No. 07-538

IN THE

# Supreme Court of the United States

ARTHUR P. CHRISTIE, ANTHONY L. ALFORD, DANIEL A. DEIGHTON, FREDERICK W. JENNART, DAVID N. HARVEY, M.D., MICHAEL A. HELLWEGE, M.D., F. HUNT SANDERS, M.D., RICHARD J. SULLIVAN, M.D., TITUS A. TAUBE, M.D., C. SCOTT EDENFIELD, M.D., RAHIL KAZI, M.D., RICHARD L. HEATON, M.D., BRITTON L. PILCHER, M.D., SANTANU DAS, M.D., THOMAS C. JOHNSON, M.D., RICHARD B. ELLIS, M.D., AND HOSPITAL AUTHORITY OF HOUSTON COUNTY D/B/A/ HOUSTON MEDICAL CENTER,
*Petitioners,*
v.
RUSSELL E. ADKINS,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Courts of Appeal for the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN HOSPITAL ASSOCIATION, GEORGIA HOSPITAL ASSOCIATION, ALABAMA HOSPITAL ASSOCIATION, AND FLORIDA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI**

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**MOTION OF AMERICAN HOSPITAL ASSOCIATION, GEORGIA HOSPITAL ASSOCIATION, ALABAMA HOSPITAL ASSOCIATION, AND FLORIDA HOSPITAL ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.2 of the Rules of this Court, the American Hospital Association, the Georgia Hospital Association, the Alabama Hospital Association, and the Florida Hospital Association (jointly "Associations") respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Counsel of Petitioners has consented to the filing of this brief, but counsel for Respondents has withheld consent. Accordingly, this motion for leave to file is necessary under Rule 37.2(b).

The Associations are non-profit state and/or national associations of hospitals and healthcare systems, devoted to improving the quality of healthcare in this country. The Eleventh Circuit's decision will directly and adversely affect members of each of these organizations because they reside in states located within the Eleventh Circuit.

The Associations fully support Petitioner's efforts to obtain review of the Question Presented in its petition. As more fully set forth in the accompanying brief, the Eleventh Circuit's decision was based on a misapplication of law and precedent and will establish horrendous healthcare policy that undercuts hospitals' efforts to assure the highest quality of patient care. By allowing access to peer review privileged materials through the vehicle of filing federal claims in federal court, the opinion will also increase litigation costs, create incentives for forum shopping between state and federal courts, and encourage misuse of the discovery process throughout the Circuit. The Eleventh Circuit wrongly departed from the test set forth in this Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), interpreting Federal Rule of Evidence 501.

For the foregoing reasons, the American Hospital Association, the Georgia Hospital Association, the Alabama Hospital Association, and the Florida Hospital Association respectfully request that they be allowed to participate in this case by filing the attached brief.

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## I. INTEREST OF *AMICI CURIAE*

*Amici curiae* are the American Hospital Association, the Georgia Hospital Association, the Alabama Hospital Association, and the Florida Hospital Association.[1] The Associations are non-profit state and national associations of hospitals and healthcare systems. They each engage in advocacy and representation efforts to enhance their members' ability to serve the healthcare needs of patients within their geographical areas.

Each of the state associations represents hospitals that are directly affected by the Eleventh Circuit's decision because their members are in states that comprise the Eleventh Circuit. Most of these same members also belong to the American Hospital Association. These state associations, along with the American Hospital Association, recognize the serious harm that the Eleventh Circuit's decision will have on their hospital members' ability to safeguard the public health.

The *amici* support Petitioners' Petition for Writ of Certiorari because the Eleventh Circuit's decision is both bad law and horrendous public policy. Unless reversed by this Court, the Eleventh Circuit's decision will: (1) undermine efforts to protect and improve health care quality by hospitals and physicians, (2) conflict with this Court's precedent and interpretation of Federal Rule of Evidence 501, which has set forth a specific test for federal recognition of common law privileges, and (3) increase litigation costs, disrupt quality review in hospitals, and encourage misuse of the discovery process in cases

[1] No counsel for any of the parties authored any portion of this brief. No entity other than *amicus curiae* Georgia Hospital Association monetarily contributed to this brief. *See* S. Ct. R. 37.6. Counsel for both parties received timely notice of the intent to file this brief. Counsel for Petitioners has consented to the filing of this brief, but counsel for Respondents has withheld consent. Therefore, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari is attached to this brief, pursuant to S. Ct. R. 37.2(b).

arising from physician staff privilege disputes by countenancing unfettered access to peer review privileged materials and deliberations.

## II. SUMMARY OF ARGUMENT

As acknowledged by the Eleventh Circuit, all fifty states and the District of Columbia safeguard the confidentiality of information associated with medical staff peer review activities. In doing so, every state has recognized that in order to promote and enhance candid, frank and critical evaluation of medical professionals' skills and standard of care, there must be full and complete assurance that the peer review process will be protected from discovery in civil actions. Despite acknowledging the unanimous recognition of the peer review privilege by the states, the Eleventh Circuit nevertheless refused to uphold the privilege under Federal Rule of Evidence 501. Instead, it opened the peer review process to full-scale discovery, without any means of protection, if a federal claim is brought in federal court. If left standing, the Eleventh Circuit's opinion will seriously undercut hospitals' ability to ensure quality healthcare in Georgia, Florida, and Alabama.

The Eleventh Circuit's decision directly conflicts with this Court's recognition and application of federal common law privilege under Federal Rule of Evidence 501. In *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996), this Court explicitly observed that where, as here, states unanimously recognize a privilege, federal courts should also honor that privilege. Contrary to this Court's admonition in *Jaffee*, the Eleventh Circuit engaged in a balancing test, in which it decided that the interests in enforcing anti-discrimination laws outweigh the unanimous views of the states that peer review matters should be privileged. The Eleventh Circuit's opinion similarly conflicts with the Fifth Circuit's

ruling in *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992), which recognized the status of the medical peer review privilege as a *sine qua non* of adequate healthcare.

From a policy perspective, the Eleventh Circuit's opinion will have additional adverse consequences. The decision will invariably increase litigation costs and impose onerous discovery burdens on hospitals in medical staff litigation. Physicians will be encouraged to convert routine staff privilege disputes into federal causes of action to gain access to federal courts, thus increasing the dockets of federal courts. As a result of the Eleventh Circuit's decision, the entire peer review process of the defendant hospital would be open to discovery – regardless of the relative merit of the underlying claim. The Eleventh Circuit's decision will have the perverse effect of encouraging plaintiffs to forum shop and file suits in federal courts to avoid being completely foreclosed from the medical peer review evidence as they would be in state courts.

Simply stated, the Eleventh Circuit's opinion is both bad law and bad public policy. This Court should grant certiorari and reverse the Eleventh Circuit.

## III. ARGUMENT

### A. Peer Review Confidentiality Is Critical To The American Health Care System

Every state in the nation protects confidential hospital peer review materials from discovery in litigation. At least 46 states have done so via legislation. *See Weekoty v. United States*, 30 F. Supp. 2d 1343, 1346 (D.N.M. 1998) (cataloging 46 states which have codified the medical peer review privilege).[2] Indeed, the Eleventh Circuit

[2] The states cited in the *Weekoty* decision excluded Massachusetts, South Carolina, Tennessee, and Utah as states legislatively recognizing the medical peer review privilege. Each of these states now has such a legislative enactment. *See* Mass. Gen. Laws ch. 111, § 204 (2007) (granting the privilege to proceedings,

recognized this very fact in this case. *See Adkins v. Christie*, 488 F.3d 1324, 1327 (11th Cir. 2007).

Every state has protected peer review confidentiality as essential to state governmental efforts to promote and improve medical care quality. They understand the importance of confidentiality to encourage physicians to be candid and appropriately protective of patient care rendered by their peers on the medical staff. As described in Petitioner's brief, breach of peer review confidentiality will destroy a crucial safeguard in our healthcare system and will likely engender spurious staff privilege lawsuits that will unnecessarily burden our federal courts. *See* Pet. Br. at 6. Physician medical staff litigation will shift to federal courts based on federal claims of discrimination, antitrust conspiracies, or other federal claims, as plaintiffs seek access to internal professional self-criticisms that would be denied in state courts.

Numerous courts have refused to open the peer review process to discovery. For instance, the Supreme Court of Georgia noted that confidentiality is required "because of the concern that the candor necessary for the effective functioning of these [peer review] committees would be destroyed if their proceedings were discoverable." *Eubanks v. Ferrier*, 267 S.E.2d 230, 232 (Ga. 1980). Similarly, the Fifth Circuit distinguished the medical peer review privilege from academic peer review and like claims by writers, publishers, musicians, and lawyers, holding that "the medical peer review process 'is a *sine qua non* of adequate hospital care.'" *Harris Methodist*, 970 F.2d at 103. The

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reports, and records of medical peer review committees, and exempting them from subpoena or discovery in judicial or administrative proceedings, with limited exceptions); S.C. Code Ann. § 40-47-190 (holding that all proceedings and information acquired by committees of medical staffs of hospitals acting pursuant to written bylaws are confidential and not subject to discovery, subpoena, or introduction into evidence); Tenn. Code Ann. § 63-6-219 (holding that all information furnished to or generated by peer review committees is privileged and not available for discovery or subpoena); Utah Code Ann. § 26-25-3 (holding information furnished to, among other things, peer review committees, or their findings or conclusions, are not subject to discovery, use, or receipt in evidence in any legal proceeding).

District Court of New Mexico similarly held that if peer review sessions were open to discovery, physicians would not be as honest in their reviews, "and the goal of improving medical care would be substantially undermined." *Weekoty*, 30 F. Supp. 2d at 1346. The Eleventh Circuit's decision is completely contrary to the unanimous views of the states about the importance of protecting the peer review privilege and contrary to other federal courts.

### B. The Eleventh Circuit's Opinion Contravenes The Supreme Court's Decision In *Jaffe v. Redmond*

In *Jaffee*, this Court stressed the importance of recognizing a privilege in federal court when states are unanimous in recognizing that same privilege. *Jaffee*, 518 U.S. at 12-13. *Jaffe* addressed the adoption of various aspects of the psychologist-patient privilege, noting that the "existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege," especially given that state legislatures, in creating privileges, take into account the importance of protecting the fact-finding capabilities of their courts. *Id.* at 13. Federal recognition of such privileges avoids "frustrat[ing] the purposes of the state legislation that was enacted to foster these confidential communications." *Id*. It also honors a privilege that is "'rooted in the imperative need for confidence and trust.'" *Id*. at 10.

Although the Eleventh Circuit below correctly observed that "all fifty states and the District of Columbia recognize [the medical peer review] privilege," *Adkins*, 488 F.3d at 1327, it attributed no significance to this fact. The Eleventh Circuit instead balanced two issues it deemed important: improved physician oversight and healthcare management, on the one hand, and the discovery of evidence of discrimination, on the

other hand. *Id.* at 1328-29. This is the exact type of balancing analysis *Jaffee* explicitly rejected.

In *Jaffee*, the Seventh Circuit had recognized the psychotherapist-patient privilege, but concluded that a balancing test should be applied in each psychotherapist-patient case, weighing the privacy considerations against the need for disclosure. *See Jaffee v. Redmond*, 51 F.3d 1346, 1357 (7th Cir. 1995). This Court rejected that approach because "participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Jaffee*, 518 U.S. at 18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)) . Other commentators have criticized lower courts' failure to apply this precedent, noting that "[t]he *Virmani* court [*Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001)] …balanced the need for promoting candor among peer review members against the interests for evidence in medical malpractice and defamation claims…" instead of paying attention to the "reason and experience" of the states in creating the privilege. Teresa L. Salamon, *Note: When Revoking Privilege Leads to Invoking Privilege: Whether There is a Need to Recognize a Clearly Defined Medical Peer Review Privilege in Virmani v. Novant Health Inc.*, 47 Vill. L. Rev. 643, 667 (2002).

The analysis applied by the Eleventh Circuit in the present case bears the same flaws as the Seventh Circuit's approach in *Jaffee*, and is even more pernicious. Instead of making a case-by-case determination based on a given set of circumstances, the Eleventh Circuit decided that *any* physician complaint alleging discrimination is sufficient to

revoke the privilege. Thus, whether a communication is privileged depends not on the circumstances under which the communication is made, but rather on conclusory allegations in a complaint alleging a violation of federal law. Consequently, doctors and hospitals in the Eleventh Circuit will no longer have the certain knowledge that the confidentiality of their peer review actions will be protected in the future if they are sued in federal court under a civil rights, antitrust, or other type of federal claim. Instead, "[p]hysicians involved in peer review will need to forecast whether the subject of the peer review will sue in federal or state court to determine what degree of privilege might apply. The privilege becomes all but illusory and provides no notice to participants…." *Id*. at 673; *see also* Alissa Marie Bassler, *Comment: Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege*, 39 Idaho L. Rev. 689, 711 (2003) (arguing that "[i]t is unreasonable to expect doctors to be able to feel isolated from liability if the privilege is only afforded in some situations"). Similar to the situation criticized by this Court in *Jaffee*, hospitals and doctors in essence will have no peer review privilege at all unless they are sued in state court.

*Amici* recognize that privileges created under Federal Rule of Evidence 501 may not be totally inviolate, but they should nevertheless be accorded appropriate respect and sensitivity. This Court in *Jaffee* addressed potential exceptions to the psychotherapist-patient privilege, contemplating that a breach of the psychotherapist-patient privilege would be warranted if necessary to avert serious threats of harm to the patient or a third party. *Jaffee*, 518 U.S. at 18 n.19. Likewise, federal courts (and state courts) employ a crime-fraud exception to the attorney-client privilege. These exceptions, however, are carefully and narrowly applied.

For example, this Court in *United States v. Zolin*, 491 U.S. 554 (1989), established a mechanism for determining whether the attorney-client privilege should be breached when the plaintiff alleged that legal representation was being used to plan a future crime or tort. This Court permitted *in camera* review of the privileged communications to determine first whether the privilege should apply. *See id*. at 568. Even before allowing this step, however, this Court insisted that plaintiffs seeking to breach the privilege must show "'a factual basis adequate to support a good faith belief by a reasonable person.'" *Id*. at 572 (citing *Caldwell v. Dist. Ct.*, 644 P.2d 26, 33 (Colo. 1982)). The Court's reason for applying this added showing was that "[t]here is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." *Id*. at 571. There were certainly numerous options available to the Eleventh Circuit in the present case which would have better served all interests, including *in camera* review of peer review materials, a more limited discovery order, or a requirement of something more than a conclusory allegation of discrimination before allowing unlimited discovery of the disputed materials. *See* Katherine T. Stukes, *Recent Development: The Medical Peer Review Privilege After Virmani*, 80 N.C. L. Rev. 1860, 1876-77 (2002) (noting that each of these alternatives should have been considered by the Fourth Circuit in the *Virmani* case).

Regrettably, the Eleventh Circuit's decision allows for just the sorts of "fishing expeditions" criticized by this Court in *Zolin*. Under the Eleventh Circuit's decision, if a physician plaintiff alleges some form of federal claim in federal court, Federal Rule of Evidence 501 is ignored, and the peer review process is open to full discovery without

limitation. The Eleventh Circuit's decision does not contemplate any preliminary *in camera* review, nor even any plausible factual basis test. It utterly fails to protect the medical review process from discovery abuse. Simply put, the Eleventh Circuit has frustrated the will of state legislatures in Georgia, Florida, and Alabama, and ignored the undisputed importance that confidentiality in the medical peer review process plays in safeguarding health care in hospitals.

### C. The Circuits Are Split On The Issue Of Recognizing The Peer Review Privilege Under Federal Rule of Evidence 501

The Eleventh Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Harris Methodist*. The Fifth Circuit in that case weighed the interest of the Civil Rights Act in preventing employment discrimination against "the confidentiality of peer review, a process critical to the advancement of quality health care," and concluded that the peer review process trumped the need to prevent discrimination. *Harris Methodist*, 970 F.2d at 101. The Fifth Circuit recognized that protecting the inherent confidentiality of medical peer review materials serves an "important public interest," and that peer review "'is a *sine qua non* of adequate hospital care'" (unlike the rejected academic peer review privilege discussed in *University of Pa. v. E.E.O.C.*, 493 U.S. 182 (1990) that was not based on unanimous state recognition). *See id.* at 103 (citing *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970)). Although the Fifth Circuit did not have to define the scope of the peer review privilege in that case because it found Fourth Amendment grounds to protect the documents, the Court of Appeals specifically affirmed the special and protected position of peer review documents.

There is a direct conflict in the Circuits over whether to uphold the state-sanctioned confidentiality of peer review proceedings. *Amici* acknowledge that two

other Circuits – the Seventh and the Fourth – also refused to uphold the peer review privilege. *See Mem'l Hosp. v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) (per curiam); *Virmani*, 259 F.3d at 284. The Seventh Circuit decision occurred prior to this Court's *Jaffee* decision, and the Fourth Circuit decision made the same erroneous balancing test that this Court specifically rejected in *Jaffee*. *See* Stukes, 80 N.C. L. Rev. at 1873. Furthermore, those decisions are in direct conflict with the Fifth Circuit's decision in *Harris*, which also preceded *Jaffee* and applied an inappropriate balancing test, but reached the correct result under *Jaffee*. Clarification of the correct application of F.R.E. 501 is urgently needed, and only this Court can provide this clarity.

**D. The Eleventh Circuit's Opinion Will Lead To Discovery Abuse**

As this Court recently recognized in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007), modern-day discovery is expensive and time consuming. This Court stated:

> [T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a §1 claim.

*Twombly*, 127 S. Ct. at 1967 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Federal claims of discrimination, just like federal claims of antitrust conspiracies, lend themselves to conclusory allegations and very expensive and time-consuming discovery proceedings

The Eleventh Circuit's opinion, unless reversed by this Court, will have exactly the adverse effect this Court warned against in *Twombly*. In physician staff privilege claims brought in federal court, the Eleventh Circuit's ruling will have the dramatic effect of significantly raising the monetary and psychological costs of such cases by opening

the hospital's peer review process across the entire medical staff simply through conclusory allegations of federal claims. By failing to recognize the significance of the peer review privilege under the *Jaffee* standards, the Eleventh Circuit's decision will encourage the misuse of the discovery process through "fishing expeditions" into a hospital's peer review files. The threat of such discovery will bludgeon hospitals and members of their medical staffs into settlements even in "anemic" cases. This is the very scenario that this Court correctly warned against and rejected in *Twombly*. In fact, the district court in this very case observed such discovery misuse:

> It has become clear that plaintiff is not aware of any other similarly situated physicians at Houston Medical Center who engaged in similar or worse misconduct but were not disciplined or terminated. Rather, the plaintiff appears to be using the discovery process to determine if there may have been other physicians who fell into this category and if he *may* have been discriminatorily suspended. These are impermissible discovery objectives.

R5-103-3. Under a proper application of Federal Rule of Evidence 501 and *Twombly*, the Eleventh Circuit should have affirmed the District Court. Its failure to do so should not be countenanced by this Court.

### E. The Eleventh Circuit's Decision Will Encourage Forum Shopping Between Federal And State Courts

The Eleventh Circuit's opinion will have the unfortunate effect of encouraging forum shopping. Plaintiff physicians will inevitably file medical staff claims in federal court, alleging antitrust or civil rights conspiracies as the basis for challenging peer review decisions, thus avoiding being completely foreclosed in state courts from discovery of medical peer review proceedings.

As this Court has held, forum shopping has long been disfavored because it "would be unfair for the character or result of a litigation materially to differ because the

suit had been brought in a federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965). Nonetheless, as a result of the Eleventh Circuit's opinion, identical conspiracy claims brought in federal court and state courts in Georgia, Alabama, and Florida are now going to involve very different discovery burdens and related costs on hospital-defendants because several years of the hospital's peer review process will now be open to discovery in federal courts. The Eleventh Circuit's opinion is also likely to result in artful pleading by physician plaintiffs, who "have an incentive to look for a federal question as a device for forcing disclosure in federal court." Bassler, 39 Idaho L. Rev. at 691 (arguing also that this division "takes away the very benefits created by state legislatures"). Such tactics will carry the very real threat of forcing suboptimal settlements by hospitals and medical staffs that strongly value the patient care benefits of peer review confidentiality. Hospitals and medical staffs may be forced to settle invalid claims rather than surrender the confidentiality of peer review records – all because a claim was brought in federal court instead of state court.

## CONCLUSION

The Eleventh Circuit's decision should be reversed. If this Court's decisions in *Jaffee*, *Twombly*, and *Plumer* mean anything, the medical peer review privilege should be recognized and protected under Federal Rule of Evidence 501. If the privilege is not recognized, the Eleventh Circuit will have rendered a severe blow to protecting the safety and well-being of patients in hospitals throughout Georgia, Alabama, and Florida, and creating substantial economic burdens on hospitals to defend themselves in federal court. *Amici* respectfully urge this Court to grant petitioners' request for a writ of certiorari in this case.

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