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22 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
23 IN AND FOR THE COUNTY OF SAN FRANCISCO

24 CALIFORNIA SOCIETY OF
25 ANESTHESIOLOGISTS, a California
26 nonprofit corporation, and CALIFORNIA
27 MEDICAL ASSOCIATION, a California
28 nonprofit corporation
Petitioners,

vs.

ARNOLD SCHWARZENEGGER, as
Governor of the State of California, and
Does 1 through 50, inclusive,

Respondents.

No. **CPF-10-510191**

**PETITION FOR WRIT OF
MANDATE, PROHIBITION, OR
OTHER APPROPRIATE RELIEF
AND REQUEST FOR
DECLARATORY RELIEF**

ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2010 FEB -2 AM 2:02

SUN, FEB 7 - 4-11, CLERK

BY: _____
CLERK

1 Petitioners, CALIFORNIA SOCIETY OF ANESTHESIOLOGISTS and
2 CALIFORNIA MEDICAL ASSOCIATION (collectively, "Petitioners"), submit this
3 Verified Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and
4 Request for Declaratory Relief ("Petition"), with respect to the following allegations:
5

6 **I. INTRODUCTION**

7 1. The use of anesthesia has long been an integral and common
8 practice in medicine. California's Legislature, pursuant to its police power to protect
9 the public health, has limited the ability to administer anesthesia to physicians or
10 certified registered nurse anesthetists ("CRNAs") acting under the supervision of a
11 physician. This Petition seeks to enforce existing California laws that require
12 physician supervision whenever CRNAs administer anesthesia.

13 2. Medicare regulations provide that participating hospitals may
14 allow CRNAs to administer anesthesia, but only under physician supervision. A
15 participating hospital can "opt out" of this supervision requirement (*i.e.*, allow CRNAs
16 to administer anesthetics without physician supervision) in states where the governor
17 has submitted a letter to the Centers for Medicare and Medicaid Services ("CMS")
18 certifying that three conditions have been met: (1) that the Governor has consulted
19 with both the State Boards of Medicine and Nursing about issues related to both access
20 to and the quality of anesthesia services in the state; (2) that the Governor has
21 concluded it is in the best interests of the state's citizens to opt-out of the physician
22 supervision requirement; and (3) that the opt-out is consistent with state law.

23 3. Governor Arnold Schwarzenegger ("Governor") has submitted
24 such an "opt-out" letter; but in so doing, the Governor acted contrary to California laws
25 that prohibit CRNAs from administering anesthesia without physician supervision.
26 Petitioners accordingly ask this Court to issue a writ of mandate, prohibition, or other
27 appropriate relief compelling the Governor to withdraw the "opt-out" letter and to take
28 no further action to effect an opt-out of the Medicare physician supervision

1 requirement. In addition, Petitioners ask this Court to enter a judgment declaring that,
2 under California law, a CRNA providing anesthesia may do so only under physician
3 supervision.

4 **II. PARTIES**

5 4. Petitioner California Society of Anesthesiologists ("CSA") is a
6 California nonprofit corporation with its principal place of business in San Mateo
7 County, California. CSA is dedicated to promoting the highest standards of the
8 profession of anesthesiology, to fostering excellence through continuing medical
9 education, and to serving as an advocate for anesthesiologists and their patients. Its
10 approximately 4,000 members are licensed physicians specializing in anesthesiology,
11 including members practicing the subspecialty of pain medicine or pain management.
12 Some of CSA members supervise CRNAs who administer anesthesia to their patients
13 in hospitals and other health care facilities. The challenged action in this Petition
14 would have a significant impact on CSA members' practice of medicine, their ability to
15 protect their patients, and their physician/patient relationships.

16 5. Petitioner California Medical Association ("CMA") is a nonprofit
17 corporation with its principal place of business in Sacramento, California. CMA's
18 purposes are to promote the science and art of medicine, the care and well-being of
19 patients, the protection of the public health, and the betterment of the medical
20 profession. Its members consist of approximately 35,000 physicians and medical
21 students. Its physician members practice medicine in California in all specialties and
22 settings, including anesthesiology. CMA's physician members also will be affected if
23 California is permitted to opt out of the Medicare requirement that physicians supervise
24 any CRNA who administers anesthesia.

25 6. Petitioners California Society of Anesthesiologists and California
26 Medical Association are duly authorized to bring this action on behalf of their own
27 interests and in a representative capacity on behalf of their physician members who are
28 being harmed by the unlawful conduct described herein.

1 7. Respondent Arnold Schwarzenegger is the elected Governor of
2 the State of California. Governor Schwarzenegger is named in his official capacity.

3 8. Petitioners are ignorant of the true names and capacities of the
4 respondents sued herein as DOES 1 through 50, inclusive, and therefore sue said
5 respondents by such fictitious names. Petitioners will seek leave to amend this Petition
6 when the same have been ascertained. Petitioners are informed and believe and
7 thereon allege that each of such fictitiously-named respondents is responsible in some
8 manner for the matters alleged herein.

9 9. Petitioners are informed and believe and thereon allege that at all
10 relevant times, each of the respondents, including each of the fictitiously-named
11 respondents, acted as the agents, servants, and employees of one another, and that each
12 and all of said respondents was acting with in the course and scope of such agency or
13 employment at the time the events alleged herein occurred.

14
15 **III. VENUE**

16 10. Respondent Governor Schwarzenegger is a state official sued in
17 his official capacity. Venue is proper in this Court pursuant to Code of Civil Procedure
18 section 401(1) because the California Attorney General maintains an office in the City
19 and County of San Francisco.

20
21 **IV. GENERAL FACTUAL ALLEGATIONS**

22 11. Prior to 2001, federal Medicare conditions for participation
23 applicable to hospitals required that CRNAs be supervised by physicians, without
24 exception. Subsequently, a federal regulation (42 C.F.R. §482.52) was amended to
25 provide an "opt-out" provision, which allows hospitals that so elect to be exempt from
26 the supervision requirement in States where the governor has submitted a letter to CMS
27 that satisfies three requirements imposed by the regulation.

28 //

12. The opt-out provision states in full:

A hospital may be exempted from the requirement for physician supervision of CRNAs as described in paragraph (a)(4) of this section, if the State in which the hospital is located submits a letter to CMS signed by the Governor, following consultation with the State's Boards of Medicine and Nursing, requesting exemption from physician supervision of CRNAs. The letter from the Governor must attest [1] that he or she has consulted with State Boards of Medicine and Nursing about issues related to access to and the quality of anesthesia services in the State and [2] has concluded that it is in the best interests of the State's citizens to opt-out of the current physician supervision requirement, and [3] that the opt-out is consistent with State law. (42 C.F.R. §482.52(c)(1).)

13. For more than eight years after establishment of this opt-out option, Petitioners do not believe California has attempted to opt-out of the physician supervision requirement for the administration of anesthesia by CRNAs. In or about June 2009, Governor Schwarzenegger submitted a letter dated June 10, 2009 to CMS whereby he purported to exercise "the option to exempt the State of California from the requirement that certified registered nurse anesthetists be supervised by a physician" (hereinafter referred to as "Respondent's Opt-out Decision"). A true and correct copy of the Governor's letter dated June 10, 2009, is attached hereto as Exhibit A.

14. Petitioners have found no evidence that the Governor ever consulted with the Medical Board of California – the state agency responsible for the enforcement of the Medical Practice Act – on issues concerning administering of anesthesia by CRNAs. While the Medical Board did receive an inquiry from the California State and Consumer Services Agency in the first half of 2009 concerning the scope of practice of nurse anesthetists, there is no evidence of communication or consultation during this same period between the Governor or any members of his staff and the Medical Board regarding access to and quality of anesthesia services. The Medical Board, in a letter dated March 2, 2009 to Leslie Lopez, Deputy Secretary and

1 General Counsel, California State and Consumer Services Agency did in fact state that
2 it “appears that a nurse anesthetist is required to have physician . . . supervision.”

3 15. The fact that CRNAs are required to have physician supervision is
4 recognized in the Nursing Practice Act, Business & Professions Code §§2700 *et seq.*
5 That Act as a whole contemplates physician supervision, the levels of which vary
6 depending upon the nature and complexity of the tasks to be performed.

7 16. The administration of anesthesia by registered nurses under
8 physician supervision has been recognized as lawful in California at least since the
9 decision of the California Supreme Court in *Chalmers-Francis v. Nelson* (1936) 6
10 Cal.2d 402, which upheld such actions by nurses when done “under the immediate
11 direction and supervision of the operating surgeon and his assistants.” *Chalmers-*
12 *Francis v. Nelson, supra*, at 404. In subsequent cases, and in numerous Opinions by
13 the California Attorney General, and in the November 6, 2009 opinion of the
14 Legislative Counsel Bureau, it has been confirmed that registered nurses must function
15 under physician supervision when administering anesthesia. Those decisions are
16 consistent with numerous California statutes, and no statute eliminating this
17 requirement has been enacted in California.

18 17. The Nurse Anesthetists Act (Business & Professions Code
19 §§2825, *et seq.*) is silent with respect to CRNA scope of practice, except to provide in
20 substance that such scope of practice is defined by the statutes defining the practice of
21 registered nursing generally (Business & Professions Code §2833.6). The Board of
22 Registered Nursing has not adopted any regulations defining the CRNA scope of
23 practice.

24 18. In submitting the “opt-out” letter, Respondent Governor
25 Schwarzenegger acted contrary to California laws that prohibit CRNAs from
26 administering anesthesia without physician supervision. The “opt-out” letter also fails
27 to satisfy 42 C.F.R. §482.52 in that opting-out of the physician supervision requirement
28 was not and is not consistent with California law.

1 19. Under 42 C.F.R. §482.52(c)(2), a request for exemption under 42
2 C.F.R. §482.52(c)(1) is effective upon submission and may be withdrawn at any time.
3 Shortly after the Governor's "opt-out" letter was submitted to CMS, Petitioners asked
4 the Governor to withdraw the "opt-out" letter, explaining in detail why it was not
5 consistent with State law as required by 42 C.F.R. §482.52. The Governor refused to
6 withdraw the "opt-out" letter, asserting that it was consistent with California law.

7 20. Petitioners are informed and believe that certain hospitals in the
8 State of California have, based on Respondent's Opt-out Decision, already begun to
9 take the position that CRNAs who administer anesthesia are not required to be
10 supervised by a physician.

11
12 **PETITION FOR WRIT OF MANDATE, PROHIBITION**
13 **OR OTHER APPROPRIATE RELIEF AND**
14 **REQUEST FOR DECLARATORY RELIEF**

15 21. The allegations set forth in paragraphs 1 through 20, inclusive, are
16 hereby incorporated by reference as if fully set forth at length.

17 22. Petitioners and their members have a direct and immediate
18 beneficial interest in the matters to which this Petition relates. Anesthesiologists,
19 including members of Petitioners CSA and CMA, are placed in particular peril, and
20 suffer special damage and injury under present circumstances, because physicians have
21 traditionally provided the supervision required by law in most facilities. Relationships
22 between physicians, including but not limited to anesthesiologists, and CRNAs have
23 been jeopardized and made uncertain by the Governor's actions. Furthermore,
24 hospitals, hospital medical staffs, and anesthesiologists serving as directors of
25 anesthesia departments or services, as well as individual physicians, are uncertain as to
26 their responsibilities due to Respondent's Opt-out Decision.

27 23. The Governor has a clear, present and ministerial duty to act in
28 strict conformance with the laws of the State of California and to avoid violations of
the law. Respondent's Opt-out Decision is contrary to California law and is therefore

1 unlawful.

2 24. Petitioners and their members have no plain, speedy and adequate
3 remedy in the ordinary course of law, other than the relief sought by this Petition.
4 Petitioners and their members have suffered and will continue to suffer irreparable
5 injury as a result of Respondent's Opt-out Decision.

6 25. Petitioners have no administrative remedy that will result in
7 preventing or enjoining the illegal acts described herein and their unlawful impact on
8 Petitioners and their members.

9 26. Petitioners are informed and believe and thereon allege that they
10 have performed all conditions precedent to filing a petition for a writ of mandate,
11 prohibition or other appropriate relief with respect to the matters that are the subject of
12 this Petition.

13 27. An actual controversy has arisen and exists between Petitioners,
14 Respondent Governor Schwarzenegger, and others regarding the legal authority of
15 CRNAs and the existence of a requirement for physician supervision of CRNAs under
16 California law, which disputes Respondent has purported to resolve by Respondent's
17 Opt-out Decision, giving rise to an actual controversy between the parties as to the
18 existence of a requirement under California law for physician supervision of CRNAs.

19 28. Petitioners and their members therefore desire a declaratory
20 determination of the requirement of physician supervision of CRNA-administered
21 anesthesia.

22 29. A declaration is necessary and appropriate at this time so that
23 Petitioners and their members, as well as hospitals, physicians, other providers of
24 health care, and patients can determine their rights and obligations with respect to the
25 administration of anesthesia by CRNAs and the requirement that such activities be
26 supervised by physicians.

27 //

28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioners prays for relief as follows:

3 1. That the Court issue a writ of mandate commanding Respondent
4 Governor Schwarzenegger to withdraw the "opt-out" letter said Respondent submitted
5 to CMS in or about June 2009, and to take no further action to effect an opt-out under
6 42 C.F.R. §482.52;

7 2. That the Court declare that Respondent Governor Schwarzenegger
8 has and had no authority to submit said Respondent's "opt-out" letter to CMS because
9 opting-out of the requirement that CRNAs be supervised by physicians was not and is
10 not consistent with California law;

11 3. That the Court declare that, under California law, a CRNA is not
12 authorized to administer anesthesia except under the supervision of a physician;

13 4. For costs of suit and attorneys' fees incurred in this proceeding;
14 and

15 5. For such other and further relief as the Court may deem proper.

16
17 Dated: February 2, 2010

HASSARD BONNINGTON LLP

18
19
20 By: B. Thomas French
B. Thomas French

21
22 Attorneys for Petitioners, California
Society of Anesthesiologists and
23 California Medical Association
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VERIFICATION

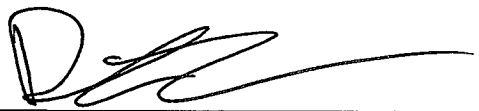
I, Dustin Corcoran, state that:

1. I am the Chief Executive Officer and Executive Vice President of
Petitioner, California Medical Association, in the above-entitled matter.

2. I have read the foregoing Petition for Writ of Mandate,
Prohibition, or Other Appropriate Relief and Request for Declaratory Relief and know
the contents thereof. The facts stated therein are true of my own knowledge, except as
to those matters alleged on information and belief, and as to those matters I believe it
to be true.

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

Executed on February 1, 2010, at Sacramento, California.



Dustin Corcoran

VERIFICATION

I, Linda B. Hertzberg, M.D. state that:

1. I am the President of Petitioner, California Society of Anesthesiologists, in the above-entitled matter.

2. I have read the foregoing Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and Request for Declaratory Relief and know the contents thereof. The facts stated therein are true of my own knowledge, except as to those matters alleged on information and belief, and as to those matters I believe it to be true.

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

Executed on February 1, 2010, at Fresno, California.



Linda B. Hertzberg, M.D.



GOVERNOR ARNOLD SCHWARZENEGGER

June 10, 2009

Ms. Charlene Fizzerra
Acting Administrator
Centers for Medicare and Medicaid Services
314G Hubert Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Dear Ms. Fizzerra,

Pursuant to the final rule published in the November 13, 2001, Federal Register, Volume 66, Number 219, I am exercising the option to exempt the State of California from the requirement that certified registered nurse anesthetists be supervised by a physician.

Having consulted with the California Board of Medicine and California Board of Registered Nursing and having determined that this exemption is consistent with state law, I have concluded that it is in the interests of the people of California to opt out of this requirement.

Sincerely,

A handwritten signature in black ink, reading 'Arnold Schwarzenegger'.

Arnold Schwarzenegger

/la

