IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 19-0767
(Linn County No. LACV086697)

ROXANNE RIEDER and TONY RIEDER,

Plaintiffs-Appellants,

vs.

DAVID SEGAL, M.D., MERCY HOSPITAL, CEDAR RAPIDS, IOWA d/b/a MERCY MEDICAL CENTER, CEDAR RAPIDS, IOWA, ET AL.,

Defendants-Appellees.

UPON FURTHER REVIEW FROM THE IOWA COURT OF APPEALS,
APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY,
THE HONORABLE IAN K. THORNHILL

AMICUS CURIAE BRIEF OF IOWA HOSPITAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, AND IOWA MEDICAL SOCIETY IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY OF AMICUS CURIAE AND INTEREST

The Iowa Hospital Association, Iowa Medical Society, and American Medical Association submit this *amicus curiae* brief to provide the Court with information and analysis as to why the Iowa Supreme Court should decline to further recognize or adopt a new and independent tort of negligent credentialing and decline to create an affirmative duty on the part of a hospital to immediately limit, restrict, or suspend privileges of a credentialed physician merely upon notice of an inquiry or investigation by the Iowa Board of Medicine ("IBOM"), as has been specifically argued in the matter before the Court.

The Iowa Hospital Association ("IHA") represents and advocates for Iowa hospitals, providing assistance, information, and resources pertaining to health policies. IHA's members include all of Iowa's approximately 118 community hospitals, major health systems serving Iowans, and numerous associate members.[1] IHA, as the only statewide association representing all of Iowa's hospitals, has health care policy information to assist the Court in assessing the ramifications of any rendered decision in this case on the entire health care system in Iowa.

The Iowa Medical Society ("IMS") is the statewide professional association for Iowa allopathic (M.D.) and osteopathic (D.O.) physicians.[2] IMS represents

[1] *See also*, https://my.ihaonline.org/.
[2] *See also*, https://www.iowamedical.org/.

approximately 6,000 Iowa physicians, residents, and medical students. IMS exists to assure the highest quality healthcare in Iowa through its role as a physician and patient advocate.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States.[3] Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health. These remain its core purposes. AMA members practice in every medical specialty area and in every state, including Iowa.

Both the AMA and the IMS are representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts. Because of the position of their members as physicians, residents, and medical students—i.e. health care providers impacted by the issue in this matter— the AMA and IMS provide a unique perspective and information on the purpose and policy considerations surrounding recognition of a negligent

[3] *See also*, https://www.ama-assn.org/.

credentialing claim and the duty on the part of a hospital to immediately limit, restrict, or suspend privileges of a credentialed physician[4] merely upon notice of an inquiry or investigation by the IBOM which Plaintiffs-Appellants and the Iowa Association of Justice ("IAJ") seek to impose.

These *amicus curiae* hope to provide the Court with the perspective of the healthcare providers and institutions of this state and assist the Court in assessing the potentially significant ramifications of the Court's decision in this matter. As such, the interests of these *amicus curiae* are public in nature. These *amici* have no interest in the specifics of the individual dispute between the litigants involved in the underlying litigation on appeal. Rather, these *amici*'s interests are focused on their concern that recognizing a claim of negligent credentialing or a specific duty for a hospital to act against physician privileges based on mere knowledge of an IBOM investigation would be inconsistent with Iowa law, and undermine existing peer review systems and other healthcare legislation unique to this state. From a public perspective, these *amici* believe recognizing breach of such a duty as a viable independent, actionable tort for "negligent credentialing" would impede the free flow of information critical to quality assurance activities and decrease the willingness of physicians to participate in peer review activities, including service

[4] Plaintiffs pled their claim against the hospital as one of "negligent credentialing" and the IAJ construes a breach of this non-existent duty more broadly as one of "negligent credentialing."

on credentialing committees (as well as participation in other peer review and quality assurance activities). Moreover, these *amici* are concerned that recognition of "negligent credentialing," broadly, or the specific duty articulated by the Iowa Court of Appeals, would result in physicians becoming less willing to participate and speak openly and honestly in quality assurance activities out of fear that their discussions may later become the focus of a lawsuit—leading to the irreversible erosion of the peer review privilege framework.

Iowa's health care system is overall underserved, and in certain communities, unserved. Imposition of such a duty would unnecessarily prevent good physicians from serving the needs of Iowa's communities. Moreover, recruitment in Iowa remains a challenge to the state, particularly in rural communities. Recognition of such a duty to limit privileges based on mere IBOM inquiry creates an unnecessarily hostile environment further impeding recruitment of quality providers to Iowa.

Formal recognition and adoption of the duty proposed by Plaintiffs-Appellants—characterized by the IAJ *amicus* as a form of "negligent credentialing"—as an independent cause of action would drastically undermine the legislative framework of this state; including Iowa physician licensure and regulatory structure, Iowa's peer review laws, and Iowa's morbidity and mortality laws; and result in far reaching effects that would negatively impact the delivery of healthcare to the citizens of this state.

This brief is submitted by the above signed attorneys, none of whom are or have been counsel for the parties to the appeal and remaining in this case.[5] No party's counsel authored this brief in whole or in part, nor did any person, party, or party's counsel contribute money to fund the preparation or submission of this brief on behalf of these *amicus curiae*.

ARGUMENT

While the Plaintiffs-Appellants and IAJ broadly frame one of the issues before this Court as a question of whether or not it should formally recognize and adopt an independent cause of action for "negligent credentialing," this argument ignores the specific question of duty before this Court and the negative consequences adopting a tort for breach thereof would have on the delivery of health care for the citizens of Iowa. The issue of "negligent credentialing," broadly, is not properly before this Court. The issue addressed by the lower courts was limited to discussion of whether a narrow duty exists to immediately limit, restrict, or suspend the privileges of a credentialed physician upon notice of an inquiry or investigation by the Iowa Board of Medicine. Therefore, this Court need not consider the broader issue of whether

[5] Finley Law Firm, PC represented Dr. David Segal and Eastern Iowa Brain and Spine Surgery, PLLC in the original action; however, these parties were voluntarily dismissed by the Plaintiffs-Appellants on October 22, 2018, prior to the district court's March 14, 2019 Order Granting Partial Summary Judgment and the September 2, 2020 decision by the Iowa Court of Appeals, which generated the issues on further review before this Court.

"negligent credentialing" should be formally recognized or adopted. *See Hall v. Jennie Edmundson Mem'l Hosp*., 812 N.W.2d 681, 685 n.4 (Iowa 2012) (where, as here, this Court declined to substantively visit the issue stating, "[p]rominent among the reasons we defer a decision on the existence of the tort of negligent credentialing is the fact that the defendants have not claimed the tort should not be recognized and we prefer to confront and decide the issue in a case in which the matter is disputed and briefed by the parties.").

Should it nevertheless consider the issue, however, broadly adopting the tort of "negligent credentialing" would be inconsistent with Iowa's physician licensure and regulatory structure, negatively impacting the availability and delivery of healthcare to Iowans; conflict with Iowa's peer review and morbidity and mortality privileges and the public policies underlying those statutes; and fail to recognize that Iowa's patient population is already adequately protected by Iowa law in connection with any medical errors. The Court should not accept the Plaintiff-Appellees and IAJ *amicus curiae*'s invitations to legislate from the bench. Instead, it should affirmatively decline to adopt or further recognize an independent cause of action for "negligent credentialing," including in the specific context of the duty Plaintiffs-Appellants seek to impose on Iowa's healthcare providers.

I. PUBLIC POLICY SUPPORTS THE CONCLUSION THAT A HOSPITAL HAS NO DUTY TO IMMEDIATELY LIMIT, RESTRICT, OR SUSPEND PRIVILEGES OF A CREDENTIALED PHYSICIAN MERELY UPON NOTICE OF AN INQUIRY OR INVESTIGATION BY THE IOWA BOARD OF MEDICINE

Arguing this Court should adopt an independent cause of action for "negligent credentialing" and impose an undefined and amorphous duty of care "in granting privileges to medical professionals who practice at their facilities and provide care to patients," ignores the specifics of what the Plaintiffs-Appellants and IAJ truly ask this Court to do in circumstances such as those before it. *See* IAJ Br. at p. 7. The argument actually advanced at the district court and made by the Plaintiffs-Appellants and IAJ is that this Court should create an overly broad duty on the part of hospitals and peer review committees making credentialing decisions to not only ensure professional competency when credentialing physicians, but to impose an affirmative duty to immediately limit, restrict, or suspend privileges of a credentialed physician if and when they receive generic notice or have abstract awareness of a confidential inquiry or investigation by the IBOM. *See* App. 343 ("Plaintiff argues on policy grounds that such a duty should exist . . .").

An initial inquiry or investigation by the IBOM, however, is merely an investigation. *See* Iowa Admin. Code § 653-24.1; 653-24.2. By design, investigative inquiries are intended to be confidential, and physicians are entitled to due process before action is taken against their licenses. *See* Iowa Code § 272C.4(6); Iowa

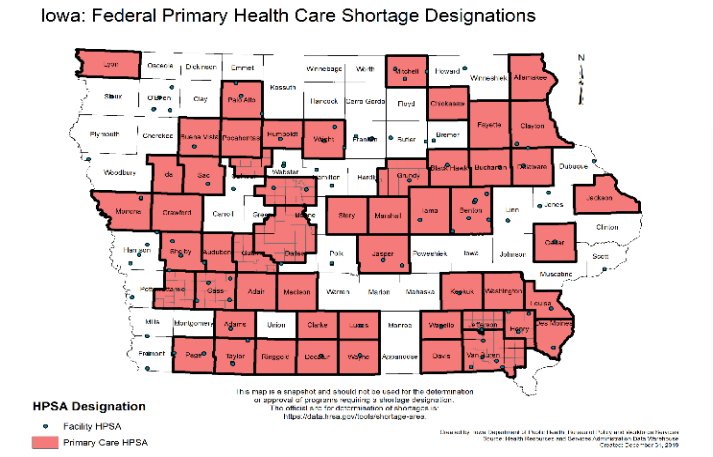
Admin. Code § 653-24.2(8); *Gilchrist v. Bierring,*14 N.W.2d 724, 732 (Iowa 1994). In performing its statutory obligation to license, monitor, and regulate the scarce population of physicians in Iowa, the Iowa Board of Medicine receives between 600–700 complaints per year and investigates approximately 70 percent, or nearly 500, of those. App. 434, Kent Nebel Depo., p. 10; *see also,* 2018 Iowa Board of Medicine Annual Report (reporting the Board received 649 complaints and mandatory reports, completed reviews or investigations of 578 case files).[6] These complaints and investigations range from everything from "my doctor was rude to me and I had to wait in the waiting room too long" to those much more serious. App. 434. Yet, on average, of the approximately 500 investigations, only 25, or 5%, result in physician discipline of some sort. App. 435.

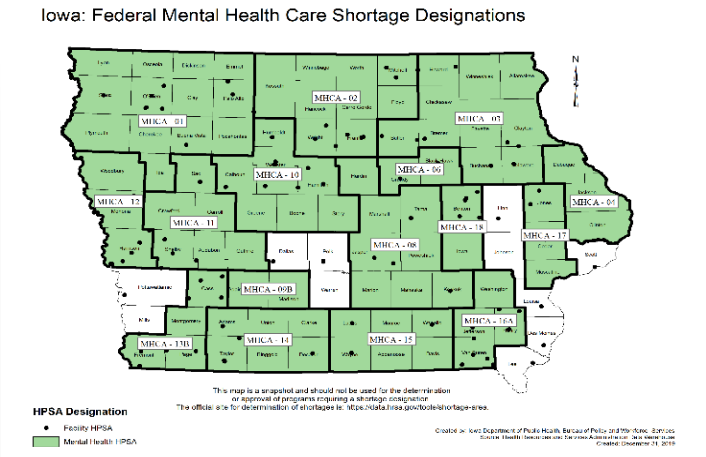
The wide-reaching, negative impact imposing such a duty would have on the availability of health care for Iowans cannot be understated. Iowa already faces a significant shortage of physicians.[7] In fact, Iowa has federal and state designated primary health care shortages in approximately 57 of its 99 counties, mental health

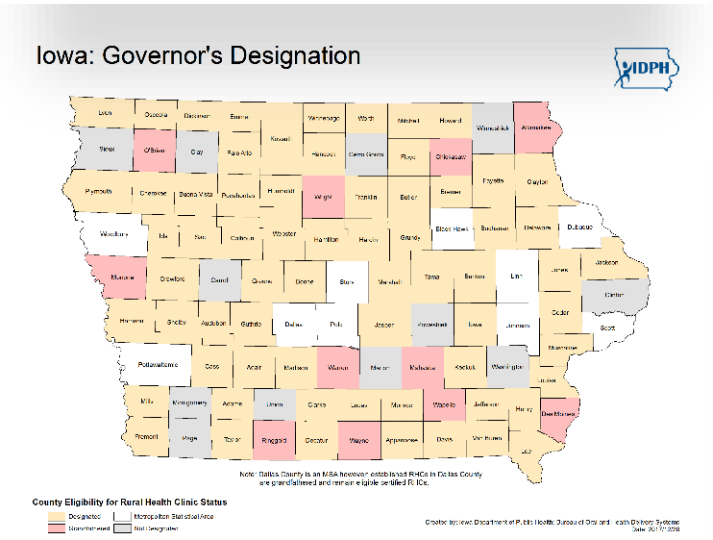
[6] https://medicalboard.iowa.gov/sites/default/files/documents/2019/06/2018_annual_report.pdf.

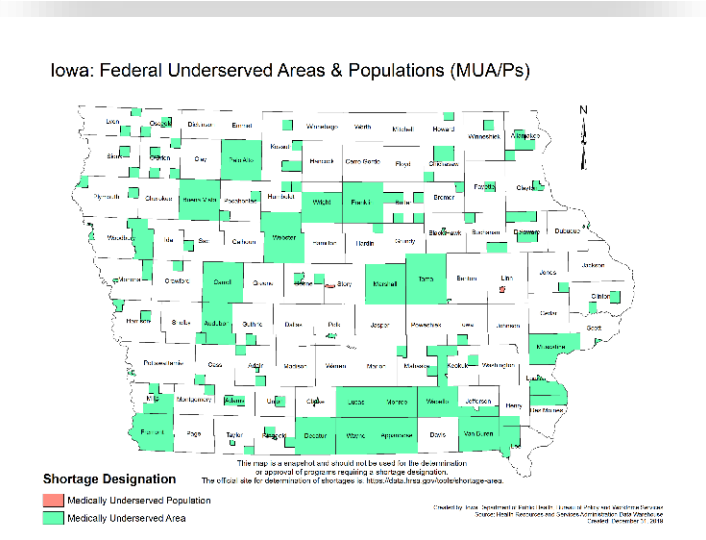
[7] Association of American Medical Colleges, 2019 Iowa Physician Workforce Profile, *available at* https://www.aamc.org/media/37911/download; see also, 2018 Iowa Board of Medicine Annual Report, indicating same figure of active physicians with work addresses in Iowa, *available at* https://medicalboard.iowa.gov/sites/default/files/documents/2019/06/2018_annual_report.pdf.

care shortages in 88 of its 99 counties, and widespread underserved areas and populations.[8] The Iowa Department of Public Health's maps[9] helpfully illustrate the extent of this critical shortage:









[8] Primary Care Shortage Designations, Iowa Department of Public Health, *available at* https://idph.iowa.gov/policy-and-workforce-services/rural-health-primary-care/primary-care-shortage-designations.

[9] https://idph.iowa.gov/policy-and-workforce-services/rural-health-primary-care/primary-care-shortage-designations.

These images reflect the fact that, in 2019, Iowa ranked 42nd in physician population per 100,000 residents and 45th in primary care physicians per 100,000 residents.[10] Iowa only has approximately 6,886 active physicians. *Id.*

Nevertheless, Plaintiffs-Appellants and the IAJ ask this Court to potentially remove approximately 10% of the practicing physicians in Iowa from practice each year just because a complaint is filed or investigation initiated, or a hospital otherwise receives notice of a complaint or investigation. As the district court appropriately recognized:

> To find that such a duty does attach as soon as an investigation commences would be to nullify the purpose of the investigation and the due process it protects. If hospitals were obligated to suspend the privileges of every one of the 600-700 physicians against whom a complaint is filed in a given year, it would result in a substantial depravation of due process, especially in the case of the 575-675 physicians against whom no misconduct is ever founded.

App. 346. Such a duty based upon generic knowledge of an ongoing investigation alone threatens to drastically limit Iowans' access to health care by removing qualified and safe practitioners from practice while meritless complaints are investigated.

Imposing such an unreasonable duty to the detriment of a physician's reputation and record would also make Iowa less attractive to physicians. Iowa only

[10] Association of American Medical Colleges, 2019 Iowa Physician Workforce Profile, *available at* https://www.aamc.org/media/37911/download.

retains approximately 35.4% of the physicians who receive their medical training in Iowa, ranking it 44th out of 50 states in retention.[11] If hospitals were required to immediately limit, restrict, or suspend a physician's credentials upon notice of an investigation alone, not only would recruitment be made more difficult, but healthcare entities may also be required to make reports to the National Practitioner Data Bank. *See* 42 U.S.C. § 11133.[12] Such reports would make Iowa even less attractive to physicians, as the reports may impugn a physician's record without due process, may impact their ability to practice in other states, and affect the providers' ability to participate in healthcare insurance networks. As discussed in the foregoing paragraph, Iowa already has a shortage of physicians and difficulty attracting doctors to the state. Now more than ever, during a world-wide pandemic emergency, Iowans cannot afford further limitations on their ability to receive the health care they need and deserve.

II. IOWA'S PHYSICIAN LICENSING AND CREDENTIALING FRAMEWORK ADEQUATELY PROTECTS PATIENTS

By the time a physician applies for hospital credentials and staff privileges, numerous different stakeholders in the healthcare system have already evaluated and validated the physician's competence and qualifications to practice medicine.

[11] Association of American Medical Colleges, 2019 Iowa Physician Workforce Profile, *available at* https://www.aamc.org/media/37911/download.
[12] *See also* National Practitioner Data Bank Guidebook, Chapter E: Reports, *available at* https://www.npdb.hrsa.gov/guidebook/EOverview.jsp.

Regulators also routinely (1) monitor and re-evaluate physicians' qualifications through the licensure renewal process and its ability to conduct investigations, (2) refer physicians for competency evaluation, and (3) suspend, limit, or discipline physicians as appropriate. This framework adequately and appropriately protects patients in Iowa. Imposing the additional burdens and liability exposure urged by the Plaintiffs-Appellants and the IAJ on the health care system will only increase costs and stress its functionality, not improve outcomes or safety.

A physician in Iowa is not eligible to be credentialed or receive privileges to practice in an Iowa hospital until the IBOM, the entity statutorily tasked with evaluating physicians for licensure, determines such a physician is qualified for licensure pursuant to statutorily prescribed qualifications and issues that physician a license. *See* Iowa Code § 272C.4 (Duties of board); Iowa Admin. Code § 653-1.2 (Purpose of Board); Iowa Admin. Code § 653-9.3 (Eligibility for licensure); Iowa Admin. Code § 653-9.11 (Issuance of a license). For example, the IBOM will not issue a physician a license to practice medicine in Iowa unless he or she has met specified educational requirements, including, graduation from medical school and successful completion of post-graduate residency training. Iowa Admin. Code § 653-9.3 (Eligibility for licensure).

The IBOM's involvement in physician licensure, however, does not end at the license door. As alluded to in the foregoing section, hospitals and licensees are

required to report judgments and settlements; wrongful acts, omissions, and negligence; disciplinary action in other jurisdictions; and any hospital disciplinary action including restriction, suspension, revocation, relinquishment, or nonrenewal of a licensee's hospital privileges or credentials. Iowa Admin. Code § 653-22.1–.5. The IBOM is then vested with the power to process and investigate all complaints and reports. It can take various enforcement actions, including ordering physical, mental, or clinical competencies, suspension of the provider's license (including emergency suspension pending due process review in the case of emergencies or significant concerns), and even revocation. *See, e.g.*, Iowa Code § 272C.10; Iowa Admin. Code §§ 653-24.1–.4.

The IBOM is empowered to review and consider licensee applications and determine whether a physician should be licensed in this state. It then closely monitors licensees, investigates complaints, and takes actions to appropriately regulate licensees whose professional competencies are called into question by health care entities, private citizen complaints or other sources under the framework of Iowa Code chapters 147, 148, 148E, 148H and Iowa Admin. Code chapter 653 (Board of Medicine). Through this highly regulated licensure structure and regulatory process, patients in Iowa receive preemptive protection in the context of licensure before credentialing decisions. Further, a hospital should not be subjected to greater liability than the state's own "gatekeepers" of the medical profession

simply because a physician has selected the hospital as a venue to care for the physician's patients when that care cannot be provided in an office setting. Nevertheless, recognition of the tort of negligent credentialing would do just that. To permit such a claim to proceed is inconsistent with the licensing and credentialing framework in Iowa and would be highly detrimental to Iowans seeking healthcare treatment.

III. NEGLIGENT CREDENTIALING IS INCOMPATIBLE WITH IOWA'S PEER REVIEW PRIVILEGE DESIGNED TO ASSURE THE QUALITY, SAFETY, AND APPROPRIATENESS OF HOSPITAL SERVICES

Recognizing and allowing a cause of action for the credentialing decisions made by peer review committees is also inconsistent with Iowa's statutory peer review privilege and immunity and would conflict with and undermine unambiguous legislative intent to protect credentialing documents, individuals, and entities involved in credentialing decisions. This conflict further emphasizes why this Court should decline to recognize negligent credentialing as an independent tort.

Iowa Code section 147.135(2) provides, in part:

> As used in this subsection, "*peer review records*" means all complaint files, investigation files, reports, and other investigative information relating to licensee discipline or professional competence in the possession of a peer review committee or an employee of a peer review committee. *Peer review records are privileged and confidential, are not subject to discovery, subpoena, or other means of legal compulsion for release to a person other than an affected licensee or a peer review committee, and are not*

> *admissible in evidence in a judicial or administrative proceeding other than a proceeding involving licensee discipline or a proceeding brought by a licensee who is the subject of a peer review record and whose competence is at issue. A person shall not be liable as a result of filing a report or complaint with a peer review committee or providing information to such a committee, or for disclosure of privileged matter to a peer review committee. A person present at a meeting of a peer review committee shall not be permitted to testify as to the findings, recommendations, evaluations, or opinions of the peer review committee in any judicial or administrative proceeding other than a proceeding involving licensee discipline or a proceeding brought by a licensee who is the subject of a peer review committee meeting and whose competence is at issue.* Information or documents discoverable from sources other than the peer review committee do not become nondiscoverable from the other sources merely because they are made available to or are in the possession of a peer review committee. . . .

Iowa Code § 147.135(2) (emphasis added); *see also* 42 U.S.C. 11111 (limiting liability in connection with peer review actions and providing that any peer review body or individual associated or participating therewith "shall not be liable in damages under any law of the United States or of any State with respect to the action," where prescribed procedures are followed).

Peer review means "evaluation of professional services rendered by a person licensed to practice a profession." Iowa Code § 147.1(8). Peer review records are defined as "all complaint files, investigation files, reports, and other investigative information relating to licensee discipline or professional competence in the possession of a peer review committee or an employee of a peer review committee." *Id.* § 147.135(2). A "peer review committee" is defined as "one or more

persons acting in a peer review capacity who also serve as an officer, director, trustee, agent, or member of … A healthcare entity, including but not limited to a group medical practice, that provides health care services and follows a formal peer review process for the purpose of furthering quality health care." Iowa Code § 147.1(5)(f). This broad statutory protection has been in place for almost 35 years, since the 1986 amendment to Iowa Code section 147.135. *Id.* When an asserted privilege is based on a statute, the terms of the statute define the reach of the privilege. *AgriVest P'ship v. Cent. Iowa Prod. Credit Ass'n*, 373 N.W.2d 479, 483 (Iowa 1985).

Statutory peer review immunity and privilege extend to and cover credentialing files. *Day v. The Finley Hosp.*, 769 N.W.2d 898, 902 (Iowa Ct. App. 2009); *see also Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996) (stating that the statutory protections of Iowa Code section 147.135 are "broad"); *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 2012 WL 6093780, at *3 (N.D. Iowa Dec. 7, 2012) (J. Strand) (noting the Iowa Court of Appeals, in *Day, supra*, held "section 147.135 unambiguously extends the peer review privilege to credentialing files because it applies to all 'investigation files,' 'reports,' and 'other investigative information' in the custody of the peer review committee, whether it was generated by the committee or not," and noting the decision in *Day* has not been disturbed by the Iowa Supreme Court or legislature since its issuance, now more than nine years ago);

Cawthorn v. Catholic Health Initiatives Iowa Corp., 806 N.W.2d 282, n.6 (Iowa 2011) (summarizing state courts in other jurisdictions which have found the peer review privilege applies to credentialing files under their own peer review laws).

The AMA recognizes a broad definition of peer review and has stated, "[p]eer review goes beyond individual review of instances or events: it is a mechanism for assuring the quality, safety, and appropriateness of hospital services." AMA Policy, H-375.962, *Legal Protections for Peer Review*.[13] Credentialing files not only fall under Iowa's peer review protections, but are clearly encompassed by the industry definition of "peer review" and the purpose for protecting such information is analogous and equally applicable to the need and purpose for protecting the credentialing decisions. The AMA notes that "good faith peer review" is conducted "with honest intentions that assess appropriateness and medical necessity to assure safe, high-quality medical care[.]" *Id.*

As Justice Mansfield recognized while on the Iowa Court of Appeals, the legislature has never approved negligent credentialing claims and "it makes no sense to argue that express statutory language [of Iowa's peer review immunity and privilege] should yield to the needs of a cause of action that the legislature has never recognized." *Day*, 769 N.W.2d at 902. The same remains true today. To adopt

[13] *Available at* https://policysearch.ama-assn.org/policyfinder/detail/Policy%20H-375.962?uri=%2FAMADoc%2FHOD.xml-0-3167.xml.

negligent credentialing without acknowledging the realities and function of Iowa's peer review privilege structure or the fact the legislature has not recognized the action, "puts the cart before the horse." *Id.* This Court should not adopt a cause of action which so clearly conflicts with Iowa law and has never been recognized by the legislature.

Even the Plaintiff in *Day* recognized the incompatibility of Iowa's peer review privilege and the tort of negligent credentialing. *Day*, 769 N.W.2d at 902 ("Day also argues that it would be impractical and absurd to have negligent credentialing claims without allowing plaintiffs access to credentialing files."). Likewise, Iowa's peer review privilege is incompatible with a hospital or health care provider's ability to defend a negligent credentialing claim, as the statute makes any peer review committee credentialing file materials inadmissible and prevents any individual associated with the credentialing process from *testifying as to "the findings, recommendations, evaluations, or opinions of the peer review committee in any judicial or administrative proceeding . . ."*. Iowa Code § 147.135(2) (emphasis added). The wholesale inability of a health care provider or entity from defending such claim is incompatible and inconsistent with the legislative intent to protect peer review material (including credentialing files), further quality assurance, and encourage the free flow of information, by protecting the individuals and entities participating in the peer review process. Iowa's statute-based peer review

confidentiality provisions allow physicians to speak openly, honestly, and frankly about all review organization functions, including credentialing. If this cause of action were recognized, however, physicians would naturally fear that their candor would be subsequently punished or at issue in later lawsuits involving negligent credentialing. This Court should not adopt the tort of negligent credentialing, as to do so would thwart the legislature's long-standing and well-established structure and intent.

IV. RECOGNITION OF A TORT FOR "NEGLIGENT CREDENTIALING" IS INCONSISTENT WITH IDENTIFIED PUBLIC POLICIES IN IOWA DESIGNED TO PROTECT PATIENTS AND IMPROVE HEALTH CARE

Iowa's peer review privilege and the established public policies related thereto are not the only examples which highlight how recognizing negligent credentialing would be inconsistent with Iowa law and public policy. This Court, in *Burton v. University of Iowa Hosps. & Clinics*, 566 N.W.2d 182 (Iowa 1997), noted that the reasons for maintaining the confidentiality privilege in Iowa Code section 147.135, Iowa's Peer Review statute, apply with equal force to morbidity and mortality studies protected under Iowa Code section 135.40-42:

> [The privilege] allows a physician to consult with peers about his [or her] care and treatment of a particular patient. It also allows critical retrospective analysis of cases to learn better methods of treatment for the future. Similarly, it encourages peers to lodge complaints and initiate disciplinary action against those who are practicing substandard care, without fear of disclosure or retribution.

Id. at 188 (citing *Carolan*, 553 N.W.2d at 886 (quoting Thomas A. Finley et al., Tort Reform and Medical Malpractice: Iowa's Past, Present, and Future, 36 Drake L. Rev. 669, 676 (1986-87))).

Recently, in *Willard v. State*, 893 N.W.2d 52 (Iowa 2017), this Court further recognized broad protection and public policy covering morbidity and mortality studies to track adverse events, safety issues, and other concerns regarding the health, care, and safety of patients to prevent patient safety issues in the future. The Court discussed this policy in detail, which warrants restating here given its direct applicability to credentialing decisions, stating, in part:

> Here, there are relevant public policy issues to be considered. The rationale underlying the protection of privileged communication from discovery "is the protection of interests and relationships, which rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice."
>
> The overall statutory scheme regarding morbidity and mortality information and studies is broad. . . . There are a number of public policy objectives underlying morbidity and mortality statutes. Preventable medical errors are a pervasive issue in hospitals across the country and decreasing the number of these errors is of the utmost importance. The information utilized in morbidity and mortality studies is collected from hospital employees and is intended to track adverse events; sentinel events; safety issues; and any other concerns regarding the health, care, and safety of patients. The objective of collecting this information is to study adverse incidents in order to create new systems and methods to prevent patient safety issues in the future. The information provided is supplied by employees about their peers or supervisors. Morbidity and mortality studies are protected so

> employees are forthcoming with their concerns, issues, and criticisms.
>
> We considered similar public policy considerations in *Carolan,* 553 N.W.2d at 886. . . . We noted that confidentiality was imperative . . . The protection afforded by the confidentiality privilege allows hospital staff to feel comfortable reporting any and all safety concerns because those reports will remain confidential and not be subject to discovery in a legal proceeding. This confidentiality allows hospitals to utilize PSNs to reduce adverse patient safety events based on preventable medical errors. The protection is intended to apply to documents or communications that constitute "patient safety work product."

Willard, 893 N.W.2d at 63–64 (internal citations and emphasis omitted).

Thus, for the same reasons discussed in the foregoing section with respect to the inconsistency of an independent cause of action for negligent credentialing and Iowa's broad peer review privilege, recognition of a claim for negligent credentialing would also be inconsistent with Iowa's broader public policies and conflict with other Iowa laws. Moreover, it would likely have the same concerning impact on physicians' willingness to participate in credentialing matters when, "without broad protections, physicians would be very reluctant to participate, knowing the information could easily be revealed in a court of law," or otherwise placed at issue vis-à-vis a negligent credentialing claim against the hospital and its credentialing committee members.

The chilling effect of interfering with broad protections afforded to credentialing decisions, acknowledged by this Court in other contexts, is no different

in the context of an independent cause of action for negligent credentialing. Such an effect in credentialing could be devastating. As recognized in other contexts, interference with credentialing decisions is likely to hinder the candor of participants and the free flow of information in credentialing decisions. Further, most of the physician-members of credentialing committees are volunteers. Service on these committees will become increasingly unattractive for physicians if they are concerned "information could easily be revealed in a court of law" and the complexity and burden of the credentialing process is increased by exposure to possible tort liability. *Id.* Rather than risk their professional reputations and expose themselves to liability in the context of a credentialing decision, physician-members are likely to decline credentialing committee service.

If this occurs, the public policies crafted to improve the quality of physicians and their care will be irreparably undermined. Increasing the burden and complexity of hospital credentialing committee work and exposing individual physicians who are willing to serve on such committees to reputational damage and/or personal liability will deter involvement from physicians who would otherwise willingly participate in the credentialing process. Instead of performing a key role in curating a medical staff that supports patient and healthcare needs of the community served by the hospital, physicians will be more likely to remain on the sidelines.

Instead of improving the quality of a hospital's medical staff, creating a new cause of action for negligent credentialing is more likely to deter physician participation and impede the quality and candor of the evaluations by physicians who do participate. The unintended consequences would undermine the overall integrity of the credentialing process and negatively impact the quality of patient care provided within a hospital. Indeed, the AMA recognizes the detrimental effect that negligent credentialing actions would have on the medical community. *See* AMA Policy H-230.952, *Negligent Credentialing Actions Against Hospitals* (noting that "'negligent credentialing' lawsuits undermine the overall integrity of the credentialing process, potentially resulting in adverse impacts to patient access and quality of care").[14]

V. IOWA LAW ALREADY PROVIDES ADEQUATE REMEDIES TO FAIRLY AND JUSTLY COMPENSATE PATIENTS FOR MEDICAL ERRORS

Iowa's hospitals and clinics are already liable under numerous existing causes of action, which give patients and health care service consumers more than adequate recourse to be compensated for any injuries caused by a credentialed physician. These include a wide range of events from negligent care by nurses and other employees to slips and falls, faulty equipment, and hospital-borne infections.

[14] *Available at* https://policysearch.ama-assn.org/policyfinder/detail/Credentialing?uri=%2FAMADoc%2FHOD.xml-H-230.952.xml.

Patients also have well-established causes of action for injuries resulting from alleged professional negligence by their physicians, whether in the setting of a hospital or elsewhere. Patients' rights in Iowa are already well-protected. There is no need for yet another tort, particularly one which will inevitably interfere with an already heavily regulated and nuanced relationship between independently licensed physicians, independently licensed hospitals, and the state's regulatory bodies.

While this Court has previously "assumed" a tort of negligent credentialing is actionable in this state, neither it nor the Iowa legislature has expressly recognized negligent credentialing claims. *See Hall*, 812 N.W.2d at 685 ("We assume without deciding that the tort [of negligent credentialing] is actionable in this state. As we find no reversible error in any of the district court's rulings challenged on appeal…we conclude we need not decide the question whether the tort [of negligent credentialing] is actionable."); *Day*, 769 N.W.2d at 902 (J. Mansfield noting "[t]he legislature has never approved negligent credentialing claims."). Rather than affirmatively adopting the tort, this Court should use this opportunity to correct course and hold that that negligent credentialing is not a recognized cause of action in this state, as such a claim is inconsistent with the existing credentialing framework of this state and clearly expressed legislative intent and public policy.

Courts in Iowa do not declare or make public policy. *See Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 765 (Iowa 2009). Rather, they necessarily determine if public

policy has been expressed in a statute or an administrative regulation. *Id.* Public policy "is not predicated on this court's 'generalized concepts of fairness and justice.'" *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 404 (Iowa 2017) (quoting *Dier v. Peters*, 815 N.W.2d 1, 12 (Iowa 2012); *Claude v. Guar. Nat'l Ins. Co.*, 679 N.W.2d 659, 663 (Iowa 2004)). Rather, the Court "must look to the Constitution, statutes, and judicial decisions of [this] state, to determine [our] public policy and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals contravenes no principle of public policy." *Id.*

The proposed tort of negligent credentialing is an unworkable "solution" in search of a non-existent problem. Hospitals already have sufficient incentive to ensure the competence of their medical staff without a threat of additional liability for credentialing decisions involving independent contractor-physicians. Although procedural processes for credentialing may vary slightly between hospitals according to their various medical staff bylaws, when deciding whether a physician should be granted credentials to practice in the hospital, both employed physicians and independent contractor physicians are subjected to scrutiny in every hospital. Due to the potential for various vicarious liability claims, Iowa hospitals already have sufficient incentive to ensure the credentialing process is both prescribed and carried out in a manner that ensures a quality medical staff. Likewise, in the event a patient suffers a compensable injury, they have more than sufficient means by

which to recover and be made whole for any injury. Accordingly, increasing causes of action in the context of medical malpractice cases will not make a hospital's credentialing process better, improve safety, or better protect healthcare service consumers. It will only make credentialing more onerous, health care more costly, and decrease health care access.

If adopted, is a credentialing committee going to deny an application for privileges because of a single negative comment by an instructor during the applicant's residency years earlier for fear that such comment may be used against the hospital in a future negligent credentialing claim? Can a physician who has received and completed treatment for substance abuse, addiction, or mental health issues years ago ever be credentialed without creating significant exposure for the hospital? What about treatment for physical ailments or injuries? Should physicians be suspended for every complaint, whether or not meritorious, while that issue is investigated? Should all health care providers' credentials be suspended any time a hospital receives an investigative subpoena from a regulatory board related to a patient of any provider involved in that patient's care, despite the lack of any specific information about the nature of the complaint or knowledge of the identify of the individual provider whose care may be at issue? These are the questions hospital administrators will be faced with if this tort were adopted.

The result of recognizing a new, negative credentialing tort would mean that a hospital and its credentialing committee will be robbed of the ability to exercise judgment in building its medical staff to meet patient needs, and patients will be deprived of qualified health care providers. Further, physicians in higher risk specialties known for higher instances of claims, such as OB/GYNs, will be impacted more heavily as having likelihood of a greater claim history. If the mere existence of a claim history deters a hospital's willingness to grant privileges, the widespread, critical physician shortage problems in Iowa,[15] inability to recruit physicians to the state, and problems of patient access to specialty care, particularly for patients living in rural communities, will only be exacerbated. Thus, creating a new cause of action for negligent credentialing will not only add administrative complexity and require an expenditure of additional time, effort, and resources to the credentialing process for both hospitals and physicians, but it will also have a negative impact on patients' access to care in Iowa.

[15] *See, e.g.*, the Iowa Department of Public Health's discussion of primary care shortages across the state, *available at* https://idph.iowa.gov/policy-and-workforce-services/rural-health-primary-care/primary-care-shortage-designations. *See also* the U.S. Health Resources & Services Administration, identifying primary care provider shortages more than half of the counties in the State of Iowa, *available at* https://data.hrsa.gov/tools/shortage-area.

CONCLUSION

For the foregoing reasons, this Court should decline to formally adopt or further recognize an independent tort for "negligent credentialing." To do so is inconsistent with the public policy of Iowa, the statutory framework for physician licensure in Iowa, and existing Iowa law, particularly within the context of this case, where the Plaintiffs-Appellants and IAJ seek to impose a duty to immediately limit, restrict, or suspend the privileges of a credentialed physician merely upon notice of an inquiry or investigation by a regulatory body. Further recognition of this tort may have potentially devastating consequences on the delivery of healthcare services to Iowans and harm, rather than protect, patients.

CERTIFICATE OF COST

I, Joseph F. Moser, certify that there was no cost to reproduce copies of the preceding Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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I hereby certify:

That I filed the foregoing Amicus Curiae Brief with the Clerk of the Supreme Court of Iowa by EDMS on the 11th day of January 2021, which constitutes service on all other parties and amicus curiae to this appeal pursuant to Iowa Ct. R. §16.315(1)(b).

/s/Joseph F. Moser