S262487

In the Supreme Court of the State of California

MARISOL LOPEZ,
Plaintiff and Appellant,

v.

GLENN LEDESMA, M.D.,
SUZANNE FREESEMANN, P.A., AND BRIAN HUGHES, P.A.,
Defendants and Respondents;

BERNARD KOIRE,
Defendant and Respondent;

After a Decision by the Court of Appeal
Second Appellate District, Division Two, Case No. B284452
Hon. Lawrence P. Riff, Trial Judge
Los Angeles County Superior Court No. BC519180

Application for Leave to File Brief of *Amici Curiae*; Brief of *Amici Curiae* California Medical Association, California Dental Association, California Hospital Association, California Academy of PAs, and the American Medical Association in Support of Defendants and Respondents Glenn Ledesma, M.D., Suzanne Freesemann, P.A., and Brian Hughes, P.A.

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Application for Leave to File Brief as *Amici Curiae*

Under California Rules of Court, Rule 8.520(f), the California Medical Association, California Hospital Association, California Dental Association, California Academy of PAs, and the American Medical Association (*Amici*) request permission to file the attached Brief of *Amici Curiae* in support of Defendants and Respondents Glenn Ledesma, M.D., Suzanne Freesemann, P.A., and Brian Hughes, P.A. *Amici*'s brief addresses the issue of the proper application of the limitation on noneconomic damages in the Medical Injury Compensation Reform Act of 1975 (MICRA), codified at Civil Code section 3333.2 (Section 3333.2), in cases alleging medical malpractice in the context of physician supervision of physician assistants. Section 3333.2, and its effect on noneconomic damages awards in medical malpractice cases, is of great interest to *Amici*.

I. Interests of *Amici Curiae*

California Medical Association (CMA) is a nonprofit incorporated professional association of more than 50,000 member physicians practicing in California, in all specialties. California Dental Association (CDA) represents over 27,000 California dentists—more than 70% of the dentists practicing in this state. CMA's and CDA's membership includes most of the physicians and dentists who are engaged in the private practices of medicine and dentistry in California.

California Hospital Association (CHA) is a nonprofit organization dedicated to representing the interests of California hospitals, health systems and the patients they serve. CHA represents more than 400 hospital and health system members having approximately 94 percent of the patient hospital beds in California, including general acute care hospitals, county hospitals, rural hospitals, academic medical centers, children's hospitals, psychiatric hospitals, nonprofit hospitals, investor-owned hospitals, and multi-hospital health systems.

California Academy of PAs (CAPA) is the professional organization representing physician assistants in California. CAPA is committed to improving access to quality health care within integrated, physician-led team practices. CMA, CDA, CHA, and CAPA have been active before the California Legislature, the Supreme Court of California, and the California Courts of Appeal in areas of concern to healthcare providers.

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the

AMA are to promote the art and science of medicine and the betterment of public health. AMA members practice in every specialty area and in every state, including California.

The AMA joins this brief on its own behalf and as a representative 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.

Thus, CMA, CDA, CHA, CAPA, and the AMA represent a wide variety of members of the health-care-providing community and have a strong interest in MICRA's limitation on noneconomic damages in actions based on "professional negligence" under MICRA.

Some funding for this brief was provided by organizations and entities that share *Amici*'s interests, including physician-owned and other medical and dental professional liability organizations and nonprofit and governmental entities engaging physicians for the provision of medical services, specifically: The Doctors Company; The Dentists Insurance Company; Kaiser Foundation Health Plan, Inc.; Medical Insurance Exchange of California; and the Regents of the University of California.

No party or counsel for a party authored this brief in whole or in part, nor has any party or counsel for any party made a monetary contribution intended to fund this brief's preparation or submission.

II. Need for Further Briefing

This appeal involves the limitation on noneconomic damages in MICRA, codified at Section 3333.2. This statute, and its effect on noneconomic damages awards in medical malpractice cases, is of great interest to *Amici*.

Counsel for *Amici* have reviewed Appellant's Opening Brief on the Merits; the Answer Brief on the Merits of Respondents Glenn Ledesma, M.D., Suzanne Freesemann, P.A., and Brian Hughes, P.A.; and Appellant's Reply Brief on the Merits. Respondents' brief discusses many issues directly affecting *Amici* and their involvement in the medical care and medical malpractice insurance industries in California. *Amici* support these points in Respondents' Brief.

The limit on noneconomic damages is an important part of MICRA, which *Amici* have endeavored to protect since the Legislature enacted the statutory framework in 1975. (See, e.g., *Chan v. Curran* (2015) 237 Cal.App.4th 601; *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 851, fn. 4; *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412; *Leung v. Verdugo Hills Hosp*. (2008) 168 Cal.App.4th 205, 212; *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, 961; *Delaney v. Baker* (1999) 20 Cal.4th 23, 31, fn.

4; *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 188, fn. 3; *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 640 fn. 2, 643 fn. 3, 649 fn. 7; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 979; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 171.) The Court of Appeal granted *Amici* leave in this case to file a brief in support of Respondents and participate in oral argument, and expressly relied on aspects of *Amici*'s argument in its opinion affirming the trial court. (Mar. 24, 2020 Opin. at p. 17, fn. 13.)

Amici submit that this Court will benefit from additional briefing. This brief supplements, but does not duplicate, the parties' briefs. Instead, it discusses statutory interpretation and public policy concerns not directly addressed by the parties.

Respectfully submitted,

Dated: February 25, 2021 TUCKER ELLIS LLP

By: */s/ Traci L. Shafroth*
Traci L. Shafroth

Counsel for Amici Curiae *California Medical Association, California Dental Association, California Hospital Association, California Academy of PAs, and the American Medical Association*

[Proposed] Order

IT IS HEREBY ORDERED that California Medical Association, California Dental Association, California Hospital Association, California Academy of PAs, and the American Medical Association's (*Amici*) Application for Leave to File Brief of *Amici Curiae* is GRANTED and that *Amici* are permitted to file the proposed brief combined with the application.

IT IS HEREBY FURTHER ORDERED that the Brief of *Amici Curiae* California Medical Association, California Dental Association, California Hospital Association, California Academy of PAs, and the American Medical Association in Support of Defendants and Respondents Glenn Ledesma, M.D., Suzanne Freesemann, P.A., and Brian Hughes, P.A. (Brief of *Amici Curiae*) be deemed filed with the Court as of the date of this Order.

IT IS HEREBY FURTHER ORDERED that any answer to the Brief of *Amici Curiae* be filed within ___ days of the filing of this Order.

DATED: _____, 2021

_____
Presiding Justice of the Supreme Court
of the State of California

Brief Of *Amici Curiae*

I. Introduction

The California Legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA) to address a medical malpractice insurance crisis that threatened access to adequate health care across the state. The rising cost of malpractice insurance premiums was driving doctors out of the state, and forcing others to practice without any malpractice insurance coverage. MICRA addressed this problem on a number of fronts, first and foremost by capping liability for noneconomic damages in professional negligence cases against health care providers at $250,000 under Civil Code section 3333.2 (Section 3333.2).

California plaintiffs have attacked MICRA since its inception, first on constitutional grounds and later by attempting to mischaracterize their medical malpractice claims as different types of actions to avoid the application of Section 3333.2 and other key provisions. Time and again this Court has rejected these attempts, emphasizing the importance of construing MICRA broadly to advance the Legislature's clearly articulated public policies underlying it.

Plaintiff here wrongly contends that MICRA does not apply to her action because Defendants violated supervisory requirements governing physician assistants' practice of medicine. The Court should

reject her argument and affirm the lower courts' rulings that Section 3333.2 applies, limiting Plaintiff's noneconomic damages to $250,000.

The damages cap applies to any action based on professional negligence, subject to the proviso that the medical services provided are "within the scope of services for which the provider is licensed" and "are not within any restriction imposed by the licensing agency." Plaintiff's action is a medical malpractice action, based entirely on allegations that Defendants negligently provided medical services in treating Plaintiff's daughter, Olivia Sarinana's, dermatology condition. Defendants were all licensed to provide medical treatment, including the dermatology services at issue here. And none were subject to restrictions imposed by their licensing agencies. Consequently, the trial court did not err in limiting Plaintiff's damages under Section 3333.2.

In an attempt to evade Section 3333.2's reach, however, Plaintiff argues that because Defendants violated supervisory requirements of the Physician Assistant Practice Act (PAPA) and its accompanying regulations, the physician assistants were "engaged in the unlawful practice of medicine," triggering the proviso that renders Section 3333.2 inapplicable. This Court has already rejected a similar challenge to another MICRA provision containing the same proviso. It should do so again here.

As this Court has emphasized, the proviso was not intended to exclude an action from MICRA where a health care provider violates professional regulations. "Instead, it was simply intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed—for example, when a psychologist performs heart surgery." *Waters v. Bourhis* (1985) 40 Cal.3d 424 (*Waters*).

Applying that holding here, if a physician assistant renders services for which he has not been licensed, such as dentistry or orthoptics, the provision of those services would trigger the first clause of Section 3333.2's proviso. The services he rendered would fall outside the scope of services for which he is licensed, so in an action alleging that he rendered those services negligently, MICRA's damages cap would not apply.

Similarly, if the Physician Assistant Board puts probationary restrictions on an individual physician assistant's license, such as precluding him from prescribing controlled substances, and he prescribes controlled substances anyway, that conduct would trigger the second clause of Section 3333.2's proviso. The prescription would directly violate a restriction previously imposed on the individual physician assistant by the Board, so in an action alleging that he negligently prescribed the medication, MICRA's damages cap would not apply.

This is not such a case and the Court should reject Plaintiff's attempt to reinterpret the proviso. There is no limiting principle inherent in Plaintiff's proposed interpretation; under her construction, *any* violation of the regulations governing physician assistants would potentially render Section 3333.2 inapplicable, once again exposing health care providers to unlimited noneconomic damages in medical malpractice cases. Exempting such a broad group of cases would contravene the Legislature's intent in enacting MICRA: to reduce health care providers' liability for noneconomic damages, thereby reducing medical malpractice insurance costs and increasing access to health care. Had the Legislature intended to enact the sweeping exemption that Plaintiff proposes, it would have done so in clear, unambiguous terms.

Section 3333.2 applies to the claims against the physician-assistant defendants here, as well as to the claims for direct and vicarious liability leveled against their supervising physicians. Adopting Plaintiff's construction of Section 3333.2 would run afoul of this Court's instruction to liberally construe the statutory provision, contravene the Legislature's clearly articulated intent in adopting MICRA, and undermine the important public policies underlying the statutory framework. For these reasons, *Amici* urge the Court to affirm

the ruling applying Section 3333.2 to the award of noneconomic damages.

II. Legal Argument

A. This Court's precedents emphasize the important legislative purposes of MICRA.

MICRA was enacted to address a malpractice insurance crisis that threatened access to health care in California in the 1970s. (E.g., *Am. Bank & Tr. Co. v. Cmty. Hosp*. (1984) 36 Cal.3d 359, 371 (*American Bank*).) Malpractice insurance premiums had skyrocketed after the insurance companies that issued "virtually all of the medical malpractice insurance policies in California" determined that the costs of providing such policies had become prohibitively high. (*Ibid*.) Some "withdrew from the medical malpractice field entirely," while premiums charged by those that remained rose astronomically. (*Ibid*.) As a result, many doctors stopped performing certain high-risk procedures, many opted to practice without malpractice insurance, and many opted "to terminate their practice in this state altogether." (*Ibid*.) This left parts of the state without fully available medical care, and left patients who suffered serious injury due to malpractice with "the prospect of obtaining only unenforceable judgments." (*Ibid*.)

Then-Governor Brown responded to this crisis by convening the Legislature in extraordinary session to craft a remedy. (*American Bank*,

supra, 36 Cal.3d at p. 363.) Recognizing that "[t]he continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation," the Legislature enacted MICRA. (*W. Steamship Lines, Inc. v. San Pedro Peninsula Hosp.* (1994) 8 Cal.4th 100, 111, *as modified on denial of reh'g* (Sept. 22, 1994) (*Western Steamship*).) "MICRA thus reflects a strong public policy to contain the costs of malpractice insurance by controlling or redistributing liability for damages, thereby maximizing the availability of medical services to meet the state's health care needs." (*Id*. at p. 112)

MICRA "includes a variety of provisions[,] all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence." (*Western Steamship*, *supra*, 8 Cal.4th at p. 111.) These include provisions establishing a special limitations period (Code Civ. Proc. § 340.5), imposing notice requirements before a plaintiff may bring suit (Code Civ. Proc. § 364), allowing periodic payments on certain judgments (Code Civ. Proc. § 667.7), allowing introduction of evidence of a variety of collateral source benefits (Civ. Code § 3333.1), limiting contingency fees (Bus. & Prof. Code § 6146), and—crucially—limiting the recoverability of noneconomic damages (Section 3333.2).

Section 3333.2 and other MICRA provisions have survived wide-ranging constitutional attacks. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 161–62 (*Fein*) [rejecting due process and equal protection challenges to Section 3333.2]; *American Bank*, *supra*, 36 Cal.3d at p. 364 [rejecting due process and equal protection challenges to Section 667.7]; *Barme v. Wood* (1984) 37 Cal.3d 174, 180–82, [rejecting due process and equal protection challenges to Section 3333.1]; *Roa v. Lodi Medical Group, Inc*. (1985) 37 Cal.3d 920 [rejecting due process, equal protection, and separation of powers challenges to Section 6146].) And this Court has repeatedly rejected attempts by plaintiffs to avoid the application of MICRA's central provisions by recasting professional negligence actions as other types of claims. (E.g., *Flores v. Presbyterian Intercommunity Hosp.* (2016) 63 Cal.4th 75, 79 (*Flores*) [rejecting characterization of professional negligence claim as ordinary negligence to avoid applicability of MICRA's special limitations period under Section 340.5]; *Winn v. Pioneer Med. Grp*., Inc. (2016) 63 Cal.4th 148, 155 [rejecting claim that physician's provision of inadequate medical care constituted a violation of the Elder Abuse and Dependent Adult Civil Protection Act].)

One of the central problems the Legislature sought to address in enacting MICRA "was the unpredictability of the size of large noneconomic 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." (*Fein*, *supra*, 38 Cal.3d at p. 163.) The Legislature's remedy was to limit noneconomic damages awards in actions against health care providers based on professional negligence to $250,000. (Section 3333.2.) Recognizing that the cardinal rule of statutory construction is to "ascertain and give effect to the intent of the Legislature" (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 51), this Court, time and again, has rejected efforts by plaintiffs to overturn or limit the applicability of Section 3333.2. (See, e.g., *Fein*, *supra*, 38 Cal.3d at pp. 142–43; *Western Steamship*, *supra*, 8 Cal.4th at p. 104; see also *Chan v. Curran* (2015) 237 Cal.App.4th 601, 606 (*Chan*) [rejecting argument that "the rationale for the cap (indeed, for all of MICRA) no longer exists"].)

B. This Court has construed MICRA broadly, "filling in the gaps" to achieve its purpose.

This Court has repeatedly emphasized that "MICRA provisions should be construed liberally in order to promote the legislative interest in negotiated resolution of medical malpractice disputes and to reduce malpractice insurance premiums." (*Preferred Risk Mut. Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 215 (*Preferred Risk*).) MICRA's limitation on damages under Section 3333.2 is central to achieving this purpose.

In rejecting attempts to limit Section 3333.2, the Court has emphasized that a broad application of the provision is "necessary to effectuate the intent and policies prompting the MICRA legislation." (*Western Steamship*, *supra*, 8 Cal.4th at p. 112.) Accordingly, the Court has not constrained itself to "the four corners of section 3333.2," instead embracing its role "to aid in the familiar common law task of filling in the gaps in the [MICRA] statutory scheme." (*Id*. at pp. 112–13.) The Court has rejected attempts to limit application of the damages cap that fail to account for "countervailing policy considerations" and threaten "the broader purpose of MICRA by resurrecting the pre-MICRA instability associated with unlimited noneconomic damages and increasing the overall cost of malpractice insurance to account for these larger recoveries." (*Western Steamship*, *supra*, 8 Cal.4th at p. 112; see also *Preferred Risk*, *supra*, 21 Cal.4th at p. 216 [same].)

In its opinion in this case, the Court of Appeal noted in a footnote "the importance of the other policy at issue here of providing adequate compensation to injured parties," emphasizing its view that the damages cap, which has remained unchanged since its enactment in 1975, "woefully fails to adequately compensate the plaintiff" for her damages. (*Lopez v. Ledesma* (2020) 46 Cal.App.5th 980, 999, *reh'g denied* (Apr. 10, 2020).) Yet, as the Court of Appeal implicitly recognized, the

determination of the appropriate level for the damages cap is not a question for the courts.

In fact, the Legislature has considered and rejected modifications to Section 3333.2 on at least three occasions. In the late 1990s, the Legislature declined to enact a bill that would have increased the limitation to $700,000; that bill also would have established that the damages cap does not apply (1) if the health care provider consumed alcohol or illegal drugs and, because of his or her impairment, caused injury to the plaintiff; (2) if the provider previously had three or more disciplinary actions before the licensing boards; (3) if the provider committed sexual abuse or misconduct upon the plaintiff; or (4) where the provider's negligence or misconduct caused death or catastrophic injury. (Assem. Bill No. 250 (1997-1998 Reg. Sess., as amended.) Two years later, the Legislature declined to enact a bill that would have adjusted the limitation based on the Consumer Price Index. (Assem. Bill No. 1380 (1999-2000 Reg. Sess.), as amended [available here].) And as recently as 2014, the Legislature declined to advance a bill meant to address the $250,000 limitation by stating an intent "to bring interested parties together to develop a legislative solution to issues surrounding medical malpractice injury compensation." (Sen. Bill No. 1429 (2013-2014 Reg. Sess.) [available here].)

California's voters have likewise rejected attempts to modify Section 3333.2. In the 2014 general election, "California voters defeated Proposition 46, which, in part, would have modified MICRA's noneconomic damages limitation to reflect inflation, raising the cap to approximately $1.1 million as of January 1, 2015, and calling for annual adjustments thereafter. (*Chan*, *supra*, 237 Cal.App.4th at p. 607, fn. 2 [citing Ballot Pamp., Gen. Elec. (Nov. 4, 2014) analysis of Prop. 46, p. 28; *id*. text of Prop. 46, at p. 69).] The voters defeated the proposition by a margin of 64 to 33 percent.

C. The Physician Assistant's Practice Act, like MICRA, aims to increase Californians' access to medical care.

MICRA's provisions reduce the cost of malpractice insurance by limiting the amount and timing of recovery in professional negligence cases, with the ultimate goal of increasing access to affordable medical care in California. The statutes governing the medical practice of physician assistants share this objective.

The Legislature first introduced physician assistants in the practice of medicine in California in 1970. The Legislature, "[i]n its concern with the growing shortage and geographic maldistribution of health care services in California," established the Physicians' Assistants Law as "a framework for development of a new category of health manpower—the physician's assistant," with the goal of

"encourag[ing] the more effective utilization of the skills of physicians by enabling them to delegate health care tasks to qualified physicians' assistants where such delegation is consistent with the patient's health and welfare." (Stats. 1970, Regular Sess., ch. 1327, § 2, p. 2468 [available here].) The Legislature reiterated these same principles when it replaced the Physicians' Assistants Law with the Physician Assistant Practice Act.[1] (Stats. 1975, Regular Sess., ch. 634, § 2, p. 1371 [available here].)

The Legislature enacted both MICRA and PAPA in September 1975. Both reflect the primary goal of the Legislature's health-care-related enactments of expanding access to adequate medical care. Physician assistants play a particularly important role, as they were introduced by the Legislature as a new class of licensees to whom doctors could delegate tasks they would otherwise have to perform themselves, thereby improving doctors' efficiency and increasing patient access to medical services.[2]

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[1] The Legislature amended several relevant sections of PAPA effective January 1, 2020. (See Bus. & Prof. Code §§ 3500, *et seq*.) The citations to PAPA in this brief are to versions that were effective prior to the latest amendments, which were in effect at the time of the relevant events.

[2] The importance of physician assistants to the goal of expanding access to health care, especially in rural areas, has been borne out by data analyzed by the Centers for Disease Control and Prevention's National

D. MICRA's damages cap applies to professional negligence cases unless the proviso regarding scope of services or restrictions by the licensing agency is triggered.

Under MICRA, noneconomic damages are limited to $250,000 "[i]n any action for injury against a health care provider based on professional negligence . . . ." (Section 3333.2(a).) Section 3333.2 defines "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, . . . *provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital*." (Section 3333.2(c)(2) [emphasis added].)

The italicized proviso is at issue here. Plaintiff does not dispute that her case, which alleges the negligent treatment of Olivia Sarinana's dermatology condition, constitutes a professional negligence action. (See, e.g., AOB at pp. 11–15; ABM at pp. 42–43.) She incorrectly argues, however, that because Defendants did not comply with

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Center for Health Statistics (NCHS). In a 2011 analysis, based on data from the 2008 and 2009 National Hospital Ambulatory Medical Care Survey, the NCHS' Division of Health Care Statistics concluded that physician assistants "provide a critical health care function by providing care in settings with fewer physicians, such as rural locations, small hospitals, and nonteaching hospitals." (See November 2011 NCHS Data Brief No. 77, available here).

requirements governing supervision of the physician-assistant Defendants, either the first or second clause of the proviso applies, rendering Section 3333.2 inapplicable. While a failure to comply with the supervisory requirements of PAPA or its accompanying regulations might expose a physician assistant and/or her supervising physician to disciplinary proceedings, it does not trigger the proviso and therefore does not render MICRA inapplicable.

E. Violation of supervisory requirements does not change the "scope of services" for which a physician assistant is licensed, so does not trigger the first clause of the proviso.

1. The scope of services a physician assistant may provide is established by the Medical and Physician Assistant Boards and the accredited physician assistant program completed before licensure—not by the supervisory requirements under PAPA and its accompanying regulations.

PAPA establishes the high-level requirements for the process of obtaining a physician assistant license and additional requirements the physician assistant and her supervising physician must comply with *after* the physician assistant has obtained her license and is practicing. It does not establish the scope of services for which a physician assistant is licensed.

PAPA establishes the broad outlines of the licensing process itself: completion of an approved physician-assistant program, passing any required examination, payment of required fees, and certification

that the applicant is not subject to denial for misconduct (e.g., for having previously been convicted of a crime). (Bus. & Prof. Code § 3519.) Under PAPA, the Physician Assistant Board (Board) approves the accredited training programs and makes recommendations to the Medical Board of California concerning the scope of practice for physician assistants. (Bus. & Prof. Code §§ 3509, 3513.)

To obtain a license from the Board, applicants first complete an accredited physician assistant program, which generally requires completion of a four-year degree (preferably in the sciences), then completion of a master's degree from an accredited institution. The applicant must also pass the Physician Assistant National Certifying Exam (PANCE). To obtain her license, the applicant submits to the Board a certification of completion of the accredited program, releases her PANCE score to the Board, and provides forms showing completion of additional administrative requirements.

Accordingly, PAPA does not establish the scope of the medical services a licensed physician assistant may provide. That is established by the Medical Board of California, with input from the Physician Assistant Board, and effected by the scope of the training received in the underlying Board-approved master's program the applicant must complete before licensure. PAPA makes clear that it does not *expand* the scope of medical services beyond those covered by licensure by the

Board—e.g., it does not authorize provision of services, such as dentistry or orthoptics, that would not be covered in accredited physician assistant programs. (Bus. & Prof. Code § 3502, subd. (d).) But it does not, by its provisions, establish the scope of services covered by the accredited physician assistant programs.

2. Violation of additional supervisory requirements does not change the "scope of services for which the provider is licensed," so does not trigger the first clause of the proviso.

As this Court has made clear, the proviso in MICRA's definition of professional negligence "obviously was not intended to exclude an action from" MICRA's ambit "simply because a health care provider acts contrary to professional standards or engages in one of the many specified instances of 'unprofessional conduct.'" (*Waters v. Bourhis*, (1985) 40 Cal.3d 424, 436.) In *Waters*, the psychiatrist defendant engaged in conduct that violated both professional standards and criminal statutes. Yet MICRA applied to the plaintiff's professional negligence claim because it was "clear that the psychiatrist's conduct arose out of the course of the psychiatric treatment he was licensed to provide." (*Ibid*.) The proviso of Section 3333.2 and others like it are "simply intended to render MICRA inapplicable when a provider operates in a capacity for which he is not licensed—for example, when a psychologist performs heart surgery." (*Ibid*.)

A physician assistant providing dentistry treatment, like the hypothetical psychologist performing heart surgery, would be providing medical services that were not covered by the training that supported her licensure. She would be rendering treatment that was not "within the scope of services for which [she] is licensed," triggering the first clause of the proviso and rendering Section 3333.2 inapplicable.

The physician assistants here, in contrast, provided dermatology treatment physician assistants are qualified to provide by virtue of the training they receive in accredited physician assistant programs. Plaintiff does not contend otherwise. Consequently, the proviso's first clause is not triggered and Section 3333.2 applies to Plaintiff's action.

F. Violation of generally applicable supervisory requirements is not a violation of a "restriction imposed by the licensing agency," so does not trigger the second clause of the proviso.

1. The relevant restrictions are disciplinary restrictions previously imposed on an individual physician assistant's license.

Under the second clause of Section 3333.2's proviso, a case falls out of MICRA's ambit if the health care provider's provision of services violated "any restriction imposed by the licensing agency or licensed hospital." (Section 3333.2, subd. (c)(2).) PAPA gives several examples of such restrictions: The Physician Assistant Board may impose "[r]estrictions against engaging in certain types of medical services."

(Bus. & Prof. Code § 3519.5.) It may restrict a physician assistant from prescribing controlled substances. (*Ibid*.) And, where a physician assistant is accused of engaging in unprofessional conduct—including violation of PAPA's supervisory regulations at issue here—the Board may, after a hearing, issue probationary conditions on the physician assistant's license. (Bus. & Prof. Code § 3527, subd. (a).)

If the Board imposed probationary conditions restricting the medical services the physician assistant could provide and the physician assistant subsequently treated a patient in a way that violated those restrictions, his "rendering of professional services" would be "within [a] restriction imposed by [his] licensing agency." (Section 3333.2, subd. (c)(2).) In such a case, the second clause of Section 3333.2's proviso would be triggered and MICRA's damages cap would not be applicable. This is not such a case.

2. The generally applicable supervisory requirements are not the type of restrictions referred to in the second clause of the proviso.

PAPA and its accompanying regulations establish supervisory and other requirements with which physician assistants and their supervising physicians must comply. (See, e.g., Bus. & Prof. Code § 3502 [establishing parameters of supervisory requirements]; *id* § 3502.3 [providing guidelines for Delegation of Services Agreements]; *id*. § 3502.1 [providing guidelines regarding administration of

medication].) If physician assistants and their supervising physicians do not abide by these requirements of PAPA and its accompanying regulations, they may be subject to disciplinary proceedings, citations, fines, or even criminal liability. (See, e.g., §§ 3516, 3532; 16 C.C.R. § 1399.523; 16 C.C.R. § 1399.571.) But such repercussions are entirely separate from the question of whether the services provided are "within any restriction imposed by the licensing agency." (Section 3333.2, subd. (c)(2).) They are therefore irrelevant to the determination of whether the MICRA damages cap applies under the plain language of the statute.

Plaintiff is wrong to contend that because violations of supervisory requirements may constitute criminal conduct, "their conduct was tantamount to the unlawful practice of medicine without a license" and Section 3333.2's damages cap does not apply. (AOB at p. 25.) As this Court explained in *Waters*, the fact that a health care provider's misconduct may be a basis for disciplinary action by the state's licensing agency does not mean that his conduct violated a "restriction" imposed by that agency, rendering the damages cap inapplicable. (*Waters*, *supra*, 40 Cal.3d at p. 436.) As the Court explained, this "clearly misconceives the purpose and scope of the proviso[,] which obviously was not intended to exclude an action from . . . MICRA . . . simply because a health care provider acts

contrary to professional standards or engages in one of the many specified instances of 'unprofessional conduct.'" (*Ibid*.) While the psychiatrist defendant's conduct in *Waters* exposed him to disciplinary action, and even criminal prosecution, the *Waters* Court concluded that his violation of the applicable professional and other standards did not take his conduct outside MICRA's definition of professional negligence. MICRA therefore applied to the plaintiff's negligence claim. (*Ibid*.)

The same is true here. While violations of PAPA's supervisory requirements might subject Defendants here to disciplinary actions, that inquiry is distinct from the question of whether the services provided fell within a "restriction imposed by the licensing agency." (Section 3333.2, subd. (c)(2).) Had the physician assistants here been disciplined by the Board and seen their licenses restricted, then subsequently treated Olivia Sarinana in violation of those specific restrictions on their individual licenses, the second clause of the proviso would be triggered and the damages cap would not apply. But violation of the general supervisory restrictions applicable to all licensed physician assistants does not trigger the proviso, as *Waters* demonstrates.

A contrary interpretation of the proviso would create an exception to the application of the damages cap that could not be squared with this Court's precedents or with the Legislature's well-established public policy goals in enacting Section 3333.2. A

medical malpractice plaintiff could avoid MICRA's damages cap merely by peeling off one regulated member of the health care team, identifying some violation of the regulations governing that team member's provision of medical services, and stripping the protections of MICRA from that individual—exposing that individual, and potentially his supervising physician under a theory of vicarious liability, to unlimited noneconomic damages.

Allowing medical malpractice plaintiffs to avoid MICRA in this way would once again subject "health care providers to unlimited liability for noneconomic damages." (*Western Steamship*, *supra*, 8 Cal.4th at p. 114.) Adopting Plaintiff's construction of the statute would create a broad exception to operation of the damages cap, in direct contravention of the Legislature's public policy goals underlying its passage of MICRA. Creation of such an exception could not be harmonized with this Court's precedents or the public policy goals underlying the Legislature's passage of MICRA. (See, e.g., *Preferred Risk*, 21 Cal.4th at p. 215.)

G. Had the Legislature intended to exempt such a broad swath of cases from MICRA, it would have done so in clear terms.

The Court should not underestimate the impact of creating the exemption Plaintiff seeks here. The noneconomic damages cap does not apply if the services provided fall under "*any* restriction imposed by the

licensing agency or hospital." (Section 3333.2(c)(2) [emphasis added].) If violations of the supervisory regulations trigger the proviso, any failure to adhere to the detailed requirements of PAPA or its accompanying regulations could result in a holding that MICRA does not apply. Such an exemption would expose physician assistants and, through vicarious liability, their supervising physicians, to unlimited liability for noneconomic damages in personal injury and wrongful death cases across the board—an outcome at odds with the central policy underlying the legislative program. And the obvious next step would be to do the same in cases involving registered nurses and other health care providers subject to agency-imposed regulations who otherwise get the benefit of MICRA.

Had the Legislature intended to enact so broad an exception to the applicability of Section 3333.2, it could easily have done so. The Court should reject Plaintiff's contorted argument that the Legislature did so instead by obliquely referring to "the scope of services for which the provider is licensed" or "restrictions imposed by the licensing agency." (Section 3333.2(c)(2).)

III. Conclusion

MICRA applies to cases, like Plaintiff's, that flow from the provision of medical professional services. A health care practitioner's violation of regulations such as the supervisory requirements governing

physician assistants does not change the fundamental nature of the services the physician assistant is licensed to provide, so does not take them outside the "scope of services" covered by the license. Nor does it constitute a violation of the type of previously imposed, individualized restriction on a health care practitioner's license that would take the services provided outside those covered by that license. The violation of PAPA's supervisory requirements at issue here therefore does not render MICRA inapplicable.

Plaintiff's construction of Section 3333.2 is contrary to this Court's precedents and inconsistent with the Legislature's intent in enacting MICRA. This Court has repeatedly rejected attempts, like Plaintiff's here, to limit the scope of Section 3333.2 and MICRA's other key provisions. Adopting Plaintiff's interpretation would contravene the Court's admonition that the courts liberally construe MICRA, of which Section 3333.2 is an integral part. And it would undermine the important public policy underlying the statutory framework, which the Legislature clearly articulated and which the Court has consistently upheld.

For these reasons, *Amici* urge this Court to reject Plaintiff's construction of Section 3333.2 and affirm the ruling reducing the award of noneconomic damages to $250,000.

Respectfully submitted,

Dated: February 25, 2021 TUCKER ELLIS LLP

By: */s/ Traci L. Shafroth*
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Certificate of Compliance

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,037 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,

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Proof of Service

I, the undersigned, declare that I am over the age of eighteen years and not a party to the within cause. I am employed in the County of Los Angeles, State of California. My business address is 515 South Flower Street, 42nd Floor, Los Angeles, CA 90071.

On February 25, 2021, I served true copies of the foregoing document described as:

Application for Leave to File Brief of *Amici Curiae*; Brief of *Amici Curiae* California Medical Association, California Dental Association, California Hospital Association, California Academy of PAs, and the American Medical Association in Support of Defendants and Respondents Glenn Ledesma, M.D., Suzanne Freesemann, P.A., and Brian Hughes, P.A.

on the interested parties in this actions as follows:

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

Executed on February 25, 2021, at Los Angeles, California.

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