KING & SPALDING

Paul R. Johnson, No. 115817
pjohnson@kslaw.com
+1 213 443 4370
King & Spalding LLP
633 W. 5th Street, Suite 1600
Los Angeles, California 90071

June 27, 2022

Honorable Tani G. Cantil-Sakauye, Chief Justice of California, and
Honorable Associate Justices of the Supreme Court of California
350 McAllister Street
San Francisco, California

Re: S274927
County of Santa Clara v. Superior Court (H048486)
Amicus Support by California Hospital Association for Petition for Review

Honorable Justices:

Recent counts show Californians make about 12 million to 15 million trips each year to hospital emergency departments.[1] Burdening the system with unchecked underpayments by an entire class of California-licensed health-plan payors for emergency-medical services rendered in the commercial coverage marketplace is unsustainable. Cutting payments will undermine the delivery and availability of services for Californians. The free-rider problem created by the Court of Appeal's decision is a crisis in the making and requires immediate review.

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[1] California Health & Human Services Agency data show Californians made nearly 12 million trips to hospital emergency departments in 2020. See https://data.chhs.ca.gov/dataset/hospital-emergency-department-characteristics-by-facility-pivot-profile/resource/34bdefc5-8eab-462a-a717-46fbe03e031b.

Pre-COVID, Californians made nearly 15 million trips to hospital emergency departments in 2019. https://data.chhs.ca.gov/dataset/hospital-emergency-department-characteristics-by-facility-pivot-profile/resource/4a7e0519-7659-4790-a149-23499948dae3?inner_span=True.

Amicus curiae **CALIFORNIA HOSPITAL ASSOCIATION** respectfully supports the petition for review of the published decision by the Court of Appeal for the Sixth Appellate District in *County of Santa Clara v. Superior Court* (2022, H048486) 77 Cal.App.5th 1018 (*Santa Clara*).

INTEREST OF AMICUS CURIAE CALIFORNIA HOSPITAL ASSOCIATION

The California Hospital Association, representing more than 400 hospitals throughout California, advocates for better, more accessible health care for all Californians. CHA ensures that hospitals will continue to be able to provide exceptional care to patients and comprehensive health services to communities. Established in 1935, CHA provides information, resources, and perspective to state and federal policy makers to inform decisions that affect 40 million Californians.

The California Hospital Association is a nonprofit, member-driven organization, led by a 40-plus member Board of Trustees composed of the leaders of California's hospitals and health systems. (https://calhospital.org/.)

The California Hospital Association has a particular interest in preserving the ability of California hospitals to provide emergency services, including their right to judicial enforcement of reimbursement owed by publicly owned health plans for emergency services provided to patients who are plan members.

REVIEW SHOULD BE GRANTED

1. *Santa Clara* undermines emergency care by giving immunity to an entire class of licensed health plans in the commercial marketplace—while ignoring California law to the contrary

Santa Clara injects a major disruption into the funding structure for emergency-medical services. The reliable delivery of emergency services throughout the State requires that a number of interconnected elements mesh together. (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 504–508 (*Prospect*).) Among these: When a patient who is enrolled as a member of a healthcare service plan (health plan/HMO) receives emergency care from noncontracting, out-of-network providers, the health plan must reimburse the providers the "reasonable and customary value" of the emergency services rendered; providers, in turn, may not bill the patient–member for the balance of any amount billed to but unpaid by the health plan; and payment disputes are to be determined by the trier of fact in court. (*Ibid.* [no "balance billing"]; Health & Saf. Code, § 1371.4; Cal. Code Regs, title 28, § 1300.71, subd. (a)(3)(B).)

Santa Clara, however, would let publicly owned commercial health plans unilaterally decide to underpay for emergency services, by exempting them from enforcement lawsuits by providers. Case law broadly recognizes that the Knox–Keene Act permits emergency providers to sue California-licensed health plans directly over billing disputes. (*Prospect*, *supra*, 45 Cal.4th at p. 506.) Necessarily so. This Court and the Department of Managed Health Care (DMHC) recognized that: "'"[D]enying emergency providers judicial recourse to

challenge the fairness of a health plan's reimbursement determination[ ] allows a health plan to **systematically underpay** California's safety-net providers …."'" (*Id.* at p. 508, emphasis added [quoting DMHC brief quoted in *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 218 (*Bell*)].)

Because health plans licensed by DMHC under the Knox–Keene Act are the dominant form of healthcare coverage in California, rules applicable to those plans often have the most significant impact.[2] (See generally Knox–Keene Health Care Service Plan Act of 1975, Health & Saf. Code, § 1340 et seq.) For hospital emergency services, the ability of providers to enforce adequate reimbursement by health plans is particularly important. Hospitals and ER doctors must provide emergency services without questioning whether the patient can pay or is a member of an in-network versus out-of-network health plan. (See *Prospect*, *supra*, 45 Cal.4th at p. 504.) California case law confirms that emergency providers can pursue adequate compensation in the courts from the out-of-network health plans. (See *id.* at p. 506.)

Under *Santa Clara*, however, underpayments by licensed health plans that are owned by public entities would significantly deplete the financial resources for emergency-services providers in California. This is especially so in localities where publicly owned health plans, like the one in this case, are dominant or ascending. Systematic underpayment by these commercial health plans would undercut the financial viability

[2] See DMHC Enrollment Summary Report – 2021, available at: https://www.dmhc.ca.gov/DataResearch/FinancialSummaryData.aspx; compare Health Insurance Covered Lives Report, available at: http://www.insurance.ca.gov/01-consumers/110-health/coveredlivesrpt.cfm

of emergency-services providers, could drive some ER doctors to other practice areas, could discourage doctors from entering ER practice, and would impede the ability of hospitals to maintain and expand their emergency-room care.

California hospitals are already under tremendous financial strain and face painful choices about where they must make cuts to continue to remain viable. (See Carmela Coyle, "Hospitals' Financial Peril Deepens" (California Hospital Association, June 2, 2022) https://calhospital.org/hospitals-financial-peril-deepens/ [referencing Kaufman Hall national report and noting pressures in California to complete more than $100 billion in seismic upgrades in little more than seven years and significantly reduce the rate of health care cost growth into the future].) About 80% of California's approximately 400 general acute care hospitals have emergency departments.[3]

The availability of emergency services to Californians should not be undermined. But *Santa Clara* does exactly that by allowing publicly owned health plans to systematically underpay what they owe providers for emergency services.

2. If not addressed by this Court, the problem will get worse

Review is needed now, as the problem will only grow. Enabling free riders encourages more free riders. Allowing publicly owned health plans to systematically underpay for emergency services gives them an *unearned competitive advantage* that will grow their presence—and the

[3] See Cal. Health & Human Services Agency, "2020 Hospital Emergency Department - Characteristics by Facility" (Excel file, "Data" & "Pivot" tabs) at: https://data.chhs.ca.gov/dataset/hospital-emergency-department-characteristics-by-facility-pivot-profile/resource/34bdefc5-8eab-462a-a717-46fbe03e031b.

problem of underpayments—in the commercial marketplaces where they operate.

Further, publicly owned health plans will have strong *disincentives* to develop and maintain adequate networks of directly contracted emergency-medical facilities and professionals. Instead, *Santa Clara* encourages publicly owned commercial health plans to shift onto noncontracted, out-of-network emergency-room providers the financial burden these plans assumed for their members' emergency needs—by underpaying at rates that cannot be challenged.

Santa Clara also would encourage publicly owned health plans to minimize non-emergency care, by contracting with too few hospitals and doctors to be in-network, thereby driving members to overuse emergency-room services.

Here, for example, while the Modesto and Manteca providers who seek review are outside the county lines of defendant County of Santa Clara, the County-owned Valley Health Plan also has not contracted for the payment of emergency services provided by well-established hospitals *within* the County. (See, e.g., *Regional Medical Center of San Jose and Good Samaritan Hospital v. County of Santa Clara d/b/a Valley Health Plan* (Super. Ct., County of Santa Clara, No. 20CV374597).) These two hospitals are located in San Jose, the largest city in the County. The decision by this health plan not to include these two hospitals in its commercial network greatly reduces the access to non-emergency care options for the plan's members, with the foreseeable consequence that more of the County's commercial members are driven to seek services in emergency rooms.

3. The Legislature intended that private and public Knox–Keene plans operate on a level playing field

The grave consequences of this case turn on legal issues of statutory interpretation that are particularly appropriate for determination by this Court.

The Legislature did not intend to upset merit-based competition in the market for health plans by giving publicly owned health plans an unearned competitive advantage. On the contrary, just like any other health plan, a public entity (such as the County) that wants to operate a commercial health plan in the marketplace must apply for a license to operate the health plan under the Knox–Keene Act. (See generally Health & Saf. Code, § 1351.) When so licensed, it is expressly subject to the provisions of the act—which apply even-handedly, across the board, to both private and public plans—except as expressly stated in statutory provisions in the Knox–Keene Act. (*Id.*, § 1399.5.) "It is the intent of the Legislature that *the provisions of this chapter shall be applicable to any private or public entity or political subdivision* which, in return for a prepaid or periodic charge paid by or on behalf of a subscriber or enrollee, provides, administers or otherwise arranges for the provision of health care services, as defined in this chapter, *unless* such entity is exempted from the provisions of this chapter *by, or pursuant to, Section 1343*." (*Ibid.*, emphasis added.) This specific requirement shows that the Legislature intended all health plans, whether privately or publicly owned, to operate on a level playing field. *Santa Clara* did not appreciate the significance of this legislative directive. In fact, when quoting section 1399.5, the opinion inexplicably cut off the last clause in the

section, which confines the ability of public plans to be exempted. (See *Santa Clara*, *supra*, 77 Cal.App.5th at p. 1031; cf. Health & Saf. Code, § 1399.5 ["unless … exempted … by, or pursuant to, Section 1343"].)

Instead, *Santa Clara* erroneously confers an undeserved significant competitive advantage on publicly owned plans—through an exemption not set forth in the Knox–Keene Act—which is contrary to the specific dictates of California law reflected in section 1399.5.

The improper power granted a publicly owned plan by *Santa Clara*—to systematically underpay by evading judicial enforcement of the plan's legal obligation to reimburse providers of emergency services—is an "unjust windfall," as this Court and DMHC have warned. (*Prospect*, *supra*, 45 Cal.4th at p. 508.) "'"If providers are precluded from bringing private causes of action to challenge health plans' reimbursement determinations, health plans may receive an unjust windfall …."'" (*Ibid.* [quoting DMHC brief quoted in *Bell*, *supra*, 131 Cal.App.4th at p. 218].)

The Legislature did not grant publicly owned health plans any such windfall. To the contrary, the Legislature decreed that: "A health care service plan … shall reimburse providers for emergency services and care provided to its enrollees …." (Health & Saf. Code, § 1371.4, subd. (b); see *id.*, subd. (c) [exception where emergency services and care never performed].) Nothing in the Knox–Keene Act exempts publicly owned health plans from this mandate. Therefore, as the Legislature directed in section 1399.5, these health plans are equally subject to the requirements imposed on all licensed health plans by California law.

4. The health plan's obligation to pay for emergency services at the reasonable and customary rate is mandatory, not discretionary

Government Code section 815.6 grants a right of action against a public entity that fails to perform a mandatory statutory duty. *Santa Clara* acknowledges that under section 1371.4, "the duty to reimburse is mandatory …." (*Santa Clara*, *supra*, 77 Cal.App.5th at pp. 1029–1030.)

But *Santa Clara* inexplicably concludes, without any support, that because the implementing regulation directs reimbursement at "the reasonable and customary value" of the services rendered, a publicly owned health plan—or perhaps any health plan—is somehow "vested with the discretion to determine the reasonable and customary value of the services," and thus has "discretion" to determine the amount of reimbursement owed. (*Santa Clara*, *supra*, 77 Cal.App.5th at p. 1030; see also Cal. Code Regs, title 28, § 1300.71, subd. (a)(3)(B).) Neither the statute nor the regulation says that the payment amount is discretionary. To the contrary, the regulation merely provides criteria in determining the amount of reimbursement. (Cal. Code Regs, title 28, § 1300.71, subd. (a)(3)(B).) These criteria help implement—not defeat—the Legislature's mandatory decree that a health plan "shall reimburse" for emergency services. (See Health & Saf. Code, § 1371.4, subd. (b).)

California courts already have recognized that health plans are not vested with the discretion to unilaterally decide what constitutes the reasonable and customary rate. On the contrary, *Bell,* along with DMHC—both of which this Court relied on in *Prospect*—rejected the notion that health plans have any such discretionary power and

confirmed that disputes over reasonable and customary value are for the courts. (See *Prospect*, *supra*, 45 Cal.4th at p. 504–508; *Bell*, *supra*, 131 Cal.App.4th at pp. 217–218.)

CONCLUSION

This Court should grant the petition for review. The issues are important and warrant intervention by this Court. When the Court of Appeal erroneously overturned the proper ruling by the trial court in this case, the Court of Appeal undermined the delivery and availability of emergency-medical services statewide.

Respectfully,

King & Spalding LLP

by 

Paul R. Johnson
Counsel for Amicus Curiae
California Hospital Association

Paul R. Johnson, No. 115817
pjohnson@kslaw.com
+1 213 443 4370
King & Spalding LLP
633 W. 5th Street, Suite 1600
Los Angeles, California 90071

PROOF OF SERVICE

County of Santa Clara v. Superior Court, S274927, H048486
Underlying action: Superior Court, Santa Clara County, No. 19CV349757

I am a citizen of the United States, over 18 years of age, and not a party to the within proceeding. My business address is King & Spalding LLP, 633 W. 5th Street, Suite 1600, Los Angeles, California 90071.

On June 27, 2022, I am serving the foregoing **letter for amicus curiae California Hospital Association in support of petition for review** by causing true copies to be distributed as follows:

To the Court of Appeal:

Clerk, Court of Appeal
Sixth Appellate District
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

To the Respondent:

Hon. Maureen A. Folan
c/o Clerk, Superior Court
191 North First Street
San Jose, CA 95113

BY U.S. MAIL, FIRST-CLASS POSTAGE PREPAID: I am readily familiar with the firm's practice in this office of processing correspondence for mailing. Under that practice, such correspondence is placed in a sealed envelope and deposited with the U.S. Postal Service on that same day with first-class postage thereon fully prepaid in the ordinary course of business.

To the Petitioner and to the Real Parties in Interest:

ELECTRONIC SERVICE THROUGH TRUEFILING: This document is being submitted for filing through the Supreme Court's TrueFiling service, with designation that an electronic copy be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this proceeding.

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

Executed on June 27, 2022, at Los Angeles, California.

/s/ Paul R. Johnson
PAUL R. JOHNSON