false accusations to both the Medical Board of California and to the Los Angeles Times, resulting in severe damage to Dr. Safari's reputation and bad press for Kaiser. As a result of these actions, Kaiser decided to terminate Dr. Safari's hospital's privileges.

It was later proven by undisputed scientific evidence provided by two of the leading perinatologists

in the country, one of the leading fetal pathologists in the world, and one of the nation's top biomechanical experts, that it was scientifically impossible for Dr. Safari to have caused the death of the fetus. Undisputed evidence of those experts established that one of the physicians that Dr. Safari had complained about had actually caused the death of the fetus by reaching in and trying to turn the baby in utero, damaging the baby's neck and causing him to bleed to death internally.

Based on the evidence that Dr. Safari could not and did not cause the death of the fetus, the Medical Board of California completely exonerated Dr. Safari. Kaiser, on the other hand, followed through with its predetermined decision to terminate Dr. Safari's privileges. When the Medical Executive Committee of Dr. Safari's hospital refused to vote to terminate his privileges, Kaiser's management unilaterally appointed a hearing panel and hearing officer for a quasi-judicial administrative hearing required under California law. It ignored Dr. Safari's request for a mutually-agreed-upon or neutrally selected hearing officer and hearing panel members. It selected two managers, including one of its top trouble-shooters, to serve on the panel. Kaiser paid another hearing panel member more than $85,000 for her service on the panel.

Kaiser also unilaterally appointed one of its own lawyers to serve as the hearing officer who would preside over the hearing. During voir dire, the hearing officer revealed that his work for Kaiser spanned

a period of ten years. The hearing officer charged Kaiser $485 per hour and received over $100,000 from Kaiser for his work as hearing officer in Dr. Safari's hearing.

Dr. Safari objected to Kaiser's appointment of the hearing officer and the hearing panel members based on evidence of their biases and as a violation of due process. The hearing officer overruled Dr. Safari's objections to his own appointment as hearing officer and to the composition of the hearing panel.

At the hearing, the hearing officer barred Dr. Safari from introducing any evidence that he had been innocent of the fetal death that had generated the decision to terminate his privileges. The hearing officer also prohibited Dr. Safari from introducing evidence that he had been exonerated by the Medical Board of California after its hearing on that case.

Mr. Shulman had secret ex parte communications on substantive matters with Kaiser's corporate counsel, the hearing panel and witnesses adverse to Dr. Safari, over Dr. Safari's repeated objections. He refused to disclose to Dr. Safari the substance of those ex parte discussions, claiming attorney client privilege.

Dr. Safari was summarily suspended on February 29, 2008, and Kaiser has not permitted him to practice medicine since that date. Kaiser terminated Dr. Safari's privileges on September 23, 2010. Because of Kaiser's actions, Dr. Safari has now been unable to work as a perinatologist for seven years,

despite the fact that he is highly competent physician.

B. Dr. Fahlen's Property Interests Were Taken Without Due Process.

Dr. Fahlen is a nephrologist who had privileges at a Sutter hospital in Modesto, California. Dr. Fahlen first complained about dangerous hospital conditions in February, 2004, after an ICU nurse refused his orders to administer cardiac resuscitation to a patient who was pulseless, not breathing, and in extreme danger of dying. That same month, another nurse refused Dr. Fahlen's order to transfer a patient in severe respiratory distress into the ICU, endangering the patient's life. During the next four years, Dr. Fahlen repeatedly complained both in writing and orally about substandard nursing care at the hospital.

The hospital did not address Dr. Fahlen's reports about problems with the hospital's services. Instead, in the spring of 2008, the Chief Operating Officer of the hospital, Steve Mitchell, attempted to force Dr. Fahlen to leave town by getting him fired by his Sutter-affiliated medical group. Although Mr. Mitchell succeeded in getting Dr. Fahlen fired on May 14, 2008, Dr. Fahlen refused to leave town. He decided to start his own private practice in Modesto. After learning of that decision, Mr. Mitchell told Dr. Fahlen on May 30, 2008, that if he did not leave town, the hospital was going to initiate a medical

staff investigation of him and that he would be reported to the Medical Board.

When Dr. Fahlen refused to leave Modesto, Mr. Mitchell made good on his threat and initiated a medical staff investigation of Dr. Fahlen. The hospital administration manipulated the investigation by appointing Mr. Mitchell, a hospital vice-president and an employment lawyer to the investigating committee, even though the bylaws stated only physicians could be on an investigating committee.

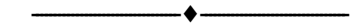
When the findings of the investigating committee were presented to the hospital's medical executive committee (MEC), someone told the MEC that Dr. Fahlen had refused to come talk to the MEC, which was a complete fabrication. Dr. Fahlen was eager to talk to the MEC but was never given an opportunity to do so.

Based on the report of the investigating committee, the MEC recommended the termination of Dr. Fahlen's privileges. Dr. Fahlen requested a hearing on the proposed termination, and that hearing took place in 2009 and 2010 before a Judicial Review Committee (JRC) of six physicians appointed by the MEC. After 13 sessions of evidence and argument, the JRC unanimously decided on June 14, 2010, that Dr. Fahlen should retain his hospital privileges.

The MEC did not appeal Dr. Fahlen's decision. The JRC's decision was supported by ample evidence. Steve Mitchell, the hospital's Chief of Staff, and the Chair of the Investigating Committee each admitted

during the hearing that Dr. Fahlen had never done anything that harmed a patient. Dr. Fahlen's competence as an outstanding nephrologist was undisputed and the charges against him were not proven.

On January 7, 2011, the Sutter Board nonetheless terminated Dr. Fahlen's hospital privileges. In doing so, it took his fundamental vested property interest. Dr. Fahlen has now been without privileges at the Sutter hospital in Modesto for more than four years, severely damaging his ability to practice medicine.



REASONS FOR GRANTING CERTIORARI

The termination of highly competent doctors after they complain about dangerous hospital conditions does not only damage those physicians and their patients. It sends a message to all of the physicians in their community not to report substandard or dangerous conditions, because they will risk their careers and livelihoods if they do so. Patients in turn suffer from a hospital culture of silence and intimidation. The Court's failure to act will cost lives of patients. It will rob physicians with the greatest integrity of their ability to practice medicine. And it will permit the continuation of an unparalleled stain on the fabric of American jurisprudence, a system of "fair hearings" where one private party can take the property of another private party after only a charade of due process.

Physicians and hospitals are always adversaries in medical disciplinary peer review hearings in California. A hospital wants to terminate or restrict a physician's hospital privileges, while the physician wants to keep them. Each has a direct and substantial financial interest in prevailing and the stakes are high. Physicians depend on hospital privileges to practice medicine and make a living. Hospitals have a direct financial interest in preventing physicians from suing them in the future. As explained further below, a California hospital can effectively immunize itself from a damages action by terminating a physician's privileges following a medical disciplinary hearing.

Thirty-six years ago, the California Supreme Court recognized that physicians practicing in California have a fundamental vested property interest in their hospital privileges at both private and public hospitals. *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802, 823-825 (1977). The Fourteenth Amendment of the U.S. Constitution prohibits a state from taking a person's property without due process. The State of California therefore cannot take a physician's property interest without due process of law.

California, however, has created a system of medical discipline in which hospitals have been delegated the power to take a physician's property without due process. California law permits quasi-judicial medical disciplinary hearings that are completely controlled by hospitals and that lack fundamental safeguards to ensure due process. This system is unconstitutional. The State cannot circumvent the Fourteenth

Amendment by delegating to private healthcare corporations a power that it could not exercise itself.

This case presents issues that are neither liberal nor conservative. The values at stake here, the protection of private property interests and the safeguarding of patient safety, are shared across the political spectrum. The Courts below have failed to enforce the Fourteenth Amendment and that failure jeopardizes hospital patients. This Court should grant review to consider the important question of constitutional law raised by this Petition.

ARGUMENT

I. IN CALIFORNIA, A PHYSICIAN'S HOSPITAL PRIVILEGES ARE A FUNDAMENTAL VESTED PROPERTY RIGHT.

Before 1989, the common law of California protected physicians' ability to practice medicine by providing due process safeguards applicable to both governmental and private hospital actions.

In *Wyatt v. Tahoe Forest Hospital*, 174 Cal.App.2d 709, 715-716 (1959), the Court recognized that, as a practical matter, physicians need access to a hospital in order to practice medicine. *Id.* at 715. The court held that physicians could not be denied privileges without first having a quasi-judicial fair hearing to determine whether denial of the privileges was factually warranted. *Id.* at 716. California courts subsequently recognized that the rule prohibiting

arbitrary, capricious or unfair exclusions applied to medical staff privileges at private hospitals. *Ascherman v. St. Francis Memorial Hospital*, 45 Cal.App.3d 507, 510-513 (1975). Private hospitals were required to provide a fair hearing that meets due process requirements, including "prevailing standards of impartiality." *Applebaum v. Board of Directors of Barton Memorial Hospital*, 104 Cal.App.3d 648, 656-657 (1980).

The Supreme Court of California strengthened the protection afforded physicians by holding that they have a fundamental vested property interest in their privileges at private hospitals. *Anton*, 19 Cal.3d at 822-825. *Anton* also held that any decision terminating a physician's hospital privileges was subject to an independent review by the judiciary through a petition for writ of mandate. *Ibid.*

II. THE CALIFORNIA LEGISLATURE CREATED AN ADMINISTRATIVE PROCEDURE FOR CONDUCTING MEDICAL DISCIPLINARY PROCEEDINGS THAT DELEGATES COMPLETE UNILATERAL CONTROL OVER THE PROCESS TO HOSPITALS THAT ARE PARTIES TO THE PROCEEDINGS.

In 1978, the California legislature reduced the due process protection afforded to physicians by amending the writ of mandate statute, California Code of Civil Procedure § 1094.5, to eliminate independent review by the judiciary. Since then, decisions of private hospitals terminating a physician's

privileges have been subject to only a substantial evidence review. Section 1094.5, subdivision (d).

In 1988, the California legislature enacted Business and Professions Code §§ 809 et seq.[1] An express purpose of the new law was to integrate public and private systems of peer review to assist the government in regulating and disciplining physicians. Section 809, subdivisions (a)(5) and (a)(9)(A). The law expressly delegated to private hospitals the authority "to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." Section 809, subdivision (a)(6).

California courts have held that §§ 809.05, 809.1 and 809.2 permit a hospital to initiate disciplinary actions against a physician, appoint the judge and the jury who will constitute the administrative hearing body, prosecute the charges, and then overrule the decision of the hearing panel if it favors the physician in most circumstances. *Kaiser Foundation Hospitals v. Superior Court*, 128 Cal.App.4th 85, 109 (2005); *Ellison v. Sequoia Health Services*, 183 Cal.App.4th 1486, 1498-1499 (2010). There is no legal requirement that the hearing officer or hearing panel be neutral. A hospital can appoint its own attorney to

[1] All statutory references are to the California Business and Professions Code, unless otherwise indicated.

be the hearing officer and its own administrators to be hearing panel members.

In July, 2008, a study mandated by the California Legislature and commissioned by the Medical Board of California determined that California's peer review system was broken and could not be fixed with moderate repairs. Lumetra, under contract with the Medical Board of California, "*Comprehensive Study of Peer Review in California*," at 104-107 (2008), http://www.mbc.ca.gov/publications/peer_review.pdf. The study concluded, " . . . [T]hese processes have failed in their purpose to ensure the quality and safety of medical care in California." *Id.* at 104. The report criticized the lack of objective standards, the absence of unbiased reviews of physicians and the lack of transparency. *Id*. at 105-106. Because of the system's fundamental problems, the study advocated eliminating private hospital operation of the peer review system and replacing it with an independent review organization that had no vested interest in the outcome of hearings. *Id.* at 107-111. It concluded that if no changes were made, the quality of care would be harmed by this flawed system. "Based on evidence found in this study, change is imperative to protect the health and medical care of Californians . . . " *Id.* at 112. The California Legislature has failed to act on the recommendations of its study for nearly seven years.

III. PHYSICIANS' PROPERTY INTERESTS IN THEIR HOSPITAL PRIVILEGES ARE PROTECTED BY THE FOURTEENTH AMENDMENT.

This Court has made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate or money. *Bd. of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). The Due Process Clause protects property rights created and defined by state law. *Id.*, 408 U.S. at 577. State-created property interests that may be essential to a person's ability to earn a living are protected by the Fourteenth Amendment. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

California has created a property interest in private hospital privileges that is protected by the Fourteenth Amendment. The court in *Anton*, 19 Cal.3d at 823-825, not only recognized physicians' property interest, it also held that the property interest in hospital privileges was fundamental and vested.

Anton's holding was more recently affirmed in *Mileikowsky v. West Hills Hospital & Medical Center*, 45 Cal.4th 1259, 1267-1268 (2009):

> Peer review that is not conducted fairly and results in the unwarranted loss of a qualified physician's right or privilege to use a hospital's facilities deprives the physician of a property interest directly connected to the physician's livelihood.

The Court observed that it is almost impossible for a physician to practice medicine without hospital privileges and that a termination of privileges is reported to both the state and federal government, which may foreclose a physician from obtaining hospital privileges elsewhere. *Id.* at 1268. "A hospital's decision to deny staff privileges therefore may have the effect of ending the physician's career." *Ibid.*

Since the Supreme Court of California has expressly recognized physicians' fundamental vested property interest in private hospital privileges, and the importance of that interest, it is protected by the Fourteenth Amendment's Due Process Clause.

IV. CALIFORNIA'S SYSTEM OF MEDICAL DISCIPLINE VIOLATES DUE PROCESS.

A. A State Cannot Deprive Someone of Property Interests Without Due Process as Determined by Federal Law.

While the state may elect not to grant a property interest, it cannot authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Those procedural safeguards must comply with due process. *Id*. at 538. The fact that the State has adopted its own procedures, which it deems adequate, does not diminish or alter the requirements of federal due process. *Id*. at 540-541. Those requirements are established by federal law. *Ibid.*; see also *Logan v. Zimmerman*

Brush Co., 455 U.S. 422, 432 (1982); *Vitek v. Jones*, 445 U.S. 480, 491 (1980). A hearing is required before an individual is finally deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

B. A Quasi-Judicial Proceeding in Which the Final Decision Maker Is a Party With a Financial Interest in the Outcome Does Not Meet Due Process Requirements.

1. Hospitals Have a Direct Pecuniary Interest in the Outcome of Medical Disciplinary Proceedings.

California hospitals have a direct financial interest in prevailing in their disciplinary proceedings. In Dr. Safari's case, for example, Kaiser had a direct and substantial financial interest in terminating Dr. Safari's hospital privileges. This is evidenced by the fact that Kaiser offered him $2,000,000 in the spring of 2007, before it initiated the medical disciplinary action at issue here. After it summarily suspended Dr. Safari in February 2008, the financial stakes grew even greater. California law provides physicians subjected to bad faith peer review with tort remedies such as interference with the right to pursue an occupation, violation of the fair procedure doctrine, and interference with prospective economic advantage and/or contractual relations. E.g., *Westlake Community Hosp. v. Superior Court*, 17 Cal.3d 465, 478 (1976); *Palm Medical Group, Inc. v. State Comp. Ins. Fund*, 161 Cal.App.4th 206, 215-217 (2008).

Ironically, a California hospital's best defense to a potential tort action is to terminate the physician's privileges following a quasi-judicial hearing. A physician is then ordinarily barred from filing an action for damages or reinstatement against the hospital, unless the doctor can win a writ of administrative mandate overturning the hospital's termination. *Westlake*, 17 Cal.3d at 482-485. Because California Code of Civil Procedure § 1094.5 was amended to eliminate independent judicial review of a hospital's decision, the hospital only needs to produce any substantial evidence to defeat the physician's petition for a writ of mandate. If the hospital can find a single expert who will criticize a physician's clinical performance, or two or three employees who criticize a physician's behavior as "disruptive," the hospital will ordinarily win the writ proceeding. Hospitals can thus effectively immunize themselves from liability to the doctor and avoid ever having their conduct evaluated by a judge or a jury in a civil proceeding.

The Supreme Court of California has recognized that when an entity controls an administrative hearing process, subject only to a substantive evidence review in the courts, it will virtually always defeat an individual's claim against the entity. *State Board of Chiropractic Examiners v. Superior Court* ("*Arbuckle*"), 45 Cal.4th 963, 977 (2009). A procedural scheme that virtually guarantees a hospital's ability to take a physician's property, without a neutral determination of the merits, does not constitute due process.

2. Under California Law, Hospitals Are Judges of Their Own Causes, in Violation of Due Process.

This case demonstrates how California hospitals have complete unilateral control over quasi-judicial hearings authorized under §§ 809 et seq. Kaiser's Board of Directors initiated the medical disciplinary action against Dr. Safari. Kaiser also acted as the prosecutor at his hearing and appointed the judge and the jury that heard evidence. Kaiser's Board then had the power to terminate Dr. Safari's privileges whether he won or lost his hearing. Sutter terminated Dr. Fahlen's privileges even though he won his hearing.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009), this Court held that the rule that "no man shall be the judge of his own cause" is a fundamental requirement of due process. *Caperton* discussed with approval the Court's earlier decision in *In re Murchison*, 349 U.S. 133 (1955). In *Murchison*, unlike the case at hand, there was no suggestion that the adjudicator had any financial interest in the outcome. However, the judge had been "the complainant, indicter and prosecutor" as well as the judge in a contempt hearing. *Id*. at 135. The Court held that the defendant had been denied due process because "no man is permitted to try cases where he has an interest in the outcome." *Id*. at 136. The judge was disqualified from deciding the case because he had an interest in affirming his own decision to initiate the

charges. *Id*. at 137. Actual bias need not be proved if there is an appearance of bias. *Id.* at 136.

Murchison did not create a broad rule prohibiting governmental administrative agencies from investigating facts and then instituting and adjudicating proceedings. *Withrow v. Larkin*, 421 U.S. 35, 53-54 (1975). However, unlike here, governmental administrative agencies ordinarily have no interest in the outcome. Government administrators enjoy a presumption of integrity that does not apply to a private party. *Id.* at 55. This Court has recognized that "[t]he purpose of an adversary hearing is to ensure the requisite neutrality . . . " *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55-56 (1993). When the government does have a pecuniary interest in the outcome, then its actions are more carefully scrutinized. *Ibid.*; see also *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991).

California law permits a party in conflict with another party to be the judge of its own cause. There is no neutrality. A situation in which a decision maker occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process. *Tumey v. Ohio*, 273 U.S. 510, 534 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

3. California Law Permits a Party With a Direct Pecuniary Interest in the Outcome to Decide the Case.

Over the last century, this Court has consistently held that a decision maker's pecuniary interest in the outcome of a case violates due process, even if that decision maker was not proven to be actually biased and the pecuniary interest was small or indirect.

In *Tumey v. Ohio*, 275 U.S. at 532, this Court held that a conviction based on an ordinance that allowed a judge to be paid out of fines assessed against defendants violated due process. There was no indication that the judge had actual bias against the defendant and the amount the judge received as a result of the defendant's conviction was $12. The Court held that proof of actual bias was not required. Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true . . . denies the latter due process of law." *Id.* at 532. The Court held that officers acting in a judicial or quasi-judicial capacity are disqualified by a financial interest in a controversy. *Ibid*.

Tumey found that due process was also violated in part because the decision of the judge at issue was, as here, subject only to a substantial evidence review by a reviewing court. *Id.* at 532-533.

In *Ward*, 409 U.S. at 60, this Court found that even an indirect financial interest of an adjudicator in the outcome of proceedings violated due process.

Ward invalidated a procedure by which fines produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not augmented by those sums. The forbidden "possible temptation" was present because the mayor's executive responsibilities might have made him partisan to maintaining the contribution from the court. *Ibid.*

The procedure was held unconstitutional even though it was subject to a de novo review in a reviewing court:

> Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Id. at 61-62. California's medical disciplinary hearings are never decided by any neutral and detached tribunal.

This Court's holding in *Ward* barring even an indirect financial interest of an adjudicator in the outcome of a hearing was extended to administrative hearings in *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). In *Gibson*, there was a possibility that the rule at issue might have indirectly benefitted the members of the Alabama Board of Optometry by excluding corporate competition. *Id.* at 578-579. *Gibson* held, citing *Ward*, that a financial interest need not be as direct or positive as it was in *Tumey* to be a

violation of due process. *Id.* at 579. It then held that the possible financial interest of the board members in the outcome disqualified them from hearing the case.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), a justice of the Alabama Supreme Court had a pending case against Blue Cross. This Court held that the state justice had a financial interest in the outcome of the case because the *Aetna* decision could have affected the amount received by the justice in his pending case, even though the cases were two separate actions against two different insurers. *Id.* at 823-824. In *Caperton*, this Court held that a party's large campaign contributions supporting a West Virginia Supreme Court justice disqualified the justice, despite the lack of evidence of actual bias. 556 U.S. at 883-886. The *Caperton* decision was based on a party's due process right to a fair trial before an unbiased tribunal. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

Kaiser and Sutter had considerably more direct financial interests in the outcomes here than the ones ruled impermissible in *Ward*, *Gibson*, *Aetna*, and *Caperton.* In *Ward* and *Gibson*, any potential financial benefits were indirect and uncertain. In *Aetna* and *Caperton*, there was only a possibility that the justices might be influenced by their personal interests. In none of these cases was a party to a controversy with a financial interest in the outcome also the final decision maker, as here. "The Due Process Clause entitles a person to an impartial and disinterested

tribunal in both civil and criminal cases." *Marshall v. Jerrico*, *Inc.*, 446 U.S. 238, 242 (1980). "The requirement of neutrality has been jealously guarded by this Court." *Ibid.* Under this Court's precedents, due process is violated by California's delegation of power to take physicians' property to hospitals with a financial interest directly adverse to the doctor.

C. A Quasi-Judicial Hearing in Which a Party Is Entitled to Unilaterally Appoint Both the Hearing Officer and the Hearing Panel Members Violates Due Process.

California's system of medical discipline also violates the fundamental due process requirement of neutrality because it permits the hospital to appoint both the hearing officer and the hearing panel. *Anton, supra*, emphasized both the importance of the right to hospital privileges and the importance of procedural protections to protect that right.

> It is manifest, of course, that the decision of a private agency which affects a fundamental vested right may be as significant to the holder thereof as any decision by a public agency.

Anton, 19 Cal.3d at 821. This language suggests that physicians' property interest in hospital privileges is equally as deserving of due process protection as a government entitlement. The application of constitutional due process to the deprivation of physicians'

hospital privileges is also supported by the holding in *Anton* that independent judicial review of a decision terminating a physician's privileges was required because it involved the taking of a fundamental vested right. *Id.* at 820-825.

Most importantly, a physician's right to due process is not determined by either state statutes or state common law. As described above, once a property interest is created, the procedural safeguards required to protect that interest are determined by federal law. *Cleveland Bd. of Educ.*, 470 U.S. at 541. This Court has emphasized the importance of neutrality of adjudicators in contested hearings and there is no reason not to apply that rule here. California's procedural scheme giving a party with a financial interest in the outcome of a hearing the power to appoint both the hearing officer and the jury in quasi-judicial hearings determining fundamental vested property rights violates the due process requirement of neutrality.

In Dr. Safari's case, Kaiser's appointment of its own attorney as the hearing officer plainly violated due process. The California Supreme Court has recognized that the retention of ad hoc hearing officers, who are eligible to be rehired in the future, violates constitutional due process. *Haas v. County of San Bernardino*, 27 Cal.4th 1017 (2002). In *Haas*, the Court applied the objective standard of an appearance of bias set forth by this Court in *Tumey* and *Ward*. *Haas*, 27 Cal.4th at 1025-1027. It observed that, based on *Gibson*, the law concerning disqualification

for pecuniary interest applied with full force to administrative hearings. *Id.*, 27 Cal.4th at 1027. *Haas* held that an administrative hearing officer hired on an ad hoc basis would objectively be tempted to favor the appointing entity in order to enhance the possibility of obtaining future work from the same entity, in violation of due process. *Haas*, 27 Cal.4th at 1030-1031.

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), this Court found that an arbitrator's failure to disclose that he had earned about $12,000 over a period of four to five years from one of the parties required his disqualification. The Court held that disqualification was required when a judge had "the slightest pecuniary interest." *Id.* at 148. Mr. Shulman made at least $100,000 from his work as Kaiser's attorney and hearing officer in this case. If he were rehired for another lengthy hearing as either an attorney or a hearing officer, he would stand to make that much again. In addition, Kaiser is the largest health maintenance organization in California. By pleasing Kaiser, Mr. Shulman could advance the prospects that his firm would receive additional work from a wealthy client. This situation meets this Court's oft repeated standard of "a possible temptation to the average man."

When a state chooses to use a jury for fact-finding, the Fourteenth Amendment requires that the jury be impartial. *Morgan v. Illinois*, 504 U.S. 719,

726-727 (1992). California law, as interpreted by California courts, authorizes a hospital to unilaterally appoint the hearing panel that will make factual findings on whether the hospital's decision to terminate a physician's privileges is reasonable and warranted. Section 809.2; *Kaiser Foundation Hospitals v. Superior Court*, 128 Cal.App.4th at 109.

The due process violation inherent in this procedural scheme is demonstrated by the facts in Dr. Safari's case. Kaiser appointed two high level managers to the hearing panel. As managers for Kaiser, they could be expected to hold Kaiser's perceived institutional interests primary over other considerations. Their appointments violated this Court's objective standard for disqualification, since a reasonable person would have good cause to believe that Kaiser managers favored Kaiser's management.

Section 809 et seq., California Code of Civil Procedure § 1094.5 and California cases interpreting those statutes do not provide appropriate procedural safeguards to ensure due process before a physician's property is taken. They therefore violate the Fourteenth Amendment. *Cleveland Bd. of Educ.*, 470 U.S. at 541.

V. THE STATE HAS EMPOWERED CALIFORNIA HOSPITALS TO TAKE PRIVATE PROPERTY INTERESTS UNDER COLOR OF LAW.

A. Taking Property Using Authority Given by the State Is State Action.

The taking of a person's property is a quintessential government function. The issue of how a person's property can be taken was a manifest concern of the Constitution's founders. The Fifth Amendment forbids the taking of property without due process and the taking of private property for public use without just compensation.

This Court has previously decided that procedural due process must be followed before a private party may take someone else's property using a judicial remedy such as attachment or garnishment. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 18 (1991); *Sniadach v. Family Fin. Corp*., 395 U.S. 337, 341-342 (1969). In these cases, the state both authorized the procedures in question and participated to some extent in the takings.

There appears to be no U.S. Supreme Court case analyzing a situation where the state authorizes a party to take a person's property or fundamental vested property interest with no direct involvement of the courts or law enforcement. The likely explanation is that there have been very few times when a state has given private parties the power to take private

property without judicial involvement and that none of those cases reached this Court.

Federal circuit courts have split on the issue. In *Hall v. Garson*, 430 F.2d 430, 438-440 (5th Cir. 1970) and *Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975), the courts held that statutes allowing the private taking of another person's property without judicial involvement involved state action subject to Fourteenth Amendment due process requirements. *Davis v. Richmond*, 512 F.2d 201, 205 (1st Cir. 1975) found no state action on similar facts.

This Court's analysis of the Fourteenth Amendment in other cases establishes that California's authorization of hospitals to take physician's property interest without due process constitutes state action. If a party cannot take another person's property without judicial oversight to guarantee due process, then California's empowerment of a party to take property without judicial involvement violates the Fourteenth Amendment.

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

United States v. Classic, 313 U.S. 299, 325-326 (1941). California hospitals' power to take physicians' property interests without due process is made possible only because they are clothed with the authority of state law through §§ 809 et seq. and the court

decisions interpreting those statutes. There is no other source of their power. They are therefore state actors when exercising that power.

B. The Disciplinary Proceedings of California Hospitals Are Official State Proceedings Expressly Integrated Into the State's System of Disciplining Physicians.

In *West v. Atkins*, 487 U.S. 42, 55-57 (1988), this Court held that the state's delegation of one of its functions to a private independent contractor physician made the physician a state actor. The Court held that a person acts under color of state law when the person abuses a position given by the State. *Id*. at 50. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 296 (2001), the Court held that state action is established when, inter alia, a private entity is entwined with government policies or when it has been delegated a public function by the state.

The determination of state action is a fact-driven inquiry in which "a host of facts" can bear on the outcome. *Id*. at 296. Here, the fact that California hospitals are entwined with the state in government policies has been established by both the California Legislature and by decisions of the California Supreme Court.

Section 809, subdivision (5) states that "[p]eer review, fairly conducted, will aid the appropriate

state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners." Section 809, subdivision (9)(a) states that a purpose of the law is to "better integrate public and private systems of peer review." California courts have repeatedly recognized the integration and incorporation of private hospitals into the state system of medical licensing and discipline. *Shacket v. Osteopathic Medical Board*, 51 Cal.App.4th 223, 231 (1996), held that "[t]he Legislature envisioned a process integrating the private and public systems of peer review for providers of health care services."

Kibler v. Northern Inyo County Local Hospital District, 39 Cal.4th 192 (2006), also held that the Business and Professions Code "incorporates the peer review process into the overall process for the licensure of California physicians." *Id.* at 199. *Kibler* effectively recognizes that private hospitals' disciplinary actions are under color of state law. It held that the Legislature has made such actions *official proceedings* of the state:

> . . . [T]he Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate. . . . As such, hospital peer review proceedings constitute official proceedings authorized by law within the meaning of section 425.16, subdivision (e)(2).

Id. at 200.

Based on its finding that hospital peer review decisions are official proceedings, the Court decided that hospitals engaged in peer review were entitled to the same protections from being sued as government agencies. *Id*. at 203.

In *Mileikowsky*, 45 Cal.4th at 1267, the Supreme Court of California again recognized the entwinement of private hospitals in the state government's system of medical discipline:

> In 1989, California codified the peer review process at Business and Professions Code section 809 et seq., *making it part of a comprehensive statutory scheme for the licensure of California physicians* and requiring acute care facilities such as West Hills to include the process in their medical staff bylaws. (§ 809, subd. (a)(8).)

(Emphasis added.)

The intentional integration of private hospitals in California's system of medical discipline constitutes entwinement and the quasi-judicial "official proceedings" of private hospitals are conducted under color of state law.

C. California Has Expressly Delegated to Hospitals the Authority to Exclude California Physicians by Taking Their Property Interest in Hospital Privileges.

Section 809, subdivision (a)(6), expressly delegates to private hospitals the authority "to exclude, through the peer review mechanism as provided for

by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." Such exclusions can have the effect of terminating a physician's career. *Mileikowsky*, 45 Cal.4th at 1267.

In *Unnamed Physician v. Board of Trustees*, 93 Cal.App.4th 607, 617 (2001), the court held that §§ 809 et seq. "delegates to the private sector" responsibility for quasi-judicial peer review proceedings. The California Supreme Court has held that the California Legislature delegated to private hospitals "the primary responsibility for monitoring the professional conduct of physicians licensed in California. In that respect, these peer review committees oversee 'matters of public significance. . . .'"

Whether a state has delegated its authority to act to a private party is ordinarily a question of state law. *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938). Here, § 809 expressly delegates the power to exclude physicians to private hospitals, a delegation confirmed by California courts, including the California Supreme Court. Section 809 et seq. delegates to hospitals the practically unfettered authority to take physicians' property interests. When they do so, they are wielding authority given to them by the State of California and therefore acting under color of state law.

The court below held that private hospitals in California are not state actors. That statement is true

for most private hospital conduct, including rendering medical care, operating the hospital, marketing, and similar activities. Although hospitals are highly regulated by the state and federal governments, that regulation does not establish state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). However, California does not only regulate private hospitals, it has delegated regulatory authority over physicians to those hospitals, while providing virtually no judicial oversight over those activities. California hospitals act under color of state law not because they are regulated, but because they are entwined with the state's system of medical discipline and have been delegated authority to take physicians' property.

The State of California cannot take a physician's property interest without due process of law. The State cannot circumvent the Fourteenth Amendment by delegating to private hospitals a power that it could not exercise itself. See *West v. Atkins*, 487 U.S. at 56 n.14. Kaiser and Sutter misused the power given to it by the State. California's medical disciplinary legal framework authorizes hospitals to systematically violate the due process protections of the Fourteenth Amendment.

VI. THE DUE PROCESS PROBLEMS AT ISSUE HERE COULD BE REMEDIED AT LITTLE OR NO ADDITIONAL COST TO THE STATE OR HOSPITALS.

The extent of due process required in a given situation is determined by the private interest at

stake; the risk of an erroneous deprivation of the interest through the procedures used; the probable value of additional or substitute procedural safeguards; and the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. at 335.

Here, the private interest, a fundamental vested property interest under state law, is important. A termination of hospital privileges can destroy a physician's career. As shown by the facts of this case, the risk of an erroneous deprivation is high, because California hospitals have financial interests contrary to physicians in peer review proceedings. The problem of the lack of neutral decision makers in medical disciplinary hearings could be adequately addressed by requiring mutually agreed-upon or neutral hearing officers, panel members and appellate bodies.

If California hospitals were required to provide due process, organizations such as state or local medical societies could provide panels of disinterested physicians and organizations such as the American Arbitration Association could provide neutral hearing officers. We now have many years of experience with private adjudication, and the requirement of neutral arbitrators has not proven a barrier to the widespread use of arbitration. Requiring neutral decision makers would cause little or no increase in the cost of California peer review proceedings. There is no principled or practical reason preventing California

from using neutral and impartial decision makers in its peer review proceedings.

VII. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NEVER BEEN ADDRESSED BY THIS COURT.

To Petitioners' knowledge, the question of whether a state can delegate to a private party the power to take the property of another private party without due process has never been addressed by this Court. The consequences of a decision by this Court will affect California's system of medical discipline, a system with responsibility for licensing, monitoring and disciplining the state's 124,000 licensed physicians. It will also affect the safety of patients in California hospitals.

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ____ (Feb. 23, 2015), this Court recently decided that a state government healthcare agency was subject to anti-trust regulation, affirming that federal anti-trust law is a central safeguard to preservation of economic freedom and our free enterprise. Here, the property interests in question are protected by an even more fundamental rule of law: the due process clause of the Fourteenth Amendment. Review of this case is essential to protect both physicians' property interests and patient safety.

Physicians like Dr. Fahlen and Dr. Safari spend more than ten of their most productive years studying and training to become highly expert medical

specialists. They have earned their right to a property interest in their hospital privileges, as recognized by California law.

Physicians serve one of our nation's most important needs, by providing medical care to those who might otherwise die or be permanently injured. As a nephrologist, most of Dr. Fahlen's patients have severe kidney disease that threatens their lives if they are not provided competent medical care. As a perinatologist, most of Dr. Safari's patients were women at high risk of having their babies die or suffer life-long disabilities if they were not given competent maternal and fetal obstetrical care.

Both Dr. Safari and Dr. Fahlen acted with a high degree of integrity by complaining about substandard hospital conditions that not only threatened the lives of their patients, but of other patients as well. Both of them are highly competent physicians who provided outstanding medical care to their patients. California's system of peer review nonetheless allowed their hospitals to take their privileges following show hearings that provided only the superficial gloss of fairness. As this case shows, California hospitals that want to silence physicians who report safety issues, and make an example of them, have the power to unilaterally terminate those physicians' privileges, with no independent review by the courts. This unrestrained power is dangerous not only to physician whistleblowers, but also to the patients who depend on physicians and hospitals when they are in greatest need.

CONCLUSION

Our healthcare system is in flux. To ensure patient safety, and to protect doctors from retaliation, it is essential that physicians have genuine legal protection, and not just show hearings, before a hospital can terminate their privileges and take their property interest. This case presents a new and important issue for this Court. Dr. Safari and Dr. Fahlen respectfully request that this Petition for Writ of Certiorari be granted.

Dated: April 8, 2015

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAMID SAFARI, M.D. and MARK FAHLEN, M.D., Plaintiffs-Appellants, v. KAISER FOUNDATION HEALTH PLAN; et al., Defendants-Appellees.	No. 12-16245 D.C. No. 3:11-cv-05371-JSW MEMORANDUM* (Filed Sept. 30, 2014)

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted September 12, 2014**
San Francisco, California

Before: BEA, IKUTA, and HURWITZ, Circuit Judges.

Plaintiffs appeal the district court's decision granting defendants' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs bring an as-applied challenge and a facial challenge under 42

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1983 to the peer-review process that a California health care provider must conduct before revoking a doctor's privileges to practice medicine at the provider's facilities. Plaintiffs claim the peer-review process violates the Due Process Clause of the Fourteenth Amendment.

Both the plaintiffs' as-applied and facial challenges are foreclosed by *Pinhas v. Summit Health, Ltd.,* 894 F.2d 1024 (9th Cir. 1989). First, the peer-review process has not changed materially since *Pinhas* because California Business & Professions Code § 809, *et seq.* merely codified the common law that existed when *Pinhas* was decided. *See El-Attar v. Hollywood Presbyterian Med. Ctr.,* 301 P.3d 1146, 1151 (Cal. 2013) ("[T]he peer review statute, like the common law fair procedure doctrine that preceded it, establishes minimum protections for physicians subject to adverse action in the peer review system." (internal quotations omitted)). *Pinhas*'s holding is therefore still valid. As a result, defendants were not state actors when they conducted peer review and revoked plaintiffs' privileges to practice medicine at defendants' facilities. *See Pinhas,* 894 F.2d at 1034.

Second, as *Pinas* remains valid, plaintiffs incorrectly named defendants, who are private parties, in a facial challenge to the peer-review statutes. *Id.* at 1034-35.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAMID SAFARI, M.D., and MARK FAHLEN, M.D.,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN, KAISER FOUNDATION HOSPITALS, and SUTTER CENTRAL VALLEY HOSPITALS,

Defendants. /

No. C 11-05371 JSW

ORDER DISMISSING WITH PREJUDICE

(Filed May 21, 2012)

On May 11, 2012, the Court granted Defendants' motions to dismiss and granted Plaintiffs leave to amend. Plaintiffs have advised the Court that they do not intend to amend their complaint. Accordingly, the case is DISMISSED WITH PREJUDICE. The Court shall enter a separate judgment, and the Clerk shall close the file.

IT IS SO ORDERED.

Dated: May 21, 2012 /s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAMID SAFARI, M.D., and MARK FAHLEN, M.D.,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN, KAISER FOUNDATION HOSPITALS, and SUTTER CENTRAL VALLEY HOSPITALS,

Defendants. /

No. C 10-05371 JSW

ORDER GRANTING IN PART AND DENYING AS MOOT IN PART MOTIONS TO DISMISS

(Filed May 11, 2012)

INTRODUCTION

This matter comes before the Court upon consideration of the Motion to Dismiss filed by Kaiser Foundation Health Plan and Kaiser Foundation Hospitals (the "Kaiser Defendants"). This matter also comes before the Court upon consideration of the Motion to Dismiss filed by Sutter Central Valley Hospitals ("Sutter") (collectively "Defendants," unless otherwise noted). The Court has carefully considered the parties' papers, relevant legal authority, and has had the benefit of oral argument, and the Court HEREBY GRANTS, IN PART, and DENIES, IN PART, AS MOOT the motions.

BACKGROUND

This case arises out of facial and as applied challenges to the constitutionality of California's statutory scheme governing medical peer review proceedings, California Business and Professions Code sections 805, *et seq.,* as well as California Code of Civil Procedure section 1094.5(d).[1] Plaintiffs, Dr. Hamid Safari ("Dr. Safari") and Dr. Mark Fahlen ("Dr. Fahlen") (collectively "Plaintiffs"), allege that this statutory scheme violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because, in their view, it permits private parties to deprive them of their protected property interest to practice medicine at these hospitals without due process of law.

B. Facts and Procedural History Pertinent to Dr. Safari.

Dr. Safari is an obstetrician and perinatologist, who was employed at the Kaiser-Fresno Medical Center, a private hospital, from 1997 until February

[1] Based on the allegations in Plaintiffs' Complaint, on January 30, 2012, this Court issued Orders pursuant to Federal Rule of Civil Procedure 5.1(b) and 28 U.S.C. § 2403(b), certifying to the Attorney General of the State of California that Plaintiffs had drawn into question the constitutionality of Business and Professions Code sections 809, *et seq*. The State of California has not chosen to intervene. At the hearing, Plaintiffs clarified that they also raise challenges to Business and Professions Code section 805 and California Code of Civil Procedure section 1094.5(d).

29, 2008. (Compl. ¶¶ 5, 74.) According to Dr. Safari, between 2001 and 2003, he repeatedly observed and reported corruption in the Quality Assurance Committee of his department, which led to certain members of the department losing their positions. These physicians apparently became "extremely antagonistic" to Dr. Safari. (*Id.* ¶ 44.)

On April 21 and 22, 2005, Dr. Safari attended the birth of a S.V., a high risk obstetrical patient, who was having twins. One of the twins was born lifeless with a neck injury after a vacuum assisted delivery. Dr. Safari contends that he did nothing wrong doing the procedure, but he alleges that his "adversaries claimed that [he] had negligently caused the death by pulling too hard with a vacuum." (*Id.* ¶ 45.) The Kaiser Defendants rescinded Dr. Safari's privileges to do vaginal deliveries, and Dr. Safari requested a hearing to contest the proposed discipline. (*Id.* ¶ 46.) Dr. Safari did not prevail at this hearing, but, for various reasons, he did not appeal the decision. (*Id.* ¶¶ 47-49.) On January 12, 2009, after an evidentiary hearing, the Medical Board of California determined that Dr. Safari's use of the vacuum was appropriate and within the standard of care. (*Id.* ¶¶ 59-61.)

Dr. Safari alleges that after this hearing, the Kaiser Defendants' "top level management decided they wanted to remove [him] entirely from the Kaiser system." (*Id.* ¶ 50.) Although the Kaiser Defendants offered him a monetary settlement to leave, he chose to stay. (*Id.* ¶¶ 50, 52.) He alleges that shortly thereafter, on April 24, 2007, the Kaiser Defendants

initiated a new disciplinary proceeding based on the S.V. case and alleged behavioral issues. (*Id.* ¶¶ 51-52.) The Kaiser Defendants sent Dr. Safari a notice of the recommended disciplinary action on September 23, 2007, and Dr. Safari requested a hearing on October 3, 2007. In November 2007, the Kaiser Defendants offered Dr. Kaiser $2,000,000.00 to leave Kaiser. (*Id.* ¶¶ 53-57.) "After Dr. Safari did not accept Kaiser's monetary offer to leave," the Kaiser Defendants summarily suspended him on February 29, 2008. (*Id.* ¶ 58.) Dr. Safari again requested a hearing to challenge this decision, and he also raised challenges to the Kaiser Defendants' bylaws and fair hearing plan. (*Id.* ¶¶ 58, 62-68.) The hearing panel recommended that the Kaiser Defendants terminate Dr. Safari's privileges at Kaiser, and on September 23, 2010, the Kaiser Defendants' Board of Directors affirmed the summary suspension and terminated his privileges. (*Id.* ¶¶ 73-74.) Dr. Kaiser contends that there were numerous flaws in these proceedings and that, as a result, the Kaiser Defendants violated his due process rights. (*See generally* Compl. ¶¶ 20-40, 53-55, 57-58, 62-73.)

On December 17, 2010, Dr. Safari filed a petition for a writ of mandate to overturn the Kaiser Defendants decision to terminate his privileges. Those proceedings, *Safari v. Kaiser Foundation Health Plan and Kaiswer Foundation Hospitals,* Alameda County Superior Court No. RG 10551842, still are pending.

(*Id.* ¶¶ 76-77.)[2] Dr. Safari also alleges that the delays attendant in the judicial review process violate his due process rights, because he cannot practice medicine. (*Id.* ¶¶ 74-79.)

B. Facts and Procedural History Pertinent to Dr. Fahlen.

Dr. Fahlen is an internist and nephrologist, who, from 2004 through January 2011, held privileges at the Memorial Medical Center, ("MMC"), a private hospital Sutter operated in Modesto. (Compl. ¶¶ 6, 80-81, 85.) Between January 2004 and April 2008, Dr. Fahlen complained about serious nursing errors at MMC, and he claims Sutter retaliated against him for these complaints. (*Id.* ¶¶ 81-82.) According to Dr. Fahlen, at Sutter's behest, Dr. Fahlen's employer terminated him, and when Dr. Fahlen refused to leave Modesto, MMC's Medical Executive Committee eventually brought charges against Dr. Fahlen. A medical disciplinary hearing followed based on allegations of inappropriate behavior. (*Id.* ¶ 83.) Although the hearing panel determined that Dr. Fahlen's privileges should not be terminated, and although MMC's Medical Executive Committee did not appeal that decision, on January 7, 2011, Sutter terminated Dr. Fahlen's privileges at MMC. Dr. Fahlen contends

[2] At the hearing, Kaiser informed the Court that the state court had denied Safari's petition for writ of mandate. Dr. Safari has appealed that decision.

that Sutter did so in violation of its bylaws. (*Id.* ¶¶ 84-85.) Dr. Fahlen contends that there were numerous flaws in these proceedings, which violated his due process rights. (*Id.* ¶¶ 20-40, 84-86.)

On March 9, 2011, Dr. Fahlen sued Sutter and MMC's hospital administrator, pursuant to California Health and Safety Code § 1278.5. Those proceedings, *Fahlen v. Sutter Central Valley Hospitals,* Stanislaus County Superior Court No. 369888, still are pending. (*Id.* ¶¶ 87-98; Declaration of James E. Conforti in Support of Sutter's Request for Judicial Notice, Ex. 1.)[3] Dr. Fahlen alleges that the delays attendant to these judicial proceedings also deny him due process, because he cannot practice medicine. (*Id.*)

D. Plaintiffs' Claims and Requested Relief.

Plaintiffs allege that California's peer review proceedings violate due process because: (1) Business and Professions Code section 809.2(a) permits private health care corporations to unilaterally choose the judge and jury for disciplinary hearings; (2) the statutes do not provide a standard of care to determine quality issues; and (3) the statutes do not provide for timely, effective and independent judicial review of disciplinary proceedings. (Compl. ¶¶ 19-40.)

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[3] At the hearing, Sutter represented that it has appealed the denial of its special motion to strike under California's Anti-SLAPP law and has sought of writ of mandate on a discovery dispute.

Plaintiffs claim that their individual hearings were flawed because, *inter alia,* the panel members were biased, the Defendants withheld evidence, or failed to apply a consistent standard to evaluate the evidence. (*See generally id.* ¶¶ 55, 62-73, 85.) Dr. Safari seeks an injunction that would require the Kaiser Defendants to reinstate his privileges and credentials to practice at their hospitals. (*Id.* ¶ 108.) Dr. Fahlen seeks an injunction that would require Sutter to reinstate his privileges and credentials to practice at MMC. (*Id.* ¶ 109.) Plaintiffs also seek a "declaration from this Court . . . that California law governing medical disciplinary hearings of physicians and other California licentiates pursuant to California Business and Professions Code section 809 et seq. violates Federal due process guaranteed by the Fourteenth Amendment of the United States Constitution." (Compl. ¶ 107.)

The Court shall address additional specific facts as necessary in the remainder of this Order.

ANALYSIS

Defendants have raised numerous arguments in support of their motion to dismiss. Because the Court fords that Plaintiffs cannot establish that the Defendants acted under color of state law, the Court

does not address all of Defendants' arguments in favor of dismissal.[4]

A. Applicable Legal Standard.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy,* 794 F.2d 478, 481 (9th Cir. 1986). However, even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)).

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[4] The Defendants also moved to dismiss on the basis that the Plaintiffs did not have standing to pursue claims against the hospital where they did not hold privileges. Plaintiffs conceded that point with respect to their as applied challenges and claims for injunctive relief. The Court, therefore, GRANTS, IN PART, Defendants' motion to dismiss on this basis on this basis as well. Sutter also moved to sever Dr. Fahlen's case from Dr. Safari's case. In light of the Court's ruling, the Court DENIES, IN PART, AS MOOT that aspect of Sutter's motion. Finally, although the Court does not reach the issue, the Court notes an apparent tension in the parties' position on state action and abstention under *Younger v. Harris,* 401 U.S. 37 (1971).

Pursuant to *Twombly,* a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "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." *Ashcroft v. Iqbal,* 556 U.S.662, 678 (2009) (citing *Twombly,* 550 U.S. at 556). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief" *Id.* (quoting *Twombly,* 550 U.S. at 557) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.,* 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N Cal. Collection Serv., Inc.,* 911 F.2d 242, 246-47 (9th Cir. 1990).

B. California's Statutory Scheme Regarding the Peer Review Process.

Under California law, a physician's right or privilege to use a hospital's facilities is a "property interest directly connected to the physician's livelihood." *Mileikowski v. West Hills Hosp. and Med. Ctr.,* 45 Cal. 4th 1259, 1267 (2009) (citing *Anton v. San*

Antonio Community Hospital, 19 Cal. 3d 802, 823 (1977)). "Decisions concerning medical staff membership are made through a process of hospital peer review. Every licensed hospital is required to have an organized medical staff responsible for the adequacy and quality of the medical care rendered to patients in the hospital." *Mileikowski,* 45 Cal. 4th 1259, 1267 (2009) (citing, *inter alia,* 22 Cal. Code Regs. § 70703(a)).

"The medical staff acts chiefly through peer review committees, which among other things, investigate complaints about physicians and recommend whether staff privileges should be granted or renewed." *Mileikowski,* 45 Cal. 4th at 1267. A hospital's medical staff is required to adopt written by-laws "which provide formal procedures for the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and other such subjects or conditions with the medical staff and governing body deem appropriate." 22 Cal. Code Regs. § 70703(b); *see also Mileikowski,* 45 Cal. 4th at 1267; Cal. Bus. & Prof. Code § 2282.5; 22 Cal. Code Regs. §§ 70701, 70703. "It is these bylaws that govern the parties' administrative rights." *Unnamed Physician v. Board of Trustees of St. Agnes Medical Center,* 93 Cal. App. 4th 607, 617 (2001).

"If a peer review committee recommends that the privileges of the physician be restricted or revoked because of the manner in which he or she exercised those privileges, a series of procedural mechanisms

kick into place – all governed by state law." *Unnamed Physician,* 93 Cal. App. 4th at 616 (citing Cal. Bus & Prof. Code §§ 809-809.8; 22 Cal. Code Regs. § 70703(b)). "The peer review process, while generally delegating responsibility to the private sector to monitor the professional conduct of physicians, establishes minium protections for physicians subject to adverse action in the peer review system." *Mileikowski,* 45 Cal. 4th at 1268; *Unnamed Physician,* 93 Cal. App. 4th at 617 ("The statutory scheme delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights, all specified in the statute.").

When a peer review committee recommends a "final proposed action" that will require a hospital to file a report with California's Medical Board pursuant to Business and Professions Code section 805 (an "805 Report"), "the affected physician is entitled to notice and then may request a hearing for the purpose of determining if the recommendation is reasonable and warranted." *Mileikowski,* 45 Cal. 4th at 1268-69 (citing Cal. Bus. & Prof. Code §§ 809.1(a)-(b), 809.3(b)(1-3). "The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the [physician] and the peer review body, or before a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in

the same matter, and which shall include where feasible, an individual practicing in the same specialty as the [physician]." Cal. Bus. & Prof. Code § 809.2(a). Section 809.2 also includes additional provisions designed to ensure that the hearing officer is unbiased, and it gives the physician the right to voir dire and challenge the impartiality of the hearing officer or any panel member. *Id.* § 809.2(b)-(c).

The parties also have the right to obtain documents, call and cross-examine witnesses, and to present and rebut evidence. *Id.* §§ 809.2(d), 809.3(a). Finally, at the conclusion of a hearing, "the parties are entitled to the written decision of the trier of fact, 'including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.'" *Mileikowski,* 45 Cal. 4th at 1269 (quoting Cal. Bus. & Prof. Code § 809.4(a)(1)). A party aggrieved by a decision may seek a writ of mandate pursuant to California Code of Civil Procedure 1094.5. *See, e.g.,* Cal. Code Civ. P. § 1094.5(d) (setting forth standard of review).

C. Plaintiffs Have Not Shown That Defendants Acted Under Color of State Law.

Plaintiffs bring this action pursuant to 42 U.S.C. section 1983, which "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is

not itself a source of substantive rights. It merely provides a method for vindicating federal rights elsewhere conferred. *Graham v. Connor,* 490 U.S. 386, 393-94 (1989). To state a claim under Section 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins,* 487 U.S. 42, 48 (1988); *Chudacoff v. University Medical Center of Southern Nevada,* 649 F.3d 1143, 1149 (9th Cir. 2011).

It is undisputed that the Kaiser Defendants and Sutter are private corporations, and that the hospitals at which Plaintiffs held privileges were private hospitals. In general, a private individual or private entity, cannot be held liable under Section 1983 because Section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrong." *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49 (1999) (quotation marks omitted); *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 835 (9th Cir.1999). However, a court may find that private conduct qualifies as state action "if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Academy v. Tennessee Secondary Sch. Athl. Ass 'n,* 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974)); *see also Chudacoff,* 649 F.3d at 1150.

Following *Brentwood,* the Ninth Circuit has identified four criteria or tests to determine whether state action exists: (1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.[5] *Kirtley v. Rainey,* 326 F.3d 1088, 1092 (9th Cir. 2003). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." *Id.*; *see also Chudacoff,* 649 F.3d at 1150 (a "nominally private actor is 'controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies or when government is entwined in its management and control," an individual's conduct can be considered state action) (quoting *Brentwood,* 531 U.S. at 295-96).

Plaintiffs argue that *Chudacoff, supra,* controls. In that case, the Ninth Circuit concluded that individual members of a county hospital's medical executive committee could be considered state actors. 649 F.3d at 1146. The court reasoned that the defendant hospital was a "public hospital, and there is no dispute that the operation of a public hospital is state action and that a public hospital is required to meet the provisions of the Fourteenth Amendment in the admission of physicians to its staff." *Id.* (internal quotations and brackets omitted). Because the private individuals, as members of the defendant's

[5] At the hearing, Plaintiffs agreed that there are no disputed facts that would preclude the Court from resolving this question as a matter of law.

Medical Staff, were "controlled and managed by the [defendant hospital's] Board," and because their "authority to deprive [plaintiff] of his staff privileges flowed directly from the" defendant hospital, "whose authority to regulate physician privileges at a county hospital is in turn directly authorized by Nevada law," the court concluded those individuals' actions could be fairly attributable to the state. *Id.* at 1150-51.

The court also stated that "[a]lthough determining state action can admittedly be an imperfect science," it did not consider the case to be a difficult one. *Id.* at 1149. The court then suggested a more difficult case might be presented by the fact pattern at issue in this case, *i.e.* when it involved "a private hospital whose only state link is its subjection to state regulation." *Id.* (citing, *inter alia, Pinhas v. Summit Health Ltd.,* 894 F.2d 1024 (9th Cir. 1990)). Defendants argue that this, in fact, is an easy case and that *Pinhas,* rather than *Chudacoff,* controls the outcome.

In *Pinhas,* the plaintiff claimed, *inter alia,* that Business and Professions Code sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986, 42 U.S.C. sections 11101-11152, were unconstitutional and violated his due process rights under the Fourteenth Amendment. *Id.* at 1026, 1033. The Ninth Circuit affirmed the district court's dismissal for lack of state action.

> The challenged action here, the removal of Pinhas's staff privileges . . . cannot be

> attributed to the state of California. Only private actors were responsible for the decision to remove Pinhas. That the decision was made pursuant to a review process that has been approved by the state is of no consequence: the decision ultimately turned on the "judgments made by private parties according to professional standards that are not established by the state."

Pinhas, 894 F.2d at 1034 (quoting *Blum v. Yaretsky,* 457 U.S. 991, 1008 (1982)); *see also id.* ("Because Pinhas's removal was instrumented solely by private parties, state action is absent and his due process claim was properly dismissed."); *see also Ezpeleta v. Sisters of Mercy Health Corp.,* 800 F.2d 119, 122 (7th Cir. 1986); *Crowder v. Conlan,* 740 F.2d 447, 450 (6th Cir. 1984).

Plaintiffs argue that *Pinhas* is not controlling, because the court did not address Business and Professions Code Section 809, which was enacted in 1989 and provides, *inter alia,* that "the laws of this state provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review, and better integrate public and private systems of peer review." Cal. Bus. & Prof. Code § 809(a)(9).[6] Plaintiffs have disavowed any reliance on a compulsion or coercion theory. Rather, they argue that, notwithstanding the

[6] This subsection explains why California chose to opt out of specific provisions of the Health Care Quality Improvement Act.

holding in *Pinhas,* the Defendants are acting under color of state law, because: (1) the Defendants are performing a public function; (2) the Defendants are willing participants in joint activity with the State; and (3) the Defendants' conduct is entwined with governmental policies. (*See also* Compl. ¶¶ 14-18 (setting forth allegations regarding state action).)

1. Public Function.

"Under the public function test, 'when private individuals are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.'" *Lee v. Katz,* 276 F.3d 550, 554-55 (9th Cir. 2002) (quoting *Evans v. Newton,* 382 U.S. 296, 299 (1966)). "To satisfy the public function test, the function at issue must be both traditionally and exclusively governmental." *Id.* Plaintiffs argue that this case is analogous to *Culbertson v. Leland,* 528 F.2d 426 (9th Cir. 1975). In that case, the court concluded that the defendant, the owner of a hotel, acted under color of law when, after she evicted the plaintiffs, she seized their personal property as collateral, pursuant to the Arizona Innkeeper's Lien statute. *Culbertson,* 528 F.2d at 427. The court reasoned the defendant was acting under color of state law because, "the lien statute at issue here gave [defendant] a right she would not have had at common law." *Id.* at 430. The court also noted that the parties did not have a contractual relationship regarding disposition of the property. *Id.* at 432.

Because the statute was the "sole authority for the seizure, which would not otherwise have been even colorably legal, . . . [a]nd since the statute was the sine qua non for the activity in question, the state's involvement through the statute is not insignificant." *Id.*

In contrast to the facts in *Culbertson,* when California's legislature amended California Business and Professions Code section 809, it did not grant private hospitals like Defendants rights they did not have at common law. Indeed, Plaintiffs do not argue otherwise. *See, e.g., Anton,* 19 Cal. 3d at 825; *Applebaum v. Board of Directors,* 104 Cal. App. 3d 648, 656-67 (1980); *see also Wong v. Stripling,* 881 F.2d 200, 202 (5th Cir. 1989) (concluding that plaintiff failed to allege facts showing state action under public function theory where statutory scheme "simply authorize[d] action" that private hospitals had at common law). Moreover, unlike the parties in the *Culbertson* case, there was a contractual relationship governing the rights at issue, namely Defendants' bylaws and fair hearing plans. *See, e.g., Unnamed Physician,* 93 Cal. App. 4th at 617 ("It is these bylaws that govern the parties' administrative rights.").

The Court concludes that, taking the facts alleged as true, Plaintiffs have not shown that the public function test is satisfied.

2. Joint Action.

To determine if the joint action test is satisfied, a court considers whether a state has "so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 725 (1961); *see also Kirtley,* 326 F.3d at 1088; *Pinhas,* 894 F.2d at 1034 (characterizing test as "symbiotic relationship" test).

The *Pinhas* court rejected the plaintiff's argument that the "'integration of public and private systems of peer review' met the 'symbiotic relationship' test set forth in" *Burton,* because there was no "financial relationship" between the State and the persons involved in the peer-review proceedings, "nor is any real property involved." 894 F.2d at 1034. The facts in the Complaint show that the same is true here. Moreover, this is not a case where Plaintiffs allege that the Defendants have conspired with other state actors to deprive them of constitutional rights. *See, e.g., Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 151-52 (1970). The only fact on which the Plaintiffs rely to show "joint action" is that "disciplinary actions taken by private corporations" must "be reported to the State in '805 Reports.'" (Compl. ¶ 17; *see also* Docket No. 26 (Opp. Br. to Kaiser Defs. Mot. at 12:5-7).) However, private hospitals were required to make such reports before the Legislature added Section 809

to the Business and Professions Code. Further, the Ninth Circuit rejected that very argument in *Pinhas*. 894 F.2d at 1034 (finding that although the defendant was required to make a report to the state board under Business and Professions Code section 805, that fact was "irrelevant in determining whether the state took an active role" in the termination of a physician's privileges).

The Court concludes that, taking the facts alleged as true, Plaintiffs have not shown that the joint action test is satisfied.

3. Entwinement.

Plaintiffs also allege and argue that the peer review process is so "entwined" with governmental policies that the Defendants' conduct is fairly attributable to the State. Plaintiffs argue that *Brentwood* supports a finding of state action on the entwinement theory. In that case, the defendant was a private association incorporated to regulate interscholastic athletic competition in public and private schools. Although "nominally private," the court concluded that "the pervasive entwinement of public officials in its composition and workings" rendered it a state actor. *Brentwood Academy,* 531 U.S. at 298-302.

Plaintiffs attempt to analogize *Brentwood* by arguing that "every private hospital in the state" is compelled "to participate in the State's peer review mechanism. . . ." (Opp. Br. to Kaiser Defs. Mot. at

14:2-3.) However, the facts in this case are distinguishable from the facts in *Brentwood,* in that Plaintiffs do not allege – nor do they argue – that there are any public officials involved in the composition of the hearing panels or hospital Boards. Rather, Plaintiffs rely exclusively on the statutory scheme and on the case law which states that California has delegated responsibility for the peer review process to the private sector to support their "entwinement" theory. *See, e.g., Mileikowski,* 45 Cal. 4th at 1259, 1268; *Shacket v. Osteopathic Medical Board,* 51 Cal. App. 4th 223, 231 (1996) ("The Legislature . . . delegated to the private sector the responsibility to provide fairly conducted peer review . . . [and] relied upon the peer review bodies . . . to discipline its members and report that discipline to the [defendant] as the licensing agency").

The Court finds Plaintiffs' reliance on *Brentwood* unpersuasive. Although California has adopted a statutory scheme to regulate peer review proceedings, the Supreme Court has made clear that the fact that a private actor is "subject to state regulation does not by itself convert [their] action into that of the State for purposes of the Fourteenth Amendment." *Jackson,* 419 U.S. at 350. The Court finds that the facts in this case are not materially different from the facts in *Pinhas,* and it similarly concludes that the challenged actions here "cannot be attributed to the state of California. Only private actors were responsible for the decision[s]" to terminate Plaintiffs' privileges. *Pinhas,* 894 F.2d at 1034. As in *Pinhas,* the fact that

those decisions were "made pursuant to a review process that has been approved by the state is of no consequence: the decision ultimately turned on the 'judgments made by private parties according to professional standards that are not established by the State.' *Id.* (quoting *Blum,* 457 U.S. at 1008).

For these reasons, the Court finds that Plaintiffs have not alleged facts to show that either Sutter or the Kaiser Defendants acted under color of state law and, thus, fail to state a claim under Section 1983. Although normally a court should grant leave to amend, amendment is not required if it would be futile. Based on the arguments presented to the Court, the Court finds that Plaintiffs would not be able to allege any facts to show that Defendants are, in fact, acting under color of state law and granting them leave to amend would be a futile act. Accordingly, the Court dismisses the claims against Kaiser and the Sutter Defendants with prejudice.[7]

D. The Court Dismisses the Claims for Declaratory Relief.

The Defendants also argue that the Court should dismiss the Plaintiffs' claims for declaratory relief for lack of standing. However, the actual issue is whether they are the proper parties to defend against Plaintiffs' facial challenge to Business and Professions

[7] In light of this ruling, the discovery dispute submitted by letter brief on May 8, 2012 is moot.

Code Sections 805. Plaintiffs' argument that the Defendants are the proper parties depends heavily on their argument that Defendants have acted under color of state law. Following the Ninth Circuit's directive in *Pinhas,* the Court concludes Defendants are not the proper parties to defend a facial challenge to the statutory scheme, and it dismisses Plaintiffs' claims against them on that basis as well. *See Pinhas,* 894 F.2d at 1035 ("We agree with the district court that the appellees are not the appropriate parties to defend a constitutional challenge to the relevant state and federal statutes.") (citing *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353, 1361 & n. 7 (9th Cir. 1977), *aff'd in part and rev'd in part,* 440 U.S. 391 (1979).

Because the Court cannot find that it would be futile to grant Plaintiffs leave to amend to assert the facial challenge, if Plaintiffs were to name a proper party as a defendant, it shall provide them an opportunity to do so.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART AS MOOT, the motions to dismiss filed by Sutter and the Kaiser Defendants. If Plaintiffs wish to pursue their facial challenge to California Business and Professions Code section 805, *et seq.* and California Code of Civil Procedure 1094.5(d), they may file an amended complaint naming a proper defendant or defendants

by no later than June 8, 2012. The Court CONTINUES the case management conference currently scheduled for May 25, 2012, to July 27, 2012 at 1:30 p.m.

If Plaintiffs do not file an amended complaint by June 8, 2012, the Court shall dismiss this case with prejudice.

IT IS SO ORDERED.

Dated: May 11, 2012 /s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAMID SAFARI, M.D. and MARK FAHLEN, M.D., Plaintiffs-Appellants, v. KAISER FOUNDATION HEALTH PLAN; et al., Defendants-Appellees.	No. 12-16245 D.C. No. 3:11-cv-05371-JSW Northern District of California, San Francisco ORDER (Filed Dec. 10, 2014)

Before: BEA, IKUTA, and HURWITZ, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

DENIED.