May 6, 2021

The Honorable Anthony Portantino
Chair, Senate Appropriations Committee
State Capitol, Room 2206
Sacramento, California 95814

Alliance of Catholic Health Care

Representing California's Catholic Health Systems and Hospitals

SUBJECT: SB 642 (Kamlager) – Oppose

Dear Senator Portantino:

The Alliance of Catholic Health Care represents California's Catholic-affiliated health systems and hospitals. Together, our health systems operate 51 acute care hospitals, which represent nearly 15% of all hospitals and over 16% of the hospital beds in California. We write to oppose SB 642 (Kamlager).

The costs associated with the implementation of this bill are difficult to quantify. One of the fundamental concerns with the bill is the complete shift of hospital operational authority from those with the fiduciary and fiscal responsibility for the hospital operations to practitioners, who have no responsibility to manage the costs or greater wellbeing of the hospital at large or the community the hospital serves. Under this bill, health care costs could skyrocket due to physician decision making without proper checks and balance from the administration.

Furthermore it is important to note that SB 642 (Kamlager) is rife with profound legal and Constitutional defects. Among other things, it would give physicians sweeping authority over hospital decision-making that is contrary to fundamental principles of sound hospital governance and administration, and decades of state and federal regulations and case law. In so doing, SB 642 would expose hospital patients to the threat of serious harm from incompetent physicians and inadequate resources. Moreover, while the bill does not expressly mention religion, the author's original fact sheets and requests for Assembly co-sponsors make it abundantly clear that its specific, albeit veiled, intent is to target Catholic health care and prohibit Catholic health care facilities from operating in accordance with their faith-based beliefs. Thus, SB 642 also violates the Free Exercise Clause of the First Amendment to the U.S. Constitution because it infringes the basic right of faith-based institutions to exercise and operate in accordance with their religious and moral beliefs.

As we note below, nothing about hospital administrative or business decision-making, including the applications of the *Ethical and Religious Directives for Catholic Health Care Services* (ERDs) violates the doctor-patient relationship, invades the exercise of medical judgment or the ban on the corporate practice of medicine.

Currently, physicians are free to advise their patients as they determine appropriate based upon their independent medical judgment and to provide any treatment or service that they conclude is appropriate. The hospital decisions targeted by SB 642 relate simply, and only, to ***where*** a few of the services that a physician may deem medically appropriate may be provided, *i.e.*, not at a hospital whose faith-based rules would be contravened by the service. SB 642 does not seek to promote independent medical judgment or to prevent hospitals from practicing medicine. Rather, it seeks to empower physicians to tell hospitals what treatments and services the hospital will offer

without also having the financial responsibility and liability exposure that is part and parcel of that authority and responsibility. That is contrary to state and federal law and not sound public policy.

SB 642 would restrict a hospital's governing board from exercising its responsibility and ultimate authority to operate the hospital. This effectively overrules decades of California law. The constraints the bill would impose on a governing body's operational authority are contrary to well-established law providing that the ultimate responsibility and authority for every aspect of hospital operations belong to the hospital alone, not the medical staff or its physician members.

SB 642 would also abrogate a hospital's legally vested oversight of the medical staff and physician competence—an essential part of a hospital's function of protecting patients—by giving to the medical staff and its individual members near-absolute power over the medical services at the hospital. Existing law, from the California Supreme Court and others, does not allow this. *See El-Attar v. Hollywood Presbyterian Medical Center*, 56 Cal. 4th 976, 993 (2013) ("A hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process.").

The California Supreme Court and the Court of Appeal have often reiterated the principle that the hospital's governing body, not the medical staff, has ultimate responsibility and authority for what happens inside the hospital. "Hospitals in this state have a *dual structure*, consisting of an administrative governing body, which oversees the operations of the hospital, and a medical staff, which provides medical services and is generally responsible for ensuring that its members provide adequate medical care to patients at the hospital." *El-Attar*, 56 Cal. 4th at 983 (emphasis added); *see also Alexander v. Superior Court*, 5 Cal.4th 1218, 1224 (1993) (hospital's governing body "takes ultimate responsibility for the quality and performance of the hospital"); *Hongsathavij*, 62 Cal. App. 4th at 1143 (rejecting physician's claim of "medical staff sovereignty" as "untenable" and holding that "[u]ltimate responsibility is not with the medical staff, but with the governing body of the hospital").

A hospital's ultimate authority to decide how the hospital operates includes the right to decide what services will and will not be offered. A general acute care hospital is required to provide only eight basic services, *see* Cal. Code Regs., tit. 22, § 70005(a); no other services are required. It is important to note that emergency and obstetrical care are not among the required services at California hospitals. Thus, if a hospital decides for any of a variety of factors—including legal requirements, core competency concerns, funding, staffing, volume of procedures, or religious rules that prohibit some procedures—not to permit a particular service, it has the authority to do so.

A hospital might conclude that its physicians do not have the necessary experience for a procedure; or it may have secular ethics rules that prohibit the procedure or action, including, for example, rules related to death and dying issues. Every hospital, whether faith-based or not, has an Ethics Committee that may recommend that a hospital not permit certain care in particular circumstances, for ethical reasons. Moreover, California Probate Code section 4736 specifically contemplates that a hospital may decline to provide a service requested by a patient—which could easily include a service recommended and/or approved by the patient's physician—and requires the hospital to attempt to transfer that patient to another facility that will comply with the request. This very statutory construct expressly permits a "health care institution" to lawfully decline to perform a procedure "based upon reasons of conscience". Cal. Prob. Code § 4734. SB 642 would directly contravene health care institutional rights under the Probate Code.

SB 642 also conflicts with a hospital governing board's long-recognized discretion to enter into or cancel contracts with physician groups. However, SB 642 would do just that by prohibiting a hospital from applying "corporate bylaws, policies, rules, contracts, or other institutional requirements," that are in conflict with the provisions of Business and Professions Code section 2057 in a manner that affects in any way a physician's clinical privileges, rights, or medical staff membership. SB 642, § 2 (proposed Bus. & Prof. Code § 2282.5(c)). Hospitals have been making such management decisions for decades, and courts have uniformly rejected claims by physicians challenging such actions when the contracts have had the effect of limiting or restricting certain physicians' provision of services—for instance, a contract granting exclusive rights to practice in a certain area to a particular medical group. While California courts have routinely upheld such contracts, SB 642 deems them an impermissible restriction of a physician's privileges. It is well settled, however, that this sort of contracting choice is a discretionary decision that is afforded the highest levels of deference. Hospitals have a "right … to make rational management decisions, even when exercise of that right might prove adverse to the interests of specific individual practitioners." *Redding v. St. Francis Medical Center*, 208 Cal.App.3d 98, 106 (1989); *see also Lewin v. St. Joseph Hospital of Orange*, 82 Cal.App.3d 368, 384-86 (1978) ("[t]he operation and administration of a hospital involves a great deal of technical and specialized knowledge and experience, and the governing board of a hospital must be presumed to have at least as great an expertise in matters relating to operation and administration of the hospital as any governmental administrative agency with respect to matters committed to its authority").

SB 642 would put patients' in harm's way by allowing doctors to perform potentially dangerous procedures in circumstances in which the hospital has no demonstrated competency. SB 642 would force all hospitals to allow doctors to perform any procedure that a medical staff member wishes to perform, as long as the "equipment" is on hand and the medical treatment or service falls within the scope of the physician's privileges. Unless the medical staff intervenes on the side of the hospital, the hospital would have to permit the procedure no matter the physician's level of competency or proficiency for the service and despite the fact that the hospital might not have any experience or core competency with particular procedures. Clearly, this exposes hospital patients to the threat of serious harm from incompetent physicians and inadequate resources. It is seriously antithetical to a hospital's fiduciary responsibility to the public to protect patients and to discipline problem physicians. *O'Byrne v. Santa Monica-UCLA Hosp.*, 94 Cal. App. 4th 797, 811 (2001) (a hospital's power to exclude physicians through the peer review process is a "fiduciary responsibility … to the *public*, not to an individual physician seeking to obtain or retain a staff position") (emphasis in original; citations and internal quotation marks omitted).

SB 642 would leave the hospital's governing body wide open for negligence suits by patients who are harmed by an incompetent physician. "A hospital itself may be responsible for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility." *Hongsathavij*, 62 Cal. App. 4th at 1143; *see also Elam*, 132 Cal. App. 3d at 340-41 (a hospital may be liable to a patient if its "failure to insure the competence of its medical staff through careful selection and review creates an unreasonable risk of harm to its patients"). SB 642, which restricts a hospital's ability to appropriately constrain physicians from performing hazardous procedures, would create substantial liability exposure for hospitals—not to mention the harm to patients that could cause liability in the first place.

SB 642 is not necessary to prohibit hospital boards from engaging in the corporate practice of medicine. Physicians decide what procedures are medically appropriate for their patients. That is the practice of medicine. Hospitals decide what services are offered or not within their broad management discretion and their ultimate authority to operate the hospitals.

As noted, a hospital decides what services are offered for a variety of reasons, including legal requirements, core competency concerns, funding, staffing, volume of procedures, and other reasons—including religious rules that prohibit some procedures. A hospital's determination of what procedures to offer based on such factors is hospital administration, not the practice of medicine. The availability of particular procedures at a given hospital, or lack thereof, is one reason physicians often have privileges at multiple hospitals and sometimes must send patients to another facility if they believe a procedure should be performed but the hospital, for whatever reason, does not permit it.

When a hospital prohibits a particular procedure, it is not exerting any control over physicians' medical decisions or asserting that a procedure a physician wants to perform is not medically appropriate for the patient, and no "divided loyalties" of the physician are created. As noted, hospitals are not even obligated to provide any service that is not identified in the regulation as a procedure that a hospital must provide. *See* Cal. Code Regs., tit. 22, § 70005(a). Thus, it cannot be "practicing medicine" when the hospital simply declines to offer a particular service, something that happens in every hospital for a variety of reasons including financial, medical and ethical/religious considerations.

While SB 642 does not expressly mention religion or Catholic health care facilities, it is clearly intended to prevent Catholic hospitals from tailoring the services performed to comply with binding religious doctrine. Therefore, SB 642 targets religion and will be subject to strict scrutiny under the First Amendment to the U.S. Constitution because it infringes the basic right of faith-based institutions to exercise and express their religion.

The fact that the bill does not mention religion or Catholic health care, but instead focuses on the issue of medical staff independence from "corporate" influence, indicates that the bill's drafters are attempting to avoid challenges to the Free Exercise Clause of the First Amendment of the United States Constitution by making the law appear neutral and generally applicable so as to fall within the scope of *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). In *Smith*, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." However, the Supreme Court in *Smith* also recognized that its holding would not apply to laws that are "directed at" or target a particular religious practice. *Id*. at 878.

Indeed, over the thirty years since *Smith* was decided, the Supreme Court has taken care to ensure that states not discriminate against religious institutions in violation of the Free Exercise Clause. The Court has repeatedly declined to apply *Smith* in cases involving free exercise challenges to laws or government acts that were either express or thinly veiled attempts to penalize religious practice.

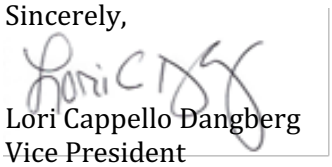
Equally important, the U.S. Supreme Court's decision on April 9, 2021 in *Tandon v. Newsom*, 593 U.S. __, 2021 WL 1328507 (April 9, 2021) makes new law that sets a much higher bar than the *Smith* decision, which was relied on by the Judiciary Committee. Although the Judiciary Committee noted the *Tandon* decision, it did so only in the context of stating that the constitutional analysis described in *Smith* might be in flux. That is a severe understatement, because the *Tandon* decision makes new law. Specifically, *Tandon* announced a new standard for determining whether a law is "neutral and generally applicable or triggers the application of rigorous strict scrutiny in free exercise cases. Under the new standard set in *Tandon*, a law is *not* "neutral and generally applicable, and therefore trigger[s] strict scrutiny" whenever it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Id*. at *1 (italics in original).

Thus, *Tandon* eliminates any requirement that the "object" or intent of the law be to burden free exercise rights in order to trigger strict scrutiny. Instead, *Tandon* adopts what has been called a "most favored nations" approach under which strict scrutiny applies where a law treats *any* comparable secular activity more favorably that faith-based conduct. This occurs whenever a statute provides exceptions for secular conduct but does not also provide exceptions for comparable faith-based conduct. SB 642 would be subject to strict scrutiny under *Tandon* because it clearly disfavors religious exercise and provides exceptions for secular conduct but not faith-based activity. For example, SB 642 disfavors faith-based decision-making regarding permissible health care services and establishes exceptions that apply only where the facility lacks equipment or a review by members of the medical staff determines that the care is not medically appropriate. Because there is no similar faith-based exception, SB 642 would (if enacted) be subject to strict scrutiny regardless of its object. Following *Tandon*, multiple respected First Amendment scholars have agreed that *Tandon* has effected a sea-change in the law of free exercise, making it much more burdensome for state laws that intrude on religious freedom to survive constitutional scrutiny. For one example, see https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

In conclusion, SB 642 would prevent the governing bodies of California hospitals from exercising the specific decision-making authority that the courts have entrusted to hospitals, not physicians and medical staffs, to correspond to the hospital's financial responsibility for the operation of the hospital and its obligation to patient safety. SB 642 is also constitutionally infirm for burdening the religious freedom of California's Catholic-affiliated hospitals and health systems.

For these reasons, we must respectfully oppose SB 642 (Kamlager).

Sincerely,



Lori Cappello Dangberg
Vice President

cc: Honorable Members, Senate Appropriations Committee