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SUPREME COURT  
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**Supreme Court**

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OF THE STATE OF CALIFORNIA

Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Petitioner,*

vs.

SUPERIOR COURT OF THE COUNTY OF RIVERSIDE,

*Respondent,*

HOSSAIN SAHLOLBEI, MD,

*Real Party in Interest.*

After a Decision by the Court of Appeal

Fourth Appellate District, Division 2

Case No. E062380

Riverside County Superior Court, Hon. Michael J. Naughton

Case No. INF1302523

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF;  
*AMICUS CURIAE* BRIEF OF THE CALIFORNIA MEDICAL  
ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST  
HOSSAIN SAHLOLBEI, MD**

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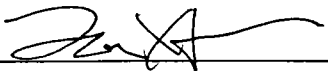
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**Certificate of Interested Entities or Persons**

Pursuant to California Rules of Court, rule 8.208, the undersigned, counsel for the California Medical Association, certifies that there are no disclosures to be made.

DATED: October 3, 2016.

By:   
LONG X. DO

*Attorney for California Medical  
Association*

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*Real Party in Interest.*

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN  
SUPPORT OF REAL PARTY IN INTEREST HOSSAIN  
SAHLOLBEI, MD**

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Pursuant to rule 8.520(f) of the California Rules of Court, the California Medical Association (“CMA”) hereby requests leave to file the attached *amicus curiae* brief in support of Real Party in Interest Hossain Sahlolbei, MD (“Dr. Sahlolbei”).

There are no persons or entities to be identified under rule 8.520(f)(4) of the California Rules of Court.

**I. INTERESTS OF THE *AMICUS CURIAE* APPLICANT**

CMA is a non-profit, incorporated professional physician association of approximately 42,000 members throughout the State of California.

CMA's membership includes California physicians engaged in the private practice of medicine in all specialties and settings. CMA's primary purposes are "to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession."

## **II. HOW THE PROPOSED *AMICUS CURIAE* BRIEF CAN HELP**

Many CMA physicians hold administrative or medical services contracts with the hospitals where they work, and many of them serve as influential leaders of their medical staffs. These physicians provide high quality medical care to their communities and are integral in the operation and success of their hospitals. Petitioner the People of the State of California ("People") proffer a novel theory of Government Code section 1090 in this case that would potentially expose all of these physicians to criminal investigation and prosecution if they work at a public hospital.

CMA's amicus brief raises important points and issues that are not addressed in the parties' briefs. It expounds on the common and complex relationships that exist between physicians and the hospitals at which they practice. The brief further explains how these relationships can enhance patient care, largely because they enable hospitals to draw on the professional judgment and experience of their physicians in matters concerning medical care. Finally, the brief covers the laws and regulations that govern hospital-physician relationships to guard against abuses and



manipulations that could undermine patient care, including the corporate bar on the practice of medicine that prohibits district hospitals and most other hospitals from employing physicians for professional services.

These discussions are important in this case because they help to illuminate why the People's effort to expand Government Code section 1090 is unjustified and unwise. That is, CMA's amicus brief explains that applying section 1090 to a class of physicians who are independent contractors and influential at their hospital would essentially expose a large number of physicians to criminal liability for conduct and arrangements that are not only routine but also necessary to ensure high quality medical care in hospitals.

### III. CONCLUSION

For the foregoing reasons, CMA respectfully requests that the Court accept and file the attached *amicus curiae* brief.

DATED: October 3, 2016

Respectfully,

CENTER FOR LEGAL AFFAIRS  
CALIFORNIA MEDICAL ASS'N

By:   
LONG X. DO

*Attorneys for the California Medical  
Association*

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**AMICUS CURIAE BRIEF OF  
THE CALIFORNIA MEDICAL ASSOCIATION**

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**I. INTRODUCTION**

The allegations in this case against Real Party in Interest Hossain Sahlolbei, M.D. (“Dr. Sahlolbei”) are very serious and, if proven, would reflect underhanded and highly inappropriate conduct. Such allegations to the extent they are true could possibly give rise to civil, regulatory, or professional licensing sanctions; but here the People of the State of California (“People”) seek to prosecute Dr. Sahlolbei under Government Code section 1090, a statute criminalizing self-dealing by government employees. Such a prosecution is first of its kind. The California Medical

Association (“CMA”) is not aware of any other instance in which independent physicians at hospitals are deemed “employees” for purposes of section 1090 on account of their contracts with the hospital and/or service as officers of the medical staff.

The parties have directed their briefing towards applying the rules of statutory interpretation to Government Code section 1090 and evaluating relevant legislative history to determine whether independent physicians can be construed to be a public hospital’s “employee.” There has not, however, been any attention paid to how Government Code section 1090 fits within the highly-regulated world of physicians and hospitals. By this *amicus curiae* brief, CMA articulates why the People’s attempt at a novel application of section 1090 is legally and practically unjustifiable as well as bad public policy that could impede patient care in hospitals.

Physicians serve an integral role in hospitals. They are the medical professionals with the education, training, experience, and ethical obligations to ensure the best possible level of patient care. Not only do physicians lead the team of health care providers that treats patients, they also can be indispensable in many other facets of the hospital’s operations. For instance, physicians can serve administrative and executive functions, determine policies and procedures affecting care, provide input on decisions about medical equipment and supplies, or interface with other hospital workers and community members. There are both settled industry

practices and laws that encourage, protect, and facilitate this symbiotic relationship between hospitals and physicians.

Hospitals throughout the state regularly put physicians in leadership and other prominent positions, and in so doing rely on the input of physicians to make important decisions affecting medical care. Physicians can effect a positive influence at their hospital through contracts to lead departments or service lines. They can derive influence as well through leadership positions on the medical staff. If the People's prosecution against Dr. Sahlolbei under Government Code section 1090 is permitted to proceed, all of these arrangements that have been encouraged and legally sanctioned could suddenly be criminalized. That would be unfair to physicians and detrimental to patient care in hospitals.

Whatever sanctions or remedies may exist to address the allegations asserted against Dr. Sahlolbei, they cannot include a criminal charge under Government Code section 1090. CMA accordingly urges the Court to affirm the court of appeal in rejecting the People's attempt to apply section 1090 to independent physicians.

## **II. INTERESTS OF *AMICUS CURIAE***

CMA is a non-profit, incorporated professional physician association of approximately 42,000 members throughout the State of California. CMA's membership includes California physicians engaged in the private practice of medicine in all specialties and settings, including hospital-based

physicians. CMA's primary purposes are to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession.

Many CMA physician members contract with hospitals to serve as department chairs or directors of various hospital services and functions, such as on-call coverage, clinical research, or quality assurance. CMA physician members also serve in leadership positions on hospitals' independent medical staffs. These physicians can be described as having influence at their hospitals due to their experience, reputation, and professional standing. All of them could potentially be exposed to criminal liability under Government Code section 1090 if the Court were to extend the statute to independent contractors in the manner urged by the People.

CMA regularly gets involved in cases in California and throughout the nation involving medical staff and physician rights in hospitals, including the last three cases before this Court in which those issues arose, *Fahlen v. Sutter Central Valley Hospital et al.* (2014) 58 Cal. 4th 655; *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal. 4th 976; and *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259.

### III. DISCUSSION

The People argue that Dr. Sahlolbei should be deemed an “employee” of the hospital for purposes of Government Code section 1090 because he has contracts with the hospital, is an officer on the medical staff, and generally is perceived to be very influential. *See* Opening Brief on the Merits at 1-2. These three factors would apply to virtually all physician leaders in all California hospitals who, by virtue of their standing and legal mandates, provide valuable input into hospital operations in order to ensure the best possible medical care. In discharging their duties, some of these physicians can take action that could be perceived to violate section 1090’s conflict of interest prohibition, although they would not be violating any other provision of law.

**A. There Is A Symbiotic Relationship Between Physicians And Hospitals, Even Though The Law Requires Physicians To Be Independent And Separate From The Hospital.**

California law strictly separates physicians from the hospitals in which they practice. Anti-kickback laws and federal Stark laws (self-referral) strictly circumscribe physicians from engaging in activities or entering into arrangements with hospitals that create financial incentives, particularly when it comes to patient referrals, that improperly influence physicians’ medical decisions. *See* 42 U.S.C. §§1395nn and 1320a-7b(b). Most prominently, California’s bar on the corporate practice of medicine prohibits most hospitals from employing physicians for professional

services. *See* Bus. & Prof. Code §2400. Health care district hospitals are not exempt and are expressly prohibited from employing physicians.<sup>1</sup> *See Conrad v. Medical Bd.* (1996) 48 Cal.App.4th 1038.

Moreover, this Court has recognized that “[h]ospitals in this state have a dual structure, consisting of an administrative governing body, which oversees the operations of the hospital, and a medical staff [comprised of physicians], which provides medical services and is generally responsible for ensuring that its members provide adequate medical care to patients at the hospital.” *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 983. Hospitals are required by law to have a medical staff “that is a separate legal entity, an unincorporated association, which is required to be self-governing and independently responsible from the hospital for its own duties and for policing its member physicians.” *Hongsathavij v. Queen of Angeles/Hollywood Presbyterian Medical Center* (1998) 62 Cal. App. 4th 1123, 1130 n.2; *see also Eight Unnamed Physicians v. MEC of the Medical Staff of Washington Township Hosp.* (2007) 150 Cal. App. 4th 503, 511-

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<sup>1</sup>The Legislature had created a temporary exemption program in existence from 2004 through 2010, for health care district hospitals to employ physicians under narrow circumstances. *See* Bus. & Prof. Code §2401.1 (repealed Jan. 1, 2011). The program was intended to help rural health care districts recruit physicians to underserved communities. It was not renewed, and there currently exists no law to exempt health care district hospitals from the corporate bar.

512 (“The medical staff is a self-governing, autonomous body with a carefully crafted set of bylaws that incorporate traditional due process procedures including a right of appeal”).

All physicians practicing at the hospital do so through the granting of privileges by the medical staff and hospital. Medical staff privileges do not create an employment or any contractual relationship between a physician and the hospital. *See O’Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal. App. 4th 797, 810. Nor does serving as an officer of the medical staff on its medical executive committee (“MEC”) create any contractual relationship between the hospital and physician.<sup>2</sup> Absent other arrangements or contracts, physicians have no direct legal relationship with the hospital by simple virtue of being granted medical staff privileges.

Notwithstanding the legal and practical separation between hospitals and their physicians, hospitals still must rely heavily on physicians to engage in all aspects of hospital operations, not just in delivering patient care. Physicians have a direct impact on the survival of the hospital because they admit and care for patients using hospital equipment and facilities, provide emergency care services and on-call services, and support

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<sup>2</sup>There is no support for the People’s claim that all officers of the medical staff, by virtue of that position, have a contractual relationship with the hospital, and the People do not offer any. *See* Opening Brief on the Merits at 3.



other important hospital functions and operations. Hospitals also depend on physicians in order to be competitive in attracting patients and recruiting top physicians. *See* “A Tighter Bond: California Hospitals Seek Stronger Ties with Physicians,” Cal. Health Care Almanac at 6 (Cal. HealthCare Found. Dec. 2009) (“Many hospital executives discussed the importance of establishing and building good relationships with physicians so as to differentiate their hospitals from competitors”).

Hospitals are always seeking ways to gain the allegiance of physicians and have developed a variety of ways to try to better align with physicians while complying with the corporate bar and the laws establishing an independent medical staff. One of the more traditional methods is to offer physicians contracts that comply with the corporate bar to cover a myriad of services. *See id.* at 5-6. Indeed, California law expressly recognizes the power of health care district hospitals like Palo Verde Hospital to enter into contracts with physicians for professional services. *See* Health & Safety Code §32129.

Hospital contracts can be awarded to physicians to act as directors of service departments (e.g., surgery or obstetrics). Professional service contracts also can be awarded to physicians or medical groups to staff a hospital’s emergency department and on-call coverage services, as well as other departments, on an exclusive basis. Almost invariably, due to the corporate bar and other applicable laws, such contracts treat the physician

as an independent contractor and must strictly conform to fair market value. *See e.g., Blank v. Palo Alto-Stanford Hosp. Ctr.* (1965) 234 Cal. App. 2d 377 (analyzing conditions for permissible revenue sharing between hospitals and physicians).

Offering physicians contracts enables hospitals to better align the two parties' interests while making use of the physicians' expertise and experience. Hospitals also can garner more influence over their independent medical staffs through contracting with individual, prominent physicians on the medical staff. Directors of hospital departments, who are awarded the position through a hospital contract, invariably become voting members on the medical executive committee ("MEC") of a medical staff. Their alignment with the hospital through the contract better ensures that the hospital's interests will be represented on the MEC.

Contracting with physicians also may enable hospitals to better control them. Many contracts, especially those offering exclusivity to a physician or medical group over a hospital service line or department, permit the hospital to automatically terminate the physicians' medical staff privileges upon termination of the contract. Hospitals thereby are able to circumvent the peer review process, which affords physicians fair procedure rights, through at-will contracts. They can banish a physician from even practicing at the hospital without peer review simply by terminating the contract with or without cause.

By attempting to focus Government Code section 1090 on physicians with contracts with hospitals or those who serve as officers of the medical staff, the People would greatly expand the statute to hundreds of physicians in every public hospital in California. As shown below, there is no justification for placing these physicians under the scrutiny of a criminal conflict of interest statute.

**B. The Engagement Of Physicians In All Aspects Of Hospital Affairs Is Encouraged And Facilitated Through Laws And Settled Industry Practice.**

Not only is the practice of hospitals awarding contracts to physicians prevalent, it has become industry practice and legally mandated in some instances for hospitals to rely on physicians for operational assistance. There are many laws and other authorities that have developed to foster hospital deference to and dependence on physicians on matters of patient care. These practices and laws are intended to enable hospitals to make use of the expertise, experience, and prominence of their physicians to enhance patient care and safety at the hospital.

Only physicians can engage in peer review to terminate or restrict a physician's medical staff privileges. *See* Bus. & Prof. Code §809.05 ("It is the policy of this state that peer review be performed by licentiates"). While hospitals "have a legitimate function in the peer review process . . . [the hospital] shall give great weight to the actions of peer review bodies."

*Id.*; see also Bus. & Prof. Code §809(a)(3) (“Peer review, fairly conducted, is essential to preserving the highest standards of medical practice”).

Hospital licensing regulations also mandate that hospitals depend on and consult with physicians on many different matters. Thus, medical staff committees (i.e., physicians on the medical staff) must be assigned responsibility for:

- (1) Recommending to the governing body the delineation of medical privileges.
- (2) Developing, maintaining, and implementing written policies and procedures . . . .
- (3) Developing and instituting, in conjunction with members of the medical staff and other hospital services, a continuing cardiopulmonary resuscitation training program.
- (4) Determining what emergency equipment and supplies should be available in all areas of the hospital.

22 C.C.R. §70203(a). Similarly, physicians on the medical staff must be given responsibility for:

- (1) Recommending to the governing body the delineation of surgical privileges for individual members of the medical staff. . . .

- (2) Development, maintenance and implementation of written policies and procedures in consultation with other appropriate health professionals and administration. . . .
- (3) Determining what emergency equipment and supplies shall be available in the surgery suite.
- (4) Determining which operative procedures require an assistant surgeon or assistants to the surgeon.

22 C.C.R. §70223(b).

The hospital licensure regulations contain several other mandates for physicians to advise hospitals. *See* 22 C.C.R. §70233(d) (“Periodically, an appropriate committee of the medical staff shall evaluate the service provided and make appropriate recommendations to the executive committee of the medical staff and administration”); *id.* §70243(j) (same with respect to clinical lab services); *id.* §70253(i) (same for radiology); *id.* §70263(t) (same for pharmacy services).

Physicians at hospitals also can have direct influence over hospital contracts affecting patient care. CMA’s Model Medical Staff Bylaws, which have been adopted by medical staffs throughout the state, provides for a Medical Staff Contracts Review Committee whose duties include the following:

- The medical staff contracts committee shall review and make recommendations to the board of [trustees/directors]

regarding quality of care issues related to exclusive arrangements for physician and/or professional services, prior to any decision being made, in the following situations:

- (i) The decision to execute an exclusive contract in a previously open department or service;
  - (ii) The decision to renew or modify an exclusive contract in a particular department or service; or
  - (iii) The decision to terminate an exclusive contract in a particular department or service.
- The medical staff contracts committee shall also review and make recommendations to the board of [trustees/directors] regarding quality of care issues related to the selection, performance evaluation, and any change in retention or replacement of physicians with whom the hospital has a contract. Prior to any decision being made, the board of [trustees/directors] shall be required to review and approve the recommendations of the medical staff contracts committee regarding these contracts, which approval shall not be unreasonably withheld.

CMA Model Medical Staff Bylaws §11.18 (2016).

The foregoing laws and other authorities reflect the reality that hospitals must depend on physicians to operate safely and effectively.

Physicians regularly, and in some cases are legally mandated to, consult with or advise hospitals and make recommendations on a wide variety of issues, including the awarding, termination, or modification of service contracts to individual physicians.

By attempting to extend Government Code section 1090 based on the influence that physicians have over hospitals, the People would criminalize activities that are expressly required or encouraged by industry practice and California law.

**C. Imposing Government Code Section 1090 On Independent Physicians Would Frustrate And Conflict With Industry Practices And Settled Laws Designed To Enhance Patient Care In Hospitals.**

There can be no justification for imposing Government Code section 1090 criminal liability on independent physicians, as the People wish to do, on the sole basis that physicians have contracts with the hospital, serve as leaders on the medical staff, and/or possess influence over the hospital by virtue of some untold criteria.

Rather than comport with the clear language of the statute, which applies only to the hospital's "employees," the People's effort would criminalize physicians for engaging in well settled industry practices that serve important functions inuring to the benefit of patients and the public.

Under the People's theory of Government Code section 1090, a physician who abides by hospital licensure regulations and medical staff

rules could face criminal prosecution. Physicians regularly give input and advice over hospital operations. If such involvement leads to the making of a contract, and if the physician is somehow “financially interested” in the contract, he or she could become criminally liable under section 1090.

These elements of section 1090 are construed broadly.

“Although section 1090 refers to a contract ‘made’ by the officer or employee, the word ‘made’ is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids.” *Millbrae Assoc. for Residential Survival v. Millbrae* (1968) 262 Cal. App. 2d 222, 237. Such a liberal construction would sweep most physicians into the scope of section 1090. Any direct or indirect advice physicians give to hospitals concerning patient care, quality assessment, or other hospital functions could be construed as participating in the making of a hospital contract. For example, a physician who presents a report to the hospital about, or who participates in an ad hoc committee assessing, the effectiveness of certain anesthetics or drugs used in the surgery department could be deemed to participate in the making of a contract if the hospital subsequently renews or enters into a new contract with the supplier of such anesthetics or drugs.



Physicians also will often be deemed to be “financially interested” in various hospital contracts given how broadly that term is construed. Courts have interpreted section 1090 to apply to any direct or indirect interest in a government-awarded contract. *See Thomson v. Call* (1985) 38 Cal. 3d 633, 645. Put another way, section 1090 is “concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising *absolute loyalty and undivided allegiance* to the best interests of the [government entity].” *Stigall v. Taft* (1962) 58 Cal. 2d 565, 569. The physician in the hypothetical above could possibly be deemed to be “financially interested” in the hospital’s contract with the supplier of surgical drugs and anesthetics if he or she, as is routine, has a professional relationship with the drug company representatives supplying those drugs or anesthetics in order to stay abreast of current trends and drugs.

There can be no reconciling a conflict between Government Code section 1090 and the important goals of the laws that require strict separation between physicians and their hospitals, i.e., the bar on the corporate practice of medicine and the law establishing medical staff independence.

As noted, section 1090 is intended to mandate absolute loyalty and undivided allegiance to the government entity on the part of its employees. As the People would have it, that would mean all physicians who are

officers on the medical staff or hold contracts with the hospital must carry out their duties with undivided allegiance and absolute loyalty to the hospital and none other. As officers of the medical staff, however, these physicians owe allegiance and duties to the medical staff and individual physicians on the medical staff. The medical staff is an independent body with self-governing rights. *See* Bus. & Prof. Code §2282.5. Physician leaders who represent the medical staff before the hospital are beholden to the independent medical staff. They may wish to work collaboratively with the hospital toward common goals and interests but they are not servants of the hospital.

Section 1090 also would conflict with the bar on the corporate practice of medicine. In order to best serve patients and protect the public, the corporate bar is designed to insulate physicians from having to serve the interests of their hospital. This Court explained in *People v. Pacific Health Corp.* (1938) 12 Cal.2d 156, 158-159, that the corporate bar is directed at the “evils of divided loyalty and impaired confidence” that inheres in hospital employment of physicians. It further has been explained,

[T]he presence of a corporate entity is incongruous in the workings of a professional regulatory licensing scheme which is based on *personal* qualification, responsibility and sanction, and . . . the interposition of a lay commercial entity between the professional and his/her patients would give rise to divided loyalties on the part of the

professional and would destroy the professional relationship into which it was cast.

65 Ops. Cal. Atty. Gen. 223, 225 (1982).

There is no way of harmonizing the corporate bar with a criminal statute that would require physicians' undivided allegiance to the hospital. Government Code section 1090 would undermine the century-old public policy underlying the corporate bar to ensure that physicians have an undivided allegiance to ensuring the best medical care for their patients. In addition to thwarting that policy, the People's effort to criminalize independent physicians in this case could create a chilling effect on physician participation in and engagement with their hospitals. Physicians would be discouraged from advising their hospitals for the betterment of patient care for fear that they could be criminally investigated or prosecuted under Government Code section 1090.

## CONCLUSION

For the foregoing reasons, CMA respectfully requests that the Court affirm the decision of the court of appeal in favor of Dr. Sahlolbei.

DATED: October 3, 2016

Respectfully,

CENTER FOR LEGAL AFFAIRS  
CALIFORNIA MEDICAL ASS'N

By:   
LONG X. DO

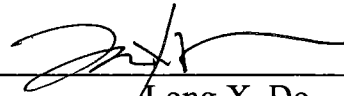
*Attorneys for Amicus Curiae the  
California Medical Association*

**CERTIFICATION OF WORD COUNT**

**(Cal. R. of Ct., rule 8.520(c))**

The text of this brief consists of 3,809 words as counted by the Microsoft Word word-processing computer application used to generate the brief.

DATED: October 3, 2016



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Long X. Do

*Attorney for Amicus Curiae the  
California Medical Association*

**PROOF OF SERVICE**

*People v. Superior Court (Sahlolbei)*, no. S232639

I, Kerry Sakimoto, hereby declare:

I am employed in Sacramento, California. I am over the age of eighteen years and am not a party to the above-entitled action. My business address is 1201 J Street, Suite 200, Sacramento, California 95814.

On October 3, 2016, I caused the document(s) to be served as indicated below:

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF;  
*AMICUS CURIAE* BRIEF OF THE CALIFORNIA MEDICAL  
ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST  
HOSSAIN SAHLOLBEI, MD**

U.S. Mail: By mailing a true copy thereof via first-class postage through the United States Postal Service, as set forth in the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 3, 2016, at Sacramento, California.

  
\_\_\_\_\_  
Kerry Sakimoto

**SERVICE LIST**

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