TUCKER ELLIS & WEST LLP
ATTORNEYS AT LAW

515 South Flower Street Forty-Second Floor Los Angeles, California 90071-2223
phone 213.430.3400 facsimile 213.430.3409 tuckerellis.com

CLEVELAND COLUMBUS DENVER LOS ANGELES SAN FRANCISCO

Direct Dial: 213.430.3417
Email: rebecca.lefler@tuckerellis.com

November 3, 2011

VIA OVERNIGHT DELIVERY

The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Fourth Floor
San Francisco, CA 94102-4797

Re: *Holly Stinnett vs. Tony Tam, M.D., et al.*
Court of Appeal Case No. F057784; Supreme Court Case No. S197135

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amici Curiae California Medical Association (CMA), California Hospital Association (CHA), California Dental Association (CDA), and American Medical Association (AMA) urge the Court to deny plaintiff/petitioner Holly Stinnett's petition for review.

Petitioner seeks to challenge Civil Code section 3333.2 ("Section 3333.2"), part of the Medical Injury Compensation Reform Act of 1975 (MICRA), on the grounds that the rational basis for MICRA has been eviscerated. Petitioner also seeks to have this Court impose a rule that trial courts should be compelled to admit evidence to support any constitutional challenge to any statute.

Review should be denied. California Rules of Court, rule 8.500, subdivision (b) states that review is proper when necessary to secure uniformity of decision or settle an important issue of law, among other grounds. None of those grounds exist in this case. The Fifth Appellate District's opinion thoroughly and accurately sets forth established California law relating to MICRA generally and Section 3333.2 specifically. This Court has offered ample guidance regarding MICRA and Section 3333.2, and there is no conflict among the lower courts on this issue. Review of this decision, therefore, is not warranted.

I. Interest of Amici Curiae

CMA is a nonprofit, incorporated, professional association of more than 33,000 physicians practicing in California, in all specialties. CDA represents almost 24,000 California dentists, over 70 percent of the dentists practicing in this state. CMA's and CDA's membership

includes most of the physicians and dentists engaged in the private practice of medicine and dentistry in California. CHA is the statewide leader representing the interests of nearly 450 hospitals and health systems in California. CMA, CDA, and CHA are active in California's courts in cases involving issues of concern to the healthcare community.

The 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 science and art of medicine and the betterment of public health.

The AMA joins this letter 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.

Some funding for this letter was provided by organizations and entities that share amici's interests, including physician-owned and other medical and dental professional liability organizations and non-profit and governmental entities engaging physicians for the provision of medical services, specifically: Cooperative of American Physicians, Inc.; Kaiser Foundation Health Plan, Inc.; MedAmerica Mutual; Medical Insurance Exchange of California; The Dentists Insurance Company; The Doctors Company; and The Regents of the University of California.

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

II. Petitioner's request for a judicial repeal of MICRA does not warrant review, as determining the wisdom and ongoing effectiveness of a statutory scheme is a legislative function.

Petitioner seeks review of Section 3333.2 in an effort to challenge the ongoing effectiveness of MICRA and have it deemed unconstitutional. Review on these grounds is unwarranted under Rule of Court 8.500; this Court should not take on the legislative function of assessing the success of the various provisions of MICRA, and it should not impose a policy that lower courts should entertain evidence for that purpose.

Petitioner's argument represents an approach to the judicial review of legislation that has been widely rejected: "Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." (*Minnesota v. Clover Leaf Creamery Co.*

(1981) 449 U.S. 456, 464; see also *F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315 ("[A] legislative choice is not subject to courtroom fact-finding"); see also *Heller v. Doe* (1993) 509 U.S. 312, 319 ("[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices") (citation omitted); *Ferguson v. Skrupa* (1963) 372 U.S. 726, 730 ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies").) And as the Court of Appeal stated below,

> The fact that Stinnett might prefer a different statute, indexed for inflation, does not render unconstitutional the statute the Legislature enacted. "We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to remain a democratic system. The forum for correction of ill-considered legislation is a responsive legislature."

(Slip Op., 23, quoting *Werner v. Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121,130.)

Petitioner seeks review to have this Court determine whether Section 3333.2 has been successful in achieving its goals of reducing and stablizing malpractice insurance premiums. Petitioner also seeks a rule allowing trial courts to admit evidence so they can decide whether statutes are well-founded. (Pet., 4.) But such determinations are not the province of the judiciary. "[T]he constitutionality of a measure under the equal protection clause does not depend on a court's assessment of the empirical success or failure of the measure's provisions." (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 374.)

This Court has made clear that "[t]he judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation...." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52.) "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." (*Ferguson v. Skrupa* (1963) 372 U.S. 726, 729.) Examining the ongoing effectiveness of MICRA, as Petitioner asks the Court to do here, is a function best left to the Legislature.

Although there is no indication that Section 3333.2 should be adjusted or changed, there is no question that the Legislature could amend that section if a change were warranted. Indeed, several times the Legislature has considered—and rejected—an increase in the damages cap in Section 3333.2. (See A. Edwards, "Medical Malpractice Non-Economic Damages Caps," 43 Harv. J. on Legis 213, 224 (Winter 2006) (discussing the proposal in MICRA's original Assembly session to index the damages cap); AB 250 (1997) (considering raising the damages cap from $250,000 to $950,000 and creating exceptions to the cap); AB 1380 (1999) (a bill to adjust the MICRA cap annually keyed to the Consumer Price Index).)

Furthermore, the Legislature has repeatedly recognized ongoing threats to the healthcare industry, even in the years since MICRA and Proposition 103 were enacted. (See, e.g., Bus. & Prof. Code, § 2418, subd. (a)(1) ("The Legislature hereby finds and declares . . . The State of *California is facing a growing crisis in physician supply* due, in part, to difficulties in recruiting and retaining physicians") (enacted 2005, emphasis added); Bus. & Prof. Code, § 2425.1 ("Currently, *California is experiencing an access to health care crisis*. . . .") (enacted 2001, emphasis added).)

It is clear from these statutes that the Legislature is continuing to consider strains on the health care industry and addressing ongoing issues to access to care for all Californians. And such issues warrant ongoing legislative consideration. In the next year and a half, the California health care system will need to absorb about six million more Californians as the federal Patient Protection and Affordable Care Act is implemented. (See "How Can California Solve Family Physician Shortages?" California Healthline, July 11, 2011, available at <http://www.californiahealthline.org/think-tank/2011/how-can-california-solve-family-physician-shortage.aspx>.) Physician shortages also remain a problem; only one in four California counties have the recommended number of physicians per capita. (*Id.*) Similar access-to-care issues were a concern at the time MICRA was enacted. (See *American Bank supra*, 36 Cal.3d at p. 371, noting that as a result of the medical malpractice insurance crisis, "in parts of the state medical care was not fully available"; see also the governor's Proclamation to the Legislature in the special session in which MICRA was enacted, noting that the crisis "could seriously limit the health care provided to hundreds of thousands of our citizens," Stats.1975, May 16, 1975 (Second Ex.Sess. 1975–1976) p. 3947.) Implementing policies relating to access to care and physician shortages are complex, multi-faceted issues that are not amenable to courtroom fact finding by parties seeking to impact an individual damages award. These are policy issues best left to legislative insight and an understanding of the statewide impact such decisions will have on California health care.

For the same reason, Petitioner's argument that other cases allow this Court to second-guess the ongoing effectiveness of MICRA is unpersuasive. Petitioner cites *Brown v. Merlo* (1973) 8 Cal.3d 855 for the proposition the judiciary can strike down existing laws on the grounds that "changed circumstances may render a once-valid statute now invalid." (Pet., 15.) Petitioner claims that Proposition 103 and changed financial circumstances since 1975 have undermined the wisdom and fairness of Section 3333.2. (Pet., 5-6.) But as this Court has noted—and the Court of Appeal pointed out—"*Brown* [has] never been interpreted to mean that we may properly strike down a statute simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163; see also Slip Op., p. 14.) Furthermore, this Court in *Brown* did not hold that a previously-constitutional law had become unconstitutional based on changed circumstances. Thus *Brown* cannot support Petitioner's request that the judiciary should take on the legislative function of determining the continuing wisdom and effectiveness of Section 3333.2 or any other law.

The other cases Petitioner cites also do not support her "changed circumstances" argument. *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 and *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 do not involve changed circumstances at all, but rather the propriety of voter-enacted propositions. *Skalko v. City of Sunnyvale* (1939) 14 Cal.2d 213 did not involve a statutory scheme such as MICRA, enacted by the Legislature to address important public policy concerns relating to large classes of Californians. Rather, *Skalko* addressed use of a single parcel of real property that was improperly zoned. These cases cannot support the fact-intensive determination Petitioner seeks to judicially overturn a statutory scheme enacted by the Legislature to address critical issues affecting Californians' access to health care.

Assessing the wisdom or effectiveness of MICRA is not the province of the judiciary. This Court should not undertake review of this case to effect the legislative change Petitioner seeks.

III. There is no reason to reexamine the case law holding that Section 3333.2 has a rational basis, as decisions in this area are consistent and there is no unsettled question of law.

Review is warranted where "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (b)(1).) That standard is not met in this case. There is no question that MICRA is rationally related to legitimate state interests; this Court has made that determination many times. As the Court of Appeal noted, this Court has already decided the exact question Petitioner presents.

In *Fein v. Permanente Medical Group, supra,* 38 Cal.3d 137, the plaintiff challenged Section 3333.2 on due process and equal protection grounds. This Court stated, "[W]e have already said that the Legislature limited the application of section 3333.2 to medical malpractice cases because it was responding to an insurance 'crisis' in that particular area and that the statute is rationally related to the legislative purpose." (*Fein*, 38 Cal.3d at p. 162, citing *American Bank, supra*, 36 Cal.3d 359, 370-374; *Barme v. Wood* (1984) 37 Cal.3d 174, 181-182; *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 930-931.) This Court concluded, "It appears obvious that this section—by placing a ceiling of $250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." (*Fein*, 38 Cal.3d at p. 159.)

Nearly a decade later, twenty years after the enactment of MICRA, this Court again held that Section 3333.2 was "necessary" to further the legitimate public policies of MICRA: "After careful consideration of the public policy underlying the Medical Injury Compensation Reform Act (MICRA), of which section 3333.2 is an integral part, we conclude that such limitation is necessary to effectuate the statutory scheme. . . ." (*Western Steamship Lines, Inc. v. San Pedro*

Peninsula Hospital (1994) 8 Cal.4th 100, 104.) Thus, the rational basis for Section 3333.2 is well-established, and there is no reason to revisit that question.

Other MICRA provisions have also been upheld by this Court. In *American Bank*, 36 Cal.3d 359, MICRA's periodic payment provision, Code of Civil Procedure section 667.7, withstood a challenge similar to the one Petitioner asserts here. This Court rejected the argument that an increase in the costs of medical care following the enactment of MICRA showed that MICRA was ineffective and unconstitutional: "[T]here can be no question but that—*from the information before it*—the Legislature could rationally have decided that the enactment might serve its insurance cost objective." (*Id.* at p. 374, emphasis added.) This Court rejected due process and equal protection challenges to Civil Code section 3333.1, the collateral source section of MICRA, in *Barme v. Wood*, *supra*, 37 Cal.3d 174. In *Roa v. Lodi Medical Group*, *supra*, 37 Cal.3d 920, this Court denied due process and equal protection challenges to Business and Professions Code section 6146, which limits attorneys' fees in medical malpractice cases. And just last year, this Court upheld MICRA's arbitration provision, Code of Civil Procedure section 1295, in *Ruiz v. Podolsky* (2010) 50 Cal.4th 838.

As this Court has recognized, MICRA has been rationally related to legitimate state interests since it was enacted, and there is no reason to undermine the existing precedent for Section 3333.2 or MICRA generally. There is no need to secure uniformity of decision or settle an important question of law (Cal. Rules of Court, rule 8.500, subd. (b)(1)); the case law is already uniform and settled. Review should be denied.

IV. Even if existing case law were insufficient, any "changed circumstances" since MICRA was enacted do not warrant review in this case.

Petitioner asserts this Court should consider whether MICRA's rational basis has waned—whether changed circumstances have affected medical malpractice insurance and rendered MICRA unnecessary. This argument does not support review.

Although Petitioner argues that the crisis that drove MICRA is "over," this Court has rejected that shortsighted view, acknowledging that a "rise in insurance rates . . . is not a temporary problem; it is a chronic situation. . . ." (*Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d 805, 821.) This Court has also upheld MICRA provisions and recognized continued threats to MICRA's goals numerous times since Proposition 103 was passed in 1988. (See, e.g., *Western Steamship, supra,* 8 Cal.4th 100, 111-114; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577-578; *Ruiz v. Podolsky*, *supra*, 50 Cal.4th 838, 843-844.) In *Western Steamship*—decided eight years after Proposition 103 was enacted—this Court noted that MICRA "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. . . ." (*Western Steamship*, 8 Cal.4th at p. 112.) Despite this substantial body of case law upholding the many challenges to MICRA following Proposition 103, Petitioner now

seeks to overturn these cases and judicially repeal MICRA on the grounds that Proposition 103 has rendered MICRA unnecessary.

There is ample support for the conclusion that MICRA, not Proposition 103, is primarily responsible for the slow rate of growth in medical malpractice insurance rates compared to insurance rate increases in other industries and other states. (See Frech, et al., "Controlling Medical Malpractice Insurance Costs—Congressional Act or Voter Proposition?" (2006) 3 Ind. Health L.Rev. 33.) Furthermore, MICRA has resulted in "increases in insurance premiums of less than three percent per year, less than one-third the rate at which premiums have risen nationally." (Richard E. Anderson, M.D., "Effective Legal Reform and the Malpractice Insurance Crisis," (2005) 5 Yale J. Health Pol'y, L. & Ethics 341, 351 (footnotes omitted).) As the AMA has noted, "Medical liability premiums increased more than 1,029 percent throughout the country from 1976 to 2007—except in California." (American Medical Association, *The case for medical liability reform,* November 2009, <http://www.ama-assn.org/ama1/pub/upload/mm/-1/case-for-mlr.pdf>.) Even Petitioner herself admitted in her Appellant's Opening Brief in the Court of Appeal that raising or eliminating Section 3333.2's cap would increase costs to insurers. (Appellant's Opening Brief, pp. 49-50.) There is no reason to grant review and reexamine the well-established purposes and benefits of MICRA.

Moreover, even if Proposition 103 did overlap with Section 3333.2, as Petitioner suggests, it would not justify a finding that Section 3333.2 is unconstitutional. Statutes that touch upon a common subject "must be read together and so construed as to give effect, when possible, to all the provisions thereof." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779 (citing *Tripp v. Swoap* (1979) 17 Cal.3d 671, 679).) And to the extent these two laws conflict, Section 3333.2 should be given full effect and Proposition 103 should be subordinated. (See Code Civ. Proc., § 1859 ("[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.").) Petitioner would have this Court do the opposite and grant review to declare that MICRA and Proposition 103 cannot constitutionally exist together even though they have been coexisting peacefully for more than two decades, and hold further that MICRA is subordinated to Proposition 103. There is no basis for the conclusion Petitioner seeks.

This Court's precedent, the Legislature's rejection of reforms to Section 3333.2, and the evidence that MICRA is effective all support the denial of review.

V. Conclusion

Review of this case is not warranted. This Court has held repeatedly that MICRA generally and Section 3333.2 specifically are rationally related to legitimate state interests, and the issues presented in this case do not change that analysis. It is not the role of the judiciary—either in this Court or in trial courts—to engage in fact finding to determine the wisdom of the Legislature's actions. The success of MICRA shows that the legitimate state interests are well-

served by this statute. The Court of Appeal's decision is an accurate reflection of established California law on this subject, and there is no reason to disturb it. This case does not meet the standard for review in California Rules of Court, rule 8.500, subdivision (b), and the petition should be denied.

Sincerely,

TUCKER ELLIS & WEST LLP

Rebecca A. Lefler

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that I am a citizen of the United States and a resident of Los Angeles, California or employed in the County of, State of California. I am over the age of 18 and not a party to the within action. My business address is Tucker Ellis & West LLP, 515 South Flower Street, Forty-Second Floor, Los Angeles, California 90071-2223.

On November 3, 2011, I served the foregoing document entitled **LETTER TO SUPREME COURT OF CALIFORNIA IN SUPPORT OF REQUEST TO DENY PETITION FOR REVIEW** by placing an original enclosed in a sealed envelope(s), addressed as follows:

[SEE ATTACHED SERVICE LIST]

(X) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

( ) By Certified mail service return receipt requested, I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

( ) By Personal Service, I caused such envelope(s) to be delivered by hand to the individuals so indicated at the address listed.

( ) By overnight courier, I caused the above-referenced document(s) to be delivered to an overnight courier service for delivery to the above address(es) or on the attached service list.

( ) By fax transmission, I caused the above-referenced document(s) to be transmitted to the person(s) named above or on the attached service list at the facsimile numbers given thereat.

( ) By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed. 1 did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

( ) I declare that I am employed in the office of the Bar of this Court at whose direction the service was made.

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

Executed on November 3, 2011, at Los Angeles, California.

Estella Licon

Estella Licon

SERVICE LIST

Daniel U. Smith, Esq.
Smith & McGinty
220 16th Avenue, Suite 3
San Francisco, CA 94118
(Attorneys for Appellant)

Stewart M. Tabak, Esq.
Tabak Law Firm
250 Dorris Place
Stockton, CA 95204
(Attorneys for Appellant)

Clerk
Stanislaus County Superior Court
For the Honorable David G. Vander Wall
800 11th Street, Dept. 23
Modesto, CA 95353

James M. Nelson, Esq.
Donnelly Nelson Depolo & Murray LLP
201 No. Civic Drive, Suite 239
Walnut Creek, CA 94596
(Attorneys for Respondents)

Kenneth R. Pedroza, Esq.
COLE PEDROZA LLP
200 S. Los Robles Avenue, Suite 300
Pasadena, CA 91101
(Attorneys for Respondents)

California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721