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April 23, 2020

Governor Gavin Newsom
State of California
State Capitol
Sacramento, California 95814

Re: Opposing Health Care Providers' Request for Complete Immunity from Responsibility for Negligent Health Care

Dear Governor Newsom:

We write to oppose the broad request by health care providers for immunity from any responsibility for negligent health care. We of course recognize the challenges posed by the COVID-19 outbreak, and appreciate your strong actions to keep Californians safe. As we explain below, the providers' request is inconsistent with your commitment to safety. Granting immunity for negligent health care would endanger rather than protect the most at-risk Californians.

We have reviewed the immunity request – a letter dated April 9, 2020, addressed to you from six health care trade associations. The providers' letter bases its request on the premise that providers will be forced to “allocate scarce medical resources among too many patients who need them.” To respond to this situation, the providers ask for an executive order that all health care providers (including health plans) “be immune from any administrative sanction or criminal or civil liability or claim for any injury, death, or loss alleged to have resulted from any act, omission, or decision made related to providing or arranging services,” absent a finding of “clear and convincing evidence of

willful misconduct." In addition, the providers request waiver of "[a]ll state statutes and regulations ... to the extent necessary to achieve this immunity."

The extent of the requested immunity is staggering: complete immunity for all negligence, **whether or not related to a shortage of equipment and, in fact, whether or not related to COVID-19**. There is no legitimate public policy reason to completely release health care providers from responsibility for their own negligent or reckless actions or behavior.

Under the providers' request, a provider would be immune from responsibility in (for example) all the following situations:

- Dehydration and development of pressure sores suffered by an elderly resident of a nursing facility or residential care facility for the elderly.
- Surgical negligence resulting in death.
- Refusal of a health plan to authorize care, leading to infection, gangrene, and amputation.
- Forcing a person to use pain medication against their wishes or accept other treatment they expressly do not want.

We note that you have announced plans to resume health care that has been delayed due to the COVID-19 outbreak. The return to the health care system of "routine" services emphasizes the importance of retaining longstanding quality of care standards.

Furthermore, a grant of immunity is unnecessary even for health care impacted by COVID-19. As you know, the law of negligence already requires that circumstances be taken into account. The providers' letter lists nine situations that supposedly justify immunity but, in general, standard negligence rules are well-equipped to determine liability (or the absence thereof) in each of those situations. State law already provides broad immunity to medical providers in states of emergency.ⁱ

Consider perhaps the most high-profile situation where COVID-19 has intersected with the health care system: the many cases of nursing facility residents who have contracted COVID-19. Under the providers' request, a facility would be completely immune from liability, even if the facility's infection control procedures were clearly deficient and essentially oblivious to the dangers presented by COVID-19. Many California nursing facilities have a long history of providing poor care – they should not be given absolute immunity at precisely the time at which high-quality care is more crucial than ever.

Also, it would be both improper and unworkable even if the grant of immunity were limited only to care related to COVID-19. In many cases, health care providers can only guess whether a patient has contracted COVID-19 due to the scarcity and unreliability of tests. And even if a test were conclusive, the presence of COVID-19 would not eliminate the need to provide health care for a pre-existing condition. Similarly, care for COVID-19 would be inextricably combined with care for other conditions. As an example, consider a nursing facility resident who has tested positive for COVID-19. If the facility fails to provide her with adequate assistance in eating, her dehydration and deterioration should not be excused by her COVID diagnosis.

We appreciate your commitment to protect all Californians, and note the particular vulnerability of communities of color and low-income communities including older adults, persons with disabilities, Limited English proficient (LEP), and LGBTQ+ individuals. Whenever access to health care is scarce these communities suffer the most. Disparities are already evident when examining treatment and the impacts of the virus among vulnerable populations and communities of color. In recent weeks, statistics across the country and in California have shown that people of color have a disproportionate share of the fatalities.ⁱⁱ The existing health and economic disparities are generally credited as the causes of this problem. However, bias also exists in the health care system, resulting in black and brown people being turned away from care more often or not being believed when explaining symptoms. Also, COVID-19 strikes older adults and people with disabilities with notable force, resulting in intensive care and sometimes death. The broad immunity requested would make it impossible to prove underlying motivation and discrimination in health care treatment decisions, which would exacerbate these existing disparities. All these Californians deserve competent health care, as much now as in any other time.

Finally, Californians should be able to trust that their health care providers will abide by the law. Any broad granting of immunity will sow distrust, particularly among communities that have experienced discrimination in the health care system in the past. Given the emergency we are in, Californians need to feel that we are all in this together and not that certain industries no longer have to follow the rules.

For all these reasons, we respectfully request that you do not issue any grants of immunity for health care providers. Legal standards already are designed to account for the surrounding circumstances, and any application of immunity would improperly value providers over patients. If you have any questions, please contact Kevin Prindiville at kprindiville@justiceinaging.org or Michael Herald at mherald@wclp.org.

Sincerely,

ACLU of California
Bet Tzedek Legal Services
California Advocates for Nursing Home Reform
California Pan-Ethnic Health Network
Central California Legal Services
Disability Rights California
Disability Rights Education & Defense Fund
Greater Bakersfield Legal Assistance
Health Consumer Alliance
Justice in Aging
Latino Coalition for a Healthy California
Legal Aid Society of San Diego County
Legal Services of Northern California
Maternal and Child Health Access
National Health Law Program
Neighborhood Legal Services of Los Angeles County
Western Center on Law & Poverty

i California Government Code § 8659

ii See, Centers for Disease Control, "Cases of Coronavirus Disease (COVID-19) in the U.S.," available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html#anchor_1587083500; California Department of Public Health, "Cases and Deaths associated with COVID-19 by Race and Ethnicity," available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Race-Ethnicity.aspx>; Kaiser Family Foundation, "Growing Data Underscore that Communities of Color are Being Harder Hit by COVID-19," available at <https://www.kff.org/coronavirus-policy-watch/growing-data-underscore-communities-color-harder-hit-covid-19/>;