November 18, 2014

The Honorable Chief Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Hughes v. Pham***, Cal.App.4th Dist., Aug. 22, 2014
Petition for Review Filed on Oct. 1, 2014

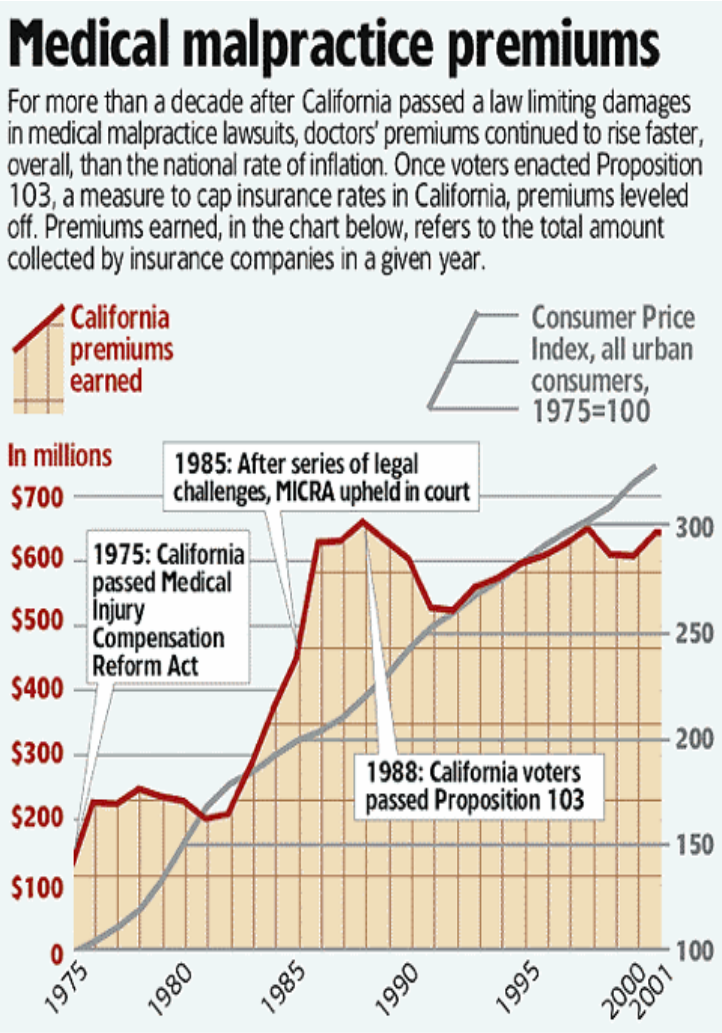
Dear Chief Justice and Associate Justices:

Consumer Watchdog respectfully urges this Court, pursuant to Rule 8.500(g), to grant the Petition for Review filed by Plaintiffs and Appellants Trent and Lisa Hughes in *Hughes v. Pham,* Cal.App.4th Dist., Aug. 22, 2014 ("*Hughes*").

Review in this case is vitally necessary because the opinion of the appellate court will leave millions of Californians and their families who have suffered from medical negligence without fair compensation despite a jury's verdict above an outdated cap on damages.

Thirty-nine years ago, California lawmakers determined that the price of pain and suffering of Californians harmed as a result of medical malpractice should be limited to $250,000. While that limit has not changed in nearly four decades, much else has, including the enactment of California laws regulating excessive medical malpractice rates, the ostensible justification of the 1975 limitation on victims' rights.

During these last four decades under MICRA, the lives of too many California families have been devastated by medical negligence and then worsened still by the outdated, one-size-fits-all cap on damages under MICRA. Sadly, this devastation never brought on the premium mitigation for doctors and hospitals that MICRA and its advocates implicitly deemed a more worthy use of money than compensation to victims. Instead, premiums continued to rise for over a decade in the wake of MICRA.[1]



It wasn't until voters took matters into their hands by adopting Proposition 103 and its strict regulation of insurance rates in 1988 that Californians began to see relief from excessive premiums.[2] Since the adoption of Proposition 103, data show that malpractice insurance rates have dropped in California more significantly than the national average over the last two decades, while insurers have continued to be profitable. Challenges by Consumer Watchdog

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[1] Rapaport, *Federal bill sets off alarm*, Sacramento Bee (Mar. 11, 2003) p. D8.
[2] *Ibid*.

and others to medical malpractice insurance rate applications have continued to ensure that doctors are not subject to excessive rates. In 2012, in fact, the Insurance Commissioner ordered several medical malpractice insurers to lower their then-current rates.[3] Thus, any purported "crisis" in the form of skyrocketing medical malpractice insurance costs cannot provide a rational basis for MICRA.

As discussed below, the human impact of MICRA, combined with the facts that Proposition 103 and not damage caps have prohibited excessive insurance rates, point to a conclusion that section 3333.2 should be reexamined by this Court.

The Interest of Consumer Watchdog and Board Member Kathy Olsen

Consumer Watchdog is a nonprofit, nonpartisan consumer advocacy organization specializing in the application of California consumer protection laws, health care reform, and enforcement of California insurance regulations, including Proposition 103 enacted by voters in 1988. Founded in 1985, Consumer Watchdog advocates for the rights of consumers and holds corporations accountable in the Legislature and the courts. Consumer Watchdog, its Board Members, and the public on whose behalf Consumer Watchdog advocates, are vitally interested in the question of whether California's MICRA law is unconstitutional.

Consumer Watchdog has worked on issues related to medical malpractice and medical malpractice insurance for nearly two decades. In 1994, Consumer Watchdog's founder Harvey Rosenfield, authored the book *Silent Violence, Silent Death: The Hidden Epidemic of Medical Malpractice*. The organization has studied and reported on the impact of both damage caps and rate regulation on medical malpractice insurance premiums and has intervened before the California Department of Insurance to oppose unnecessary rate increases by malpractice insurers. Consumer Watchdog has also educated the public about medical malpractice tragedies and how California's MICRA law has denied injured patients and their families access to the courts and removed the legal deterrent to negligent medical care.

Consumer Watchdog Board Member, Kathy Olsen is the mother of twenty-four year-old San Diego resident Steven Olsen who is blind and brain damaged because, as a jury ruled, he was a victim of medical negligence when he was two years old. He fell on a stick in the woods while hiking. Under the family's managed care plan, the hospital pumped Steven up with steroids and sent him away with a growing brain abscess, although his parents had asked for a CAT scan because they knew Steven was not well. The next day, Steven Olsen came back to the hospital comatose. At trial, medical experts testified that had he received the $800 CAT scan, which would have detected a growing brain mass, he would have his sight and be perfectly healthy today.

The jury awarded $7.1 million in "non-economic" damages for Steven's avoidable life of darkness and suffering. However, the jury was not told of the then two-decade-old

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[3] "Insurance Commissioner Dave Jones Announces Medical Malpractice Rates Lowered For Three Companies," March 8, 2012, http://www.insurance.ca.gov/0400-news/0100-press-releases/2012/release023-12.cfm

restriction on non-economic damages under MICRA. The judge was forced to reduce the amount to $250,000. The jurors only found out that their verdict had been reduced by reading about it in the newspaper.

The family received economic damages of $1.9 million to care for Steven for the rest of his life. They reached a separate out-of-court settlement with their managed care company for $2 million. However, legal fees and costs, which cannot be recovered as part of the "economic" losses, cost them $914,000.

In 2001 alone, Steven had 74 doctor visits, 164 physical and speech therapy appointments, and three trips to the emergency room. And his parents say that was a good year because Steven was not hospitalized. Steven's mother Kathy had to leave her job because caring for Steven is a full time job. She has to struggle constantly with the school district for Steven to receive special education classes. One day, Steven ate part of a light bulb, not an uncommon problem for children with brain injuries. He has to be watched constantly.

Kathy Olsen's and her family's interest in this suit is best summed up in her own words: "It has been 19 years since Steven came home from a 5-month life changing stay at the hospital. He was only 2 years old. He was a casualty of the system. The system that he had no say in. Now with all his disabilities he will never see, do things that the average person gets to do in their lifetime, or vote in an election. Please look out for all the Steven Olsens in this great country. Don't let this happen over and over again."

I. Whether California's MICRA law is Constitutional is a Question of Enormous Importance to Malpractice Victims, Their Families, and California Taxpayers.

MICRA was last examined by this Court for its constitutionality in 1985 – nearly three decades ago. (See *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 13.) In *Fein*, the Court recognized that the 1975 damage cap "discriminates between medical malpractice victims and other tort victims, imposing its limits only in medical malpractice cases, and . . . improperly discriminates within the class of medical malpractice victims, denying a 'complete' recovery of damages only to those malpractice plaintiffs with noneconomic damages exceeding $250,000." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 161, 162.) Nevertheless, the Court upheld the cap as constitutional, citing the perceived "crisis" in medical malpractice insurance and healthcare as the rational basis for limiting the compensation for a lifetime of pain and suffering at the hands of negligent medical providers to $250,000.

A. Insurance Companies Did Not Fulfill MICRA's Promise of Lower Medical Malpractice Insurance Rates.[4]

[4] This discussion is excerpted from The Foundation for Taxpayer and Consumer Rights, *How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California And How Malpractice Caps Failed*, Mar. 7, 2003.

Despite MICRA's promise of lower malpractice insurance rates, premiums continued to rise in the years following its enactment. By 1988, twelve years after the passage of MICRA, California medical malpractice premiums had reached an all-time high – 450% higher than 1975, when MICRA was enacted.

During the mid 1980s, California malpractice insurance premiums increased by more than 20% annually. Insurance companies argue that premiums continued to increase after MICRA's passage because of court challenges to the law. Despite this Court's ruling upholding MICRA in 1985, however, malpractice premiums in California increased more dramatically in 1986 than any year since the passage of MICRA. Between 1985, when the cap was upheld, and 1988, malpractice premiums soared 47%.

PREMIUM INCREASES 1983-1988

Year	California Premiums Earned	Percentage Change
1983	$287,256,000	36.37%
1984	$374,661,000	30.43%
1985	$449,727,000	20.04%
1986	$629,448,000	39.96%
1987	$633,903,000	0.71%
1988	$663,155,000	4.61%
SOURCE: National Association of Insurance Commissioners' Reports on Profitability By Line By State, 1976-2001		

While insurers continued to claim that such rate hikes were necessary, the data showed otherwise. In one lawsuit against Travelers Insurance Company, for example, the company agreed to refund $18.6 million in premium overcharges in 1981 "when it became clear that the insurer was collecting millions more in premiums than it needed to cover the cost of claims."[5]

B. Proposition 103, Not MICRA, Has Provided Rate Relief.[6]

To reign in excessive rates and stop arbitrary rating practices, the voters passed Proposition 103 in 1988. Unlike MICRA, Proposition 103 explicitly required a rate rollback of up to 20%. The relevant portion of California Insurance Code Section 1861.01 provides:

> For any coverage for a policy . . . of insurance subject to this chapter . . . every insurer shall reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987.

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[5] Diamond and Nelson, *Doctors Will Get Refunds on Insurance*, Los Angeles Times (Feb. 6, 1981) p. 1.

[6] See note 4, *supra*.

Medical malpractice rates in California began to fall immediately after the passage of Proposition 103, and, within three years of the passage of insurance reform, total medical malpractice premiums had dropped by 20.2% from the 1988 high.

Premiums Decline After Proposition 103

Year	CA MedMal Premiums (total)	% change	Cumulative % Change
1988	$663,155,000	--	--
1989	$633,424,000	-4.5%	-4.5%
1990	$605,762,000	-4.4%	-8.7%
1991	$529,056,000	-12.7%	**-20.2%**[7]
SOURCE: National Association of Insurance Commissioners' Reports on Profitability By Line By State, 1976-2001			

Medical malpractice insurers were among the first insurance companies in California to comply with Proposition 103's mandatory rate rollback. Three of the state's largest malpractice insurers – Norcal Mutual, SCPIE and The Doctors Company – refunded $69.1 million to doctors by 1992. By 1995, insurers providing medical malpractice coverage issued more than $135 million in refunds to policyholders.

Proposition 103 Mandated Refunds Paid by Major Medical Malpractice Insurers

Malpractice Insurer	**Total Refund****	**Date Paid**
Norcal Mutual Insurance Co.	$19,875,172	10/6/91
SCPIE	$30,730,384	10/15/91
Doctors Insurance Co.	$18,519,217	2/20/92
Medical Insurance Exchange of CA Group	$4,725,452	10/8/93
Total Paid by Major Malpractice Insurers	**$73,850,225**	
Source: California Department of Insurance **Refund amount includes interest.		

Upon payment of the rate rollback refunds, insurers were then subject to Proposition 103's "prior approval" regulatory system, which requires medical malpractice insurers to justify rate increases or decreases to the Department of Insurance, and the commissioner may, at any time, invalidate an insurers' rate if it is too high *or too low*. (Ins. Code § 1861.05(a).)

The data also show that Proposition 103's "prior approval" system, has stabilized medical malpractice insurance rates. The price chaos of the 1970s and 1980s was replaced with

[7] After adjusting for inflation, the premium drop is actually 30.7%.

a steady reduction of rates and then continued price stability for California doctors in the 1990s and beyond.[8]

[8] The only two years after the adoption of Proposition 103 where rate increases rose above 7% in California (2002, 2003) were in the wake of the resignation of Commissioner Chuck Quackenbush in 2000, when the CDI was restructuring its organization. Those increases settled down when Commissioner Garamendi was elected and the CDI began holding hearings into medical malpractice increases pursuant to challenges brought by Consumer Watchdog. During those years of larger increases in California, premiums increased in others states by an average 26.99% in 2002 and 19.13% in 2003.

Annual Change in California Medical Malpractice Premiums

MICRA years	Premium Chaos	**Proposition 103**	Price Stability
1975-1976	89.35%	1988-1989	- 4.48%
1976-1977	-0.60%	1989-1990	- 4.37%
1977-1978	+9.53%	1990-1991	- 12.66%
1978-1979	-3.94%	1991-1992	- 0.48%
1979-1980	-3.64%	1992-1993	+6.93%
1980-1981	-11.47%	1993-1994	+2.45%
1981-1982	+3.35%	1994-1995	+3.62%
1982-1983	+36.37%	1995-1996	+2.07%
1983-1984	+30.43%	1996-1997	+3.09%
1984-1985	+20.04%	1997-1998	+3.78%
1985-1986	+39.96%	1998-1999	- 6.25%
1986-1987	+0.71%	1999-2000	- 0.34%
1987-1988	+4.61%	2000-2001	+6.15%
		2001-2002	+21.63%
		2002-2003	+11.00%
		2003-2004	+6.86%
		2004-2005	+3.14%
		2005-2006	-1.46%
		2006-2007	-3.71%
		2007-2008	-3.19%
		2008-2009	-6.83%
		2009-2010	-0.01%
		2010-2011	-0.004%
		2011-2012	-0.04%
		2012-2013	-0.06%
SOURCE: National Association of Insurance Commissioners' Reports on Profitability By Line By State, 1976-2009			

A major medical malpractice insurer has acknowledged that the noneconomic damage caps and other restrictions in MICRA failed to reduce medical malpractice premiums. The acknowledgement came in the written testimony of SCPIE Indemnity Company's Assistant Vice President and Associate Actuary James Robertson, as part of a California Department of Insurance hearing in which SCPIE attempted to justify a 15.6% rate hike request. The rate increase was challenged by Consumer Watchdog in 2003 as excessive under the rules of California Proposition 103, and the Commissioner ultimately ordered a more modest 9.9% increase, saving policyholders $23 million.

In his testimony, Mr. Robertson stated: "While MICRA was the legislature's attempt at remedying the medical malpractice crisis in California in 1975, it did not substantially reduce the relative risk of medical malpractice insurance in California."[9]

C. Consumers and the Insurance Commissioner Continue to Enforce Proposition 103's Mandate That Medical Malpractice Insurance Rates Not be Excessive.

From 2003-2012, in every instance that Consumer Watchdog has used Proposition 103 to challenge medical malpractice insurers' attempts to hike rates, it has been successful in obtaining the Commissioner's approval of a rate lower than that sought by insurers, saving doctors over $77 million during the decade.[10] In 2012, California Insurance Commissioner Dave Jones ordered several of the top medical malpractice insurers to lower their overall rates. In a October 1, 2012 California Department of Insurance press release, Commissioner Jones stated:

> "I'm pleased the medical malpractice rates are continuing to be decreased under the Department's rate review process and authority. These medical malpractice rate reductions show the important role that Proposition 103, which authorizes the insurance Commissioner to reject excessive rate hikes for property and casualty insurance, including medical malpractice insurance, has played in curbing medical malpractice rates since it was passed in 1988."[11]

Based on the foregoing, it is clear that any "perceived threat" of out of control medical malpractice insurance costs can no longer justify MICRA's denial of just compensation to medical malpractice victims.

II. This Court Should Act to Protect Individuals' Constitutional Rights as it Has Protected Insurers' Rights to Fair Rates.

The California Supreme Court has defended insurance companies' right to fair and reasonable rates in its review of the constitutionality of voter-enacted Proposition 103. (See *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805.) Specifically, in *Calfarm*, the Court held that the provision of Proposition 103 that allowed relief from the rate rollback requirement

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[9] Supplemental Direct Testimony of James Robertson, *In the Matter of the Rate Applications of American Healthcare Indemnity Co. and SCPIE Indemnity Co.*, April 30, 2003, p. 4 (available at http://www.consumerwatchdog.org/focusarea/medical-malpractice). The statement directly responded to a question posed by California Department of Insurance Administrative Law Judge Marjorie Rasmussen, who presided over the rate hike case. She asked SCPIE to address "any impact the statutory provisions of the Medical Injury Compensation Reform Act of 1975 (MICRA) have on the magnitude of risk covered by medical malpractice insurance in California."

[10] See http://www.consumerwatchdog.org/images/inssavings.gif

[11] "Insurance Commissioner Dave Jones Announces Second Medical Malpractice Rate Reduction For NORCAL Mutual", October 1, 2012: http://www.insurance.ca.gov/0400-news/0100-press-releases/2012/release134-12.cfm

during the first year after the initiative's enactment if the insurer was "substantially threatened with insolvency" (section 1861.01(b)) was unconstitutional under the due process clauses of the state and federal Constitutions because it "preclude[d] adjustments necessary to achieve the constitutional standard of fair and reasonable rates." (*Id.* at 821.)[12]

Just as this Court acted to protect insurers' constitutional rights, it should grant review in this case to review the constitutionality of MICRA against the backdrop of malpractice victims' constitutional rights in light of the absence today of any purported malpractice insurance rate crisis that may have existed in 1975.

Indeed, since MICRA was last reviewed for constitutionality, several other states have found similar damage caps unconstitutional on the grounds presented by the *Hughes* petition. (See, e.g., *Lebron v. Gottleib Memorial* Hospital (Illinois Supreme Court February 4, 2010) 237 Ill.2d 217, 930 N.E.2d 895; *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt* (Georgia Supreme Court, March 22, 2010) 286 Ga. 731, 691 .E.2d 218; *Klotz v. St. Anthony's Medical Center v. Shapiro* (Missouri Supreme Court, March 23, 2010) 311 S.W.3d 752; *Estate of McCall v. United States* (Florida Supreme Court, March 13, 2014) 642 F.3d 944.)

Based on the foregoing, we strongly urge the Court to grant the petition for review in this matter. Review is urgently needed to address this issue of great importance to California citizens who are the victims of medical malpractice, their families, and the taxpaying public as a whole.

Sincerely,

Pamela Pressley
For amicus curiae CONSUMER WATCHDOG

cc: see attached Proof of Service

[12] This provision was held to be severable from the remaining portions of the initiative that were upheld as constitutional, including the rate rollback provision in Insurance Code section 1861.01(a) and the general standard for approval of rates that are neither excessive nor inadequate contained in section 1861.05(a).