Case No. **B250519**

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FOUR

DIORESLY LORA,
Plaintiff and Appellant,

vs.

LANCASTER HOSPITAL CORPORATION, dba PALMDALE REGIONAL MEDICAL CENTER,
Defendant and Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY,
HON. VICTOR E. CHAVEZ, JUDGE PRESIDING, CASE NO. MC023074.
SERVICE ON ATTORNEY GENERAL PER CRC RULE 8.29(C)(1)

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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PALMDALE REGIONAL MEDICAL CENTER,
Defendant and Respondent,

INTRODUCTION: IMPORTANCE OF ISSUES AND INTEREST OF AMICUS

The Civil Justice Association of California (CJAC or amicus)[1] welcomes the opportunity to address the two issues purportedly presented — whether Civil Code section 3333.2's $250,000 ceiling on recoverable noneconomic damages by plaintiffs in medical malpractice actions violates their constitutional rights to (1) equal protection and due process and (2) trial by jury.

We say "purportedly presented" because both questions have been repeatedly and consistently answered by courts over the past 30 years with a resounding "No." That plaintiff discounts this panoply of on-point authority and reason contrary to her claims is baffling, since there is nothing new presented by way of evidence or argument that has not been previously advanced and found wanting. No amount of sophistry or "hair-splitting" distinctions asserted by plaintiff to evade the numerous authorities arrayed against her can avoid what California courts have consistently and unequivocally

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[1] By application accompanying this brief, CJAC asks the Court to accept it for filing.

ruled: the lid on the amount of non-pecuniary damage recovery in the Medical Injury Compensation Reform Act's (MICRA) section 3333.2 – on its face and as applied here – comports fully with constitutional guarantees to trial by jury, equal protection and due process. See *American Bank & Trust Co. v. Community Hosp.* (1984) 36 Cal.3d 359 (upholding against due process and equal protection attack the periodic payments provision, Cal. Code of Civ. Proc. § 667.7); *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137 (upholding the "cap", Civ. Code § 3333.2); *Barme v. Wood* (1984) 37 Cal.3d 174 (upholding the collateral source reform, Cal. Civ. Code § 3333.1); *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 (upholding the sliding contingency fee scale statute, B & P Code § 6146); *Rashidi v. Moser* (2013) 162 Cal.Rptr.3d 446 (upholding "cap" against equal protection and impairment of jury trial claims; partially reversed when review granted on issue of set-offs (60 Cal.4th 718)); *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412 (upholding "cap" against jury trial and equal protection claims); and *Yates v. Pollack* (1987) 194 Cal.2d 736 (upholding "cap" in face of constitutional right to jury trial challenge).

Undaunted by the revetment of well-reasoned opinions against her, plaintiff nonetheless argues that constitutional guarantees to jury trial, due process and equal protection invalidate section 3333.2; and thus entitle her to keep all of the $3,072,856 the jury awarded for her non-economic damages, plus the almost $12 million in economic damages awarded and approved for her medical expenses and lost earnings. In short, she and her counsel want $2,822,856 more from defendant than the court judgment conferred, including $423,428 for her attorney fees to be added to the $1,871,668 the law already allows, for a total award of more than $15 million, of which

attorney fees would then comprise $2,295,096 (plus reimbursable costs). B & P Code § 6146.

Should the court accept plaintiff's arguments and scuttle the MICRA cap, the legal and economic consequences would far transcend plaintiff and her counsel's personal financial gains. Legally there is no principled distinction between a "cap" on recoverable non-economic damages against health care providers for their professional negligence and other analogous damage caps. These kinds of classifications, which plaintiff labels "discriminations," abound in the law. Uninsured motorists, for instance, are barred from collecting *any* non-economic damages should they be injured by the negligence of another motorist. *Horwich v. Superior Court* (1999) 21 Cal.4th 272; Civ. Code § 3333.3 *et. seq*. Workers injured on the job from the negligence of their employers or others cannot recover anything for their nonpecuniary losses under workers' compensation law. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148. And clients who suffer emotional distress from the negligence of their attorneys, in contrast to patients like plaintiff who are negligently injured by their doctors, are legally prevented from recovering *any* damages for their non-economic injuries. See, e.g., *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1693 (emotional distress damages are not recoverable in cases of attorney malpractice related to litigation) and *Holliday v. Jones* (1989) 215 Cal.App.3d 102, 112 (plaintiffs not entitled to recover emotional distress damages inflicted on them by attorney's malpractice).[2]

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[2] The organized contingency fee bar is strangely and hypocritically unconcerned that clients of attorneys subjected to legal malpractice are barred from recovering damages for their pain and suffering, preferring instead to focus their efforts on getting rid of or increasing the $250,000 cap health care providers are liable to pay for their patients "pain and suffering" due

(continued...)

Invalidating MICRA's non-economic damage ceiling on the constitutional grounds plaintiff asserts would, *a fortiori*, jeopardize all existing damage limits in other contexts as well as other provisions of MICRA that treat the negligence of health care providers differently from the negligence of other kinds of defendants.

Amicus does not know the full financial consequences to the general public should all damage ceilings be upended by an opinion holding they violate the right to jury trial and equal protection and due process; but in the field of health care, "raising the cap on non-economic damages from $250,000 to $1,000,000 or more would increase . . . costs in California by approximately $9.9 billion per year – an average of $261 per resident, or more than $1,000 for a family of four."[3] If that is the result of raising the ceiling to $1 million, it would obviously be worse if the lid were invalidated.

To prevent this calamity, CJAC consistently champions and defends MICRA before the legislature and judiciary against repeated attempts to repeal or gut its cost-saving reforms. Our hundreds of members representing businesses, professional associations and financial institutions, share the widespread and well-substantiated view that MICRA and its non-economic damage cap is a *model*[4] law that mirrors our express

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[2](...continued)
to medical negligence.

[3] William G. Hamm, H.E. Frech III & C. Paul Wazzan, *MICRA AND ACCESS TO HEALTH CARE*, *Executive Summary* (2014) & Pp. 35-36 ("*HAMM REPORT*"). William Hamm was formerly the Legislative Analyst for California.

[4] See, e.g., Donald J. Palmisano, *Health Care in Crisis* (2005) 5 *YALE J. HEALTH POL'Y L. & ETHICS* 371, 379 (strongly endorsing California's MICRA legislation as the "model" to pursue to fix the medical liability crisis); and Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps* (2005) 80 *N.Y.U. L. REV*. 391, 394 ("MICRA has served as a model for other states' adoption of damages caps as part of successive tort reform waves in the
(continued...)

goals for the civil justice system: fairness, efficiency, economy and certainty. This case permits us to show, once again, the need for MICRA and limn the wrongheaded, anti-public interest arguments advanced against it.

SUMMARY OF ARGUMENT

MICRA's non-economic damage ceiling fully complies with the U.S. and California constitutions. It does not violate the guarantee to due process or equal protection of the laws, nor the right to trial by jury. To hold otherwise and strike down this damage limitation would conflict with an unbroken trend of well-reasoned and settled opinions from our state Supreme Court and appellate courts that have consistently upheld it in the face of constitutional challenge.

No one has a right to a particular measure of damages or a right to have a limitation on those damages set aside because it does not provide for an inflationary cost of living increase. Legislatures and courts can, and regularly do, restrict recoverable damages or abolish entire causes of action. MICRA's lid on recoverable nonpecuniary loss is "key" to stemming runaway medical malpractice insurance premiums and litigation expenses. Time has proven the wisdom and efficacy of the cap. Its judicial invalidation would result in increased litigation and insurance costs and unfairly impede access to needed healthcare.

A judicial ruling that the cap is unconstitutional because it does not take into account the value of a money judgment over time, would destroy the purpose of the cap and threaten the unraveling of other damage limitations. We should learn from history,

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[4](...continued)
1970s, 1980s, and 2000s . . ..").

especially the causal and demonstrative benefits to the public of MICRA's damage limitation, and strive to preserve it lest we are forced to repeat the sorry circumstances that spurred its enactment.

ANALYSIS

I. THE MICRA LID ON THE AMOUNT OF RECOVERABLE NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS IS CONSTITUTIONAL.

The constitutionality of MICRA's lid on recoverable non-economic damages against defendant "health care providers" is beyond dispute. Plaintiff and her counsel understandably do not like the "cap" because it prevents them from getting more money from defendant. Even the trial judge who applied it felt compelled to confess in open court that he did not like "and ha[s] never liked" MICRA; but dislike does not equate with unconstitutionality, which is why the judge followed the law. A wide gulf exists between dislike of a law and finding it unconstitutional, a lacuna plaintiff has not and cannot traverse.

As a starting point, it is puzzling that plaintiff's counsel never addresses the veritable proposition that the legislature has the authority to abolish a cause of action for medical negligence. *Cory v. Shierloh* (1981) 29 Cal.3d 430, 439 ("It is well settled that the Legislature possesses a broad authority both to establish and to abolish tort causes of action."). This greater ability to abolish a cause of action necessarily, as a matter of logic and law, includes the lesser ability to restrict it. "The greater (the general power) includes the lesser (the limited power)." *Estate of Conroy* (1977) 67 Cal.App.3d 734, 746. And that restriction can be, as with the MICRA "cap," confined to the class of persons subject to the cause of action ("health care providers") and the damages recoverable

against them (no more than $250,000 for non-economic loss). This is the lesson of *Werner v. Southern Cal. Etc. Newspapers* (1950) 35 Cal.2d 121, holding that the Legislature "may place a limit on the *damages available* in a cause of action, even though no such limit existed at common law . . .." *Id.* at 124; italics added.

A. MICRA's "Cap" Fully Comports with Due Process and Equal Protection.

Ignoring these precedential precepts, plaintiff plunges ahead with her argument that the legislative classification of MICRA, particularly its lid on recoverable non-economic damages, offends due process and equal protection.[5] In making this argument, she concedes that though a "rational basis" once existed for the enactment of MICRA, conditions have changed sufficiently that the "rational basis" has ceased and the MICRA "cap" is thus unconstitutional. The "changed conditions" plaintiff cites are (1) the end of the medical malpractice insurance crisis that prompted MICRA's enactment, (2) the enactment of Proposition 103 in 1998 which supplants the continuing need for MICRA, and (3) the corrosive effect of inflation on the $250,000 "cap", which if factored in as the Legislature should have done, would exceed $1 million today. None of these arguments withstand scrutiny.

1. The "Changed Conditions" Contention is a Canard that Has No Support in Constitutional Jurisprudence.

Everything is coming into being and passing away. "Change," in fact, is the only

[5] "[T]he test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions agaisnt special legislation and the equal protection clause of the federal Constitution." *County of Los Angeles v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 389. "[E]qual protection and due process analysis regarding the [constitutionality of statutory classifications] is the same under both the United States and the California Constitutions." *People v. McKee* (2010) 47 Cal.4th 1172, 1215.

constant. Plato, *CRATYIUS*, 402a. The legislature and courts know this, but that knowledge is not now and has never been an adequate reason for invalidating statutes on constitutional grounds. Indeed, when the MICRA "cap" was finally upheld against an equal protection and due process challenge by our supreme court 10 years after its enactment, Chief Justice Bird observed, consistent with what plaintiff argues here, that "the medical malpractice 'crisis' [which prompted its enactment] is *fading into the past*." *Fein, supra*, 38 Cal. 3d at 169; italics added (dissenting opinion by C.J. Bird.). The majority of her colleagues who rejected the constitutional attack on the "cap" were unmoved by this remark about the effect of time's passage to the decade old "crisis" precipitating MICRA, and responded by stating simply that "the Legislature clearly *had* a reasonable basis for drawing a distinction between economic and non-economic damages, providing that the desired cost savings should be obtained . . . by limiting the recovery of non-economic damage." *Id.* at 162; emphasis added.

Reference to what the legislature *had* before it when it enacted MICRA is the relevant consideration under "rational basis" review, not the "changed conditions" that may have developed since its enactment, even though, as amicus shall show, nothing has changed in law or fact since 1975 to warrant striking down MICRA. See discussion post at Pp. 18-20. Numerous opinions recognize that the starting and ending point for determining if challenged economic/social welfare statutes like MICRA pass constitutional muster is whether, *at the time of their enactment*, the legislature had a "rational basis" for approving them. See, e.g., *Armour v. City of Indianapolis* (2012) 132 S.Ct. 2073, 2077 (no equal protection violation because "City *had* a rational basis for distinguishing between those lot owners who had already paid their share of project costs and those

who had not."); *People v. Turnage* (2012) 55 Cal.4th 62, 77 (no equal protection violation because legislature "*had* a rational basis for allowing false bomb crimes to be punished as felonies without proof of sustained fear, while requiring such a showing for felony violations of false weapons of mass destruction statute.").

"Had" is an irregular verb connoting the *past* tense that is paired in the above quotations with the subject noun "legislature." The reference that the statute challenged on equal protection and due process grounds "had a rational basis" is obviously to the time of the legislature's consideration and enactment of the challenged statute, not some distant future time.[6] None of the cases discussing whether a "rational basis" exists for a challenged statute refer to the present operation of the statute; and no applicable California or Supreme Court case exists where the former "rational basis" for a statute is found to no longer exist due to presently existing "changed circumstances" or "changed conditions."

In fact and in law, applying "rational basis" review to a challenged legislative classification requires courts to uphold it so long as it is based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy . . . ." *Allied Stores v. Bowers* (1959) 358 U.S. 522, 530. This deference to state objectives has operated in the sphere of economic regulation quite apart from whether the conceivable " 'state of facts' (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) has ever been urged in the classification's defense by those who either

[6] "Past tense is used to express an action that already took place or was completed in the past." J.A. Senn & Carl Ann Skinner, *ENGLISH: COMMUNICATION SKILLS IN THE NEW MILLENNIUM* (2002) 198.

promulgated it or have argued in its support." Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* (1978) 996.

Plaintiff's argument about "changed conditions" allowing for a different or renewed rational basis review than that obtainable by focusing on what was reasonable when the classification was enacted, ignores the history that gave rise to the distinction between "rational basis" and "strict scrutiny" review. That history began with numerous decisions of the Supreme Court that applied substantive due process and equal protection to strike down economic and social welfare legislation the Court felt too intrusive on the liberty of contract and the property rights of business. A strong disagreement between what Congress and state legislatures, on one side, and the Court on the other, believed consistent with the constitution reached its peak in the midst of the Great Depression and President Roosevelt's New Deal legislation that was routinely invalidated by the Court.[7] The President responded to this perceived problem with a proposed bill in 1937 to reorganize the judiciary, which opponents labeled a "court packing plan" and the President called an effort to "unpack" the Court by adding new members to increase its size to fifteen.

Whatever effect the President's judicial reform plan or the electorate's choice to re-elect Roosevelt with a massive majority in 1936 may have had on the Court, it

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[7] See, e.g., *Railroad Retirement Board v. Alton Railroad Co.* (1935) 295 U.S. 330 (invalidating the Railroad Retirement Act on constitutional grounds); *Louisville Joint Stock Co. v. Radford* (1935) 295 U.S. 555 (holding the Frazier–Lemke Bankruptcy Act violated due process under the Fifth Amendment); *Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495 (invalidation on constitutional grounds the National Industrial Recovery Act); *United States v. Butler* (1936) 297 U.S. 1 (striking down on constitutional grounds the Agricultural Administration Act); and *Morehead v. New York ex rel Tipaldo* (1936) 298 U.S. 587 (striking down as an impermissible interference with the right of contract New York's minimum wage law for women).

abruptly reversed its views on what "rational basis" required under due process and equal protection to sustain statutes against constitutional attacks based on due process and equal protection.[8] Former dissenters in opinions voiding economic and social welfare statutes for lacking a "rational basis" became the authors and votes on the Court for upholding analogous statutes against constitutional attack. As Justice Black explained in *Ferguson v. Skrupa* (1963) 372 U.S. 726:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. [¶] The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Id. at 729-30.

This purported "switch in time that saved nine"[9] required an explanatory rationale by the Court lest its decisions upending precedent appear merely the arbitrary product of shifting political winds. That explanation was soon delivered by Justice, later Chief Justice, Stone in the famous "footnote 4" to *United States v. Carolene Products*

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[8] See, e.g., *West Coast Hotel v. Parrish* (1937) 300 U.S. 370 (upholding against constitutional attack a Washington State minimum wage law much like that struck down in *Tipaldo*); *Virginia Railway v. Federation* (1937) 300 U.S. 515 (sustaining the constitutionality of the amended Railway Labor Act); *Wright v. Mountain Trust Co.* (1937) 300 U.S. 440 (upholding the constitutionality of the revised Frazier–Lemke Act for the protection of mortgaged farm lands); *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1 (upholding the National Labor Relations Act); and *Stewart Machine Co. v. Davis* (1937) 301 U.S. 548 (upholding the federal Social Security Act).

[9] Leo Pfeffer, *THIS HONORABLE COURT* (1965) 317.

Company (1938) 304 U.S. 144. Writing for the majority, Justice Stone suggested courts employ "more exacting judicial scrutiny" to legislation that discriminates against "discrete and insular minorities"for whom the "ordinary political processes" provide little protection in contrast to the review of social welfare and business restrictions. *Carolene Products* upheld against due process attack a federal statute, the Filled Milk Act ("Act"), that prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat. The petitioner challenging the Act argued, as does plaintiff here, that it should be permitted to show the facts justifying the Act's existence have "ceased to exist," and that, as a result, the Act violated its right to due process. 304 U.S. at 153. But the Court explained that such an inquiry "must be restricted to the issue whether *any state of facts either known or which could reasonably be assumed affords support for it*." 304 U.S. at 154; italics added. That, of course, has been the clear meaning of the "rational basis" test ever since and the origin of the well-established two-tiered approach ("rational basis" and "strict scrutiny") to due process and equal protection attacks on statutes.[10] See, e.g., *Nordinger v. Hahn* (1992) 505 U.S. 1, 15 (equal protection "does not demand for purposes of rational-basis review that a legislative or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification."); *Federal Communications Commission v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315 ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."); *In re Demergian* (1989) 48 Cal.3d 284, 292 ("A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would

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[10] See *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-299.

sustain it."); and *Fein*, *supra*, 38 Cal.3d at 159 ("It appears obvious that . . . placing a ceiling of $250,000 on the recovery of non-economic damages is rationally related to the objective of reducing the costs of malpractice defendants and their insurers.").

a. The Opinions Cited by Plaintiff do not Support her "Changed Conditions" Contention and Other Opinions Expressly Reject it.

Three opinions are cited by plaintiff as supposed authority for invalidating MICRA's non-economic damage ceiling because of "changed conditions." Appellant's Opening Brief (AOB), pp. 29-31. Only one, however – *Brown v. Merlo* (1973) 8 Cal.3d 855 (*Brown*), which preceded MICRA and was referenced in *Fein* when it upheld the cap against an equal protection challenge indistinguishable from the one made here – deals with equal protection; and it is readily distinguishable from this case. The remaining two opinions deal with non-equal protection claims and are so different from this in the facts animating them and analysis they provide as to be irrelevant and unhelpful as guidance for the court.

Brown is an equal protection opinion striking down California's automobile "guest statute" which barred actions by nonpaying passengers for injuries they sustained due to the driver's negligence. *Brown*, however, is of no help to plaintiff for several reasons. Most importantly, as mentioned, the Court was well aware of *Brown* when it upheld MICRA's non-economic damage cap against an equal protection challenge no different in principle than that advanced by plaintiff and her amicus herein. "[O]ur application of equal protection principles in *American Bank, Barme, Roa* and this case is not inconsistent with the principles enunciated in *Brown v. Merlo*." *Fein, supra,* 38 Cal.3d at 163; citations omitted.

Second, the automobile guest statute at issue in *Brown* was, unlike MICRA, not enacted in response to an emergency or crisis, so there was no danger its invalidation would trigger a new crisis as there is with the threatened invalidation of MICRA's cap. See *ante* at footnote 3.

Third, *Brown* felt it important when it examined the guest statute that it had never before "directly passed on the equal protection question posed by plaintiff." *Brown*, *supra*, 8 Cal.3d at 864. Here, however, the Court in *Fein* as well as intermediate appellate courts have expressly addressed the equal protection and due process challenges made by plaintiff and rejected them.

Fourth, the consequence of the guest statute – barring an entire cause of action – was more draconian than the ceiling MICRA places on recoverable noneconomic damages in medical malpractice actions.

Fifth and finally, the "changed circumstances" *Brown* took under consideration in invalidating the guest statute were completely different from those plaintiff and her amicus ask this court to consider. Most important was the growth and prevalence of automobile liability insurance, an event that happened independently of the guest statute. Here, however, the presence of affordable and available medical liability insurance is attributable in whole or large part to MICRA's tort reform provisions, including its cap. The other "changed circumstances" *Brown* took into consideration were conflicting and confusing judicial interpretations and applications of the guest statute. MICRA's cap, in contrast, has been consistently and uniformly upheld and applied by courts since its enactment and the definitive opinion in *Fein*.

Nor does *Cal-Farm Ins. Co. Deukmejian* (1989) 48 Cal.3d 805, the case upholding Proposition 103 in part but invalidating on due process grounds the 20% rollback of rates in effect one year before its enactment, provide any comfort to plaintiff's position. She cites *Cal-Farm* as authority for the notion that the circumstances that "triggered the enactment of Proposition 103 were not a 'temporary' 'emergency' of 'such enormity' that 'all individuals might reasonably be required to make sacrifices for the common weal.' "[11] That language, however, stands in stark contrast to the explanation provided by the principal author of MICRA, Barry Keene, about its foundational principle:

> A general policy . . . decision was made that *all interested parties must sacrifice* in order to reach a fair and rational solution to the insurance crisis. This included physicians, lawyers, insurance companies, and patients alike . . . Since [MICRA] demanded *sacrifices* from all parties, all parties were opposed to some segment of the bill. Physicians cried out against additional health quality control. Attorneys complained about tort reform. Malpractice carriers opposed the insurance provisions.[12]

This felt necessity of "mutual sacrifice" that *Cal-Farm* found lacking when Proposition 103 was approved by voters, was recognized by Governor Brown when he called a special session of the Legislature to resolve the medical malpractice insurance crisis:

> In my judgment, no *lasting solution* is possible without *sacrifice and fundamental reform*. It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession

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[11] AOB 18, citing and quoting from *Cal-Farm*, *supra*, 48 Cal.3d at 820-821.

[12] Barry Keene, *California's Medical Malpractice Crisis*, in *A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE* 27, 30-31 (Nat'l. Conf. of State Legislatures ed. 1976); emphasis added.

and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.[13]

Thus MICRA, in sharp contrast to the conditions animating Proposition 103's enactment as found by *Cal-Farm*, emanates from an emergency necessitating shared "sacrifice" and a "lasting solution" that retains "adequate medical care and [preserves] . . . adequate insurance coverage . . .." *Barme v. Wood*, *supra*, 37 Cal.3d at 180.

Neither does *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 (*Sonoma*) help plaintiff. That case involved a challenge to a state statute, enacted in response to property tax reductions mandated by Proposition 13, which invalidated existing agreements granting cost-of-living wage increases to local public agency employees. *Sonoma* found these restrictions on existing public employee contracts unjustified because there was no financial emergency justifying them. The Legislature, in enacting the restrictions, had "back-filled" local governments adversely affected by Proposition 13 with most of the funds they were to lose from the property tax reduction.[14] There is a vast difference between *Sonoma*'s finding that there was no fiscal emergency *when* the challenged statute was enacted justifying invalidation of existing cost of living wage increases, and what plaintiff asks this court do: find there is no *present* rational basis for retaining MICRA's cap.

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[13] *EXECUTIVE PROCLAMATION* of Governor Brown, May 16, 1975 at note 18.

[14] "Since five-sevenths of the revenues lost by the local entities was replaced by state funds, the loss to local entities amounts not to the 22 percent upon which respondents' claim of emergency is based, but, rather, to a loss of approximately 6 percent. Respondents do not claim that a 6 percent loss of revenue would justify the invalidation of wage increases called for in the agreements between petitioners and the local entities." *Id.* at 311.

Moreover, *Sonoma* is not based on equal protection or due process analysis, but instead on "article I, section 10, of the United States Constitution [prohibiting impairment of contracts] and article I, section 9, of the California Constitution, and whether the [challenged] statute violates the home rule provisions of the California Constitution. (Art. XI, §§ 4, 5.)" *Sonoma, supra*, 23 Cal.3d at 302.[15]

Two opinions are instructive in rejecting plaintiff's "changed conditions" contention coupled with an equal protection attack on statutes the court upheld. *Naismith Dental Corp. v. Board of Dental Examiners* (1977) 68 Cal.App.3d 253, for instance, involved an equal protection and due process challenge to a statute providing that no dentist be granted permission for an additional place of practice unless he is in personal attendance at each place of practice at least fifty percent of the time it is open. Petitioner argued that conditions had "changed" since enactment of the statute because there was now, as did not exist at the time of its enactment, "a substantial and increasing public demand for direct service prepaid dental care (as furnished by [petitioner]), and that the provision of such care is drastically limited by the challenged statute. *Id.* at 263. *Naismith* acknowledged "the argument may have merit" but rejected it because it is "more properly be addressed to the Legislature. . . 'It is not our province to weigh the desirability of the social or economic policy underlying the statute or to question its

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[15] The phrase "equal protection" appears only once in the opinion, to wit: "No contractual impairment or violation of the home rule provisions has occurred with respect to such employees, but it is urged that to deny them an increase because of these provisions would amount to a denial of due process and equal protection of the laws, and would be contrary to the Legislature's intent." *Id.* at 319. The opinion does not, however, expressly find the statutory restrictions in violation of the equal protection guarantee, but invalidates them because "respondents have not demonstrated that Proposition 13 created an emergency warranting the invalidation of salary increases called for in petitioners' contracts." *Id.* at 313.

wisdom; they are purely legislative matters.' *Allied Properties v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 141, 146"; other citations omitted.

Santa Monica Beach Ltd. v. Superior Court (1999) 19 Cal.4th 952 rejected a due process "takings" challenge to the City of Santa Monica's rent control ordinance. Petitioner argued that judged by the ordinance's express purposes it was no longer valid because it "unduly disadvantage[d] others or. . . exert[ed] adverse long-term effects on the housing market" contrary to its stated goals. Conceding the greater deference accorded statutes challenged under substantive due process or equal protection grounds than those attacked on the basis of the "due process" prohibition on "takings," the majority opinion nonetheless acknowledged that while it was not saying that in takings challenges "a change in conditions may never justify the constitutional invalidation of a once valid law, . . . the circumstances for such invalidation are quite narrow." *Id*. at 973. Just how "narrow" those circumstances must be is suggested in the footnote following that observation: "when there are fundamental constitutional rights at stake that can be curtailed only when the state demonstrates a compelling interest under the strictest judicial scrutiny." *Id*.; citations omitted.

Santa Monica Beach Ltd. declined petitioner's invitation to evaluate "whether a piece of complex legislation has sufficiently measured up to its objectives to preserve its constitutional validity," adding that "[n]othing in the United States Supreme Court's recent jurisprudence indicates that it envisions such an activist role for the courts." *Id*.

b. There is a Present Rational Basis for MICRA and its "Cap."

Though defendant has demonstrated there is no need to prove the MICRA "cap" is presently justified so long as there is some conceivable reasonable relationship to its

objective, there is ample evidence this court can judicially notice on this precise point. See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 54-46, fn. 9.

Since enactment of section 3333.2 – the "heart" of MICRA – numerous government studies confirm its continuing rational relationship to the objective of containing the costs of malpractice insurance by controlling liability for damages. See, e.g., U.S. Cong., Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BP-H-119, p. 64 Washington, D.C.: U.S. Gov't. Printing Office, Oct. 1995 ("Caps on damage awards were the only type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators."); *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System* 12, 14 & 17 (Health and Human Services: July 24, 2002) ("States with limits of $250,000 or $350,000 on non-economic damages have average combined highest premium increases of 12-15%, compared to 44% in states without caps on non-economic damages."); and House Report 112-039-Part 1-*Help Efficient, Accessible, Low-Cost, Timely Healthcare (Health) Act of 2011*, 112th Cong., 1st Sess., March 17, 2001, p. 8 ("[T]he rate of increase in medical professional liability premiums in California since 1976 has been a relatively modest 387%, whereas the rest of the United States has experienced a 1,089% rate of increase, a rate of increase 281% larger than that experienced in California.").

These post-MICRA studies confirm the soundness of numerous, consistent opinions by California courts that section 3333.2 comports with constitutional guarantees to due process and equal protection because it is rationally related to

controlling medical liability litigation and related insurance premium costs. *Fein, supra*, 38 Cal.3d at 158, 163, explained:

> [I]t is clear that section 3333.2 is rationally related to legitimate state interests. . . [¶] One of the problems identified in the legislative hearings was the unpredictability of the size of large non-economic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates.

Accord: *Stinnett v. Tam*, *supra*, 198 Cal.App.4th at 1432 ("[Plaintiff's] contention that section 3333.2 deprives her of equal protection . . . because her $250,000 in non-economic damages does not have the same purchasing power that $250,000 . . . had in 1975 . . . fails [as] *Fein* . . . already decided this statute is 'rationally related to a legitimate state interest' and 'rationally related to the legislative purpose.' "); and *Rashidi v. Moser, supra*, 162 Cal.Rptr.3d at 454-455, review granted on separate issue ("The Legislature had a rational basis for enacting the damages limitation, and . . .[plaintiff's] argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature.").

2. Proposition 103 Did not Reduce Professional Medical Liability Premium Costs, MICRA did.

Plaintiff asserts that section 3333.2 and MICRA's other liability reforms failed "to curb [malpractice insurance] premium increases," but instead enactment of Proposition 103 achieved that goal, thus demonstrating the cap is no longer necessary and lacks a "rational basis." AOB 36-37. This is what is known in law and logic as an informal (material) fallacy, mistaking what is not the cause of a given effect as the real cause (*non causa pro causa*) or the suggested inference that one event is the cause of another merely

because the first occurs earlier than the other (*post hoc ergo propter hoc* – after this therefore in consequence of this) Ruggero J. Aldisert, *LOGIC FOR LAWYERS* (3rd ed. 1997) 199. The best evidence, however, indicates that MICRA, not Proposition 103, is responsible for reducing medical malpractice insurance premiums and keeping them stable.

As the recent study by the team of economists and statisticians led by the former California Legislative Analyst William Hamm explains:

> Proposition 103 sought to control insurance *rates*, but did nothing to limit the determinants of insurance rates – insurance *costs*. Therefore, there is no reason to believe that the measure was effective in limiting rates. [¶] More importantly, the factual evidence clearly shows that Proposition 103 cannot be credited with the reduction in medical liability insurance premiums. . . . [P]remiums declined sharply during the three years after Proposition 103 took effect – a period that also followed the California Supreme Court's decision[s] upholding MICRA's constitutionality. During the same three-year period, the average rates for other insurance lines subject to Proposition 103's rate controls *increased*. The obvious explanation for this discrepancy is that MICRA reduced medical liability claim costs, but had no effect on claim costs for other lines of personal injury insurance [to which Proposition 103 also applied].[16]

The *Hamm Report* concludes, contrary to plaintiff's assertion, that section 3333.2 "has significantly reduced medical liability insurance premiums. Should the MICRA cap be eliminated or raised, these cost-savings will go away and insurance premiums will increase sharply." HAMM REPORT, *supra* at 19.

[16] HAMM REPORT, *supra* at 21. See also H. E. Frech III, William G. Hamm, and C. Paul Wazzan, "Controlling Medical Malpractice Insurance Costs – Congressional Act or Voter Proposition?" *Indiana Health Law Review*, Volume 3, Issue 1 (2006).

3. Plaintiff's Other Purported "Factual" Evidence is Infected by Legally Erroneous Premises or Plaintiff's Biased Opinion.

Plaintiff's argument that the cap impacts more harshly claimants with modest economic losses[17] is self-evident but, carried to the limits of its logic, would require constitutional abrogation of all non-economic damage restrictions. This would include the limitation of non-economic damages in multiple defendant actions to an amount based on the comparative or percentage of fault each bears in relation to the total fault,[18] the denial of non-economic damage recovery for those involved in automobile accidents who lack insurance,[19] and, as mentioned in our introduction, the bar on recovery of non-economic damages for those subjected to legal malpractice by their attorneys. See authorities cited *ante* at p. 3.

Nor does the assertion that the "cap" has not been indexed for inflation amount to anything more that a statement of the obvious. Any presumption from this undisputed observation that the cap is therefore constitutionally suspect finds no support in law. The lie to any such implication was given long-ago by *Feckenscher v. Gamble* (1938) 12 Cal.2d 482, which rejected plaintiff's claim that an amendment to Civil Code section 3343 doing away with the "benefit of the bargain" measure of damages and substituting in its place "actual loss" was legally impermissible because it cost him a 25% loss of recovery. The amendment occurred after the filing of an action for fraud, but before trial. In repudiating plaintiff's argument, the court stated that "no one has

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[17] AOB 27.

[18] Proposition 51, the Fair Responsibility Act of 1986, Civ. C. §§ 1431.1 *et. seq.*

[19] *Horwich v. Superior Court*, *supra*, 21 Cal.4th 272; Civ. Code § 3333.3 *et. seq.*

a vested right in a measure of damages." *Id.* at 499. The "actual loss" measure was applied with the court explaining that the statute "cannot . . . be legitimately interpreted as requiring the application of the measure of damages in existence at the time of the accrual of the cause of action." *A fortiori*, plaintiff here has no right to a measure of damages that factors in inflation over time.

Other opinions that have considered this "inflation" argument agree: *Stinnett v. Tam*, *supra*, 198 Cal.App.4th at 1432 ("[Plaintiff's] contention that section 3333.2 deprives her of equal protection . . . because her $250,000 in non-economic damages does not have the same purchasing power that $250,000 . . . had in 1975 . . . fails [as] *Fein* . . . already decided this statute is 'rationally related to a legitimate state interest' and 'rationally related to the legislative purpose.' ") and *Rashidi v. Moser*, *supra*, 162 Cal.Rptr.3d at 454-455 ("The Legislature had a rational basis for enacting the damages limitation, and . . .[plaintiff's] argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature.").

If the Legislature wanted to add inflation to the MICRA cap it surely could, but it has specifically refused to do this when it first enacted section 3333.2[20] and then reconsidered and rejected the idea in 1999.[21] "A court cannot eliminate measures which

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[20] "We rejected the concept of indexing the $250,000 figure because of the bad experience with inflation that was then hitting the . . . economy. Thus we decided that a single legislative cap leaving complete protection to the injured plaintiff for all economic losses was the most realistic approach." James E. Ludlam, *HEALTH POLICY – THE HARD WAY* 170, 183 (1998).

[21] The Legislature has not been unmindful of the MICRA cap and the opposition it galvanizes from the organized personal injury bar. In fact, a bill to index the cap to the consumer price index (AB 1380) was introduced in the Legislature in 1999 by the then-Speaker of the Assembly. It barely passed the Assembly but failed passage in the Senate. That measure (continued...)

do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of [what plaintiff views as] ill-considered legislation is a responsive legislature." *Cory v. Shierloh*, *supra,* 29 Cal.3d 430, 438.

B. THE MICRA LIMIT ON RECOVERABLE NON-ECONOMIC DAMAGES DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY.

The argument that Civil Code section 3333.2 impermissibly infringes on the right to trial by jury,[22] both federal and state,[23] has been considered and rejected, and for sound reasons.

We begin with recognition that the greatest infringement on the right to jury trial is *abolition* of the cause of action for which trial would otherwise attend. Yet it is indisputable that, as amicus pointed out previously, the legislature "possesses a broad authority both to establish and to abolish tort causes of action." *Cory, supra*, 29 Cal.3d at 439. "Thus statutes abolishing civil actions for alienation of affection, criminal conversation, seduction and breach of promise to marry have . . . been upheld." *Langdon v. Sayre* (1946) 74 Cal.App.2d 41. "Whether there has been a serious increase in the evils

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[21](...continued)
was preceded by a bill to increase the cap to $700,000 and make exceptions to it for a variety of circumstances. It failed passage from its own house of origin.

[22] Cal. Const., art. I, § 16 provides that "[t]rial by jury is an inviolate right and shall be secured to all . . .."

[23] The Supreme Court has declined to incorporate the Seventh Amendment into the due process clause of the Fourteenth and apply it to the states. See *Pearson v. Yewdall* (1877) 95 U.S. 294, 296. But in diversity cases and cases where federal law applies, federal courts have applied and interpreted the nature of the right to trial by jury. Also, federal court interpretations on the the right to jury trial are pertinent to determining the same right in California. *People v. Betts* (2005) 34 Cal.4th 1039, 1054, fn. 9 ("[w]e are aware of [no authority] that compels the conclusion that the right to a jury trial under the California Constitution . . . is broader than the comparable right guaranteed by the federal Constitution.").

of vexatious litigation in this class of cases . . . is for legislative determination, and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts." *Silver v. Silver* (1929) 280 U.S. 117, 122-123. Because "the legislature may abolish causes of action to prevent unfounded litigation, we cannot say that the legislature could not reasonably conclude that the danger of excessive recoveries of general damages . . . justified limitation of recovery to special damages." *Werner v. Southern Cal. Etc. Newspapers*, *supra*, 35 Cal.2d at 128; Civ. Code § 3536 ("The greater contains the less").[24]

If, then, the legislature can eliminate entirely recovery for non-economic damages without violating California's inviolate right to trial by jury, which it indisputably can and has done, why as a matter of law and logic cannot it place a lid on the recoverable amount of those damages? Does plaintiff really want to put the legislature in a constitutional straitjacket where its only options are the Hobson's choice to eliminate recovery for non-economic damages or leave them solely to the discretion of the jury? If the court were to accept plaintiff's argument, this would be the absurd result; and given the recent election outcome for Proposition 46 – a failed ballot initiative to raise the MICRA "cap" to $1.1 million and index it for inflation – would not auger well for the interests of future medical malpractice plaintiffs.

Numerous judicial opinions hold that a legislature's substitution of a limited non-economic damage remedy does not infringe on the right to trial by jury. *Tull v. United*

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[24] *Fein* recognizes that the "general damage/special damage" distinction drawn by statute and upheld in *Werner*, *supra*, 35 Cal.2d 121 against an equal protection attack is similar to the "non-economic damage/economic damage" distinction established by MICRA's section 3333.2. *Fein*, *supra*, 38 Cal. 3d at 158, n. 15.

States (1987) 481 U.S. 412 alluded to this when it stated, "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the *remedy phase* of a civil trial." *Id.* at 426, n.9; italics added. Other federal courts have found this reasoning instructive in dismissing seventh amendment jury trial challenges to state damage caps. The Fourth Circuit Court of Appeals, for instance, stated:

> [I]t is the role of the jury as fact-finder to determine the extent of a plaintiff's injuries. . . . [I]t is not the role of the jury to determine the legal consequences of its factual findings. [This] is a matter for the legislature . . . . [O]nce the jury has made findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law.

Boyd v. Bulala (4th Cir. 1989) 877 F.2d 1191 (holding that Virginia's statutory cap on recovery in medical malpractice action did not violate the right of jury trial under the seventh amendment); see also Note, *Reforming Tort Reform: Is There Substance To The Seventh Amendment?* (1989) 38 *CATH. U.L. REV.* 737, 738-39 (stating that the nationally organized personal injury bar intends to challenge damage caps on federal and state jury trial grounds, judging by this case an apparently never-ending pursuit).

Damage caps do not violate the right to trial by jury because the jury's function ends *before* the damage cap is imposed. *Boyd*, *supra*, 877 F.2d at 1196. With this power, a legislature may also limit the damages which may be recoverable for a certain cause of action. *Id.*; see also *Franklin v. Mazda Motor Corp.* (D.Md. 1989) 704 F. Supp. 1325, 1331 ("power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action"). In other words, damage caps do not violate the right to jury trial because the existence of a *remedy* is a matter of law and not fact; and the law is interpreted and applied by the court, not the jury. *Franklin,*

supra, 704 F. Supp. at 1333 (citing *Etheridge v. Medical Center Hosps.* (Va. 1989) 376 S.E.2d 525, 529 (Virginia Supreme Court upholds $750,000 damage cap)). Therefore, a damage cap merely sets the outer limits of a remedy provided by a legislature. *Franklin*, *supra*, 704 F. Supp. at 1333.

The history behind the seventh amendment underscores that damage caps do not abridge the right to a jury trial. Civil juries were provided for in the seventh amendment to protect "against the abuse of *judicial,* as distinct from *legislative,* power." *Davis v. Omitowoju* (3d Cir. 1989) 883 F.2d 1155, 1164 (emphasis in original). Since damage caps are enacted by legislatures, abuse of judicial power is not at issue.

While the peculiar wording of some state constitutions have invalidated damage limits enacted there, that is not the case in California with respect to our state's constitutional right to jury trial. Thus, *Yates v. Pollack*, *supra*, 194 Cal.App.3d 195 expressly holds that the non-economic damage lid does not violate the plaintiff's right to trial by jury. *Id.* at 200. *Yates* relies on the authority of *Fein*, and *Fein* relies upon *American Bank & Trust*, which makes it the primary opinion for why the right to jury trial is not abridged. *American Bank* explained, consistent with *Boyd*'s reasoning, that "the guarantee of jury trial in the California Constitution operates at the time of trial to require submission of certain issues to the jury. Once a verdict has been returned, however, the effect of the constitutional provision is to prohibit *improper* interference with the jury's decision." *American Bank, supra*, 36 Cal.3d at 376; italics added. The word "inviolate" "connotes no more than freedom from *substantial* impairment." *People v. Peete* (1921) 54 Cal.App. 333, 364. Deviations from the right as it existed at common law are permissible as long as there is no impairment of the "substantial features" of a jury trial.

Jehl v. Southern Pacific Co. (1967) 66 Cal.2d 821, 828-829. For the court to apply the "cap" after the jury has rendered its finding of non-economic damages is not an *improper* interference with or substantial impairment of the jury's decision.

Under MICRA's periodic payments provision, the court, upon the jury's determination of the amount of future damages owed in excess of $50,000, is authorized to "fashion the details of a periodic payment schedule." *Id.* This statute also provides that upon the plaintiff's death "a defendant's continuing liability for future damages other than damages for loss of future earnings [is] . . . subject to termination . . .," an obvious reduction in damages from their payment in lump-sum. *Id.* at 368, fn. 8. These features of the periodic payments statute are not, the court declared, "incompatible with the jury trial guarantee," (*id.* at 377) and are "similar to the authority long exercised by courts in the disbursement of the proceeds of a judgment under a number of well-established statutory schemes." *Id.* at 376.

While, as mentioned, some state courts have, primarily due to the unique wording of their constitutional provisions, found contrary to California, it is significant that overall "jury-trial challenges have been brought against non-economic damages caps laws in 14 states, and the claim has failed in 11 of those." Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation* (2005) 33 *J.L. MED. & ETHICS* 515, 521. Most state courts considering this issue have found, echoing *Fein*, *Yates* and *American Bank*, there is no abridgment of the right to jury trial because the jury still determines damages while the court applies the statutorily prescribed remedy as to the recoverable amount of those damages. This division of roles between court and jury is traditional and well-accepted: the jury determines the

facts, including the fact of and amount of damage, and the court then applies the legal remedy that sets the amount of allowable recovery.

CONCLUSION

California's $250,000 ceiling on non-economic damages recoverable in medical malpractice actions reasonably relates to its objective of ensuring the continued availability of health care services to the public. It comports fully with the California and federal constitutions with respect to equal protection and due process, and with the California Constitution's guarantees to jury trial. It was properly applied by the court to award to plaintiff in this case $250,000 for her pain and suffering. This court should decline appellant's invitation to strike it down on constitutional grounds and affirm its validity and continuing viability.

For all the reasons aforementioned, CJAC urges the Court to affirm the judgment.

Dated: March 18, 2015

Respectfully submitted,

/s/
Fred J. Hiestand
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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 9,000 words.

Dated: March 18, 2015

/s/
Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Street, Suite 1, Sacramento, CA 95817.

On March 18, 2015, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendant and Respondent in *Lora v. Lancaster Hospital Corporation, dba Palmdale Regional Medical*, B250519 on all interested parties in this action by mail (except where indicated) to the following:

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

Executed this 18th day of March 2015 at Sacramento, California.

/s/
David Cooper