EDMUND G. BROWN JR.
Attorney General of California
SUSAN M. CARSON
Supervising Deputy Attorney General
JENNIFER A. BUNSHOFT
Deputy Attorney General
State Bar No. 197306
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5085
Fax: (415) 703-5480
E-mail: Jennifer.Bunshoft@doj.ca.gov
Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CALIFORNIA SOCIETY OF ANESTHESIOLOGISTS, a California nonprofit corporation, and CALIFORNIA MEDICAL ASSOCIATION, a California nonprofit corporation,

Petitioners,

v.

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

Respondent.

Case No. CPF 10-510191

RESPONDENT GOVERNOR ARNOLD SCHWARZENEGGER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: October 8, 2010
Time 9:30 a.m.
Dept.: 301
Judge: Hon. Peter J. Busch

Action Filed: February 2, 2010
Trial Date: Not set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Governor Schwarzenegger properly exercised his discretion to conclude that requesting an exemption of the federal condition that, in order for medical facilities to be reimbursed under Medicare, a certified registered nurse anesthetist (CRNA) must be supervised by a physician, was "consistent" with California law. The federal government has fully approved Governor Schwarzenegger's request for an exemption.

Even though the applicable State statutory scheme, the Nursing Practice Act (NPA), does *not* impose any requirement that CRNAs be supervised while administering anesthesia, petitioners nonetheless contend that Governor Schwarzenegger has violated State law. The court should reject petitioners' attempt to read into the NPA a supervision requirement that the Legislature did not impose, and that has never been found by the Board of Registered Nursing, which has sole responsibility for interpreting the scope of practice of CRNAs in California. Because, as a matter of law, petitioners are not entitled to a writ of mandate overturning the Governor discretionary decision, this motion should be granted and judgment should be entered Governor Schwarzenegger's favor.

ARGUMENT

I. AS A MATTER OF LAW, GOVERNOR SCHWARZENEGGER DID NOT ABUSE HIS DISCRETION IN OPTING OUT OF THE FEDERAL SUPERVISION REQUIREMENT FOR CRNAS

A. The Relevant Federal Regulations do not Impose a Mandatory Duty, but Rather Require Governor Schwarzenegger to Exercise his Discretion

Petitioners have failed to allege any mandatory duty, as required for a writ of mandate under Code of Civil Procedure Section 1085. (See, e.g., *Coachella Valley Unified School District v. State* (2009) 176 Cal.App.4th 93, 113.) Indeed, they concede that the Centers for Medicare and Medicaid Services (CMS) regulations call upon governors to exercise discretion in opting out of the physician supervision requirement. Specifically, the three relevant CMS regulations set forth the requirements for a State to be exempted from the federal physician condition for facilities to be reimbursed for Medicare with respect to CRNAs. (42 C.F.R. §§ 482.52(c)(1), 416.42(c)(1), 485.639(e)(1).) They clearly call on the Governor to exercise his discretion in determining whether to request such an exemption. In particular, the requirement that a governor "conclude"

that the opt out is "consistent" with state law – which is the only requirement at issue here – contains discretionary terms and calls for the exercise of judgment. This precludes any finding that the regulations impose a ministerial (i.e. mandatory) duty. (*See, e.g., Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1267.) In promulgating the regulations giving governors the ability to opt out upon determining that doing so was consistent with state law, CMS recognized that there is a "difference of opinion" between parties on both sides of the issue of whether physician supervision is required, but "believe[d] that the governors are best suited to make determinations in this area." (Respondents' RJN, Exh. A, at p. 75764.)

Faced with the language of the regulations and the clear intent of CMS that governors exercise discretion in determining whether opting out is consistent with state law, petitioners concede that any duty under the regulations is discretionary. Instead, they assert the unremarkable proposition that the Governor "may not exercise that discretion in a manner that violates California law." (Pets Combined MPAs, at p. 3:2-9, citing *California Correctional Supervisors Org., Inc. v. Department of Corrections* (2002) 96 Cal. App. 4th 824, 827.)[1] The other cases petitioners cite are inapposite. *California Association for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 708, does not involve a discretionary duty; instead the court found that the state plan at issue "prescribed a ministerial duty" to perform an annual review of reimbursement rates. Because the court concluded that Department of Health Services had not conducted an annual review, it issued a writ of mandate compelling the Department to do so. (*Id.* at pp. 708-710.) In addition, petitioners' citation of *Service Employees Intern. Union Local 1000 v. Schwarzenegger* (2010) 186 Cal. App. 4th 747, is improper because the California Supreme Court has granted review, and the appellate court decision has been superseded. (Cal. Rules of Court, Rule 8.1115.)

Where, as here, any duty imposed by the CMS regulations is discretionary, the court can

[1] *California Correctional Supervisors* recognized that the abuse of discretion standard applied where a statute permitted an agency to exercise discretion, and noted that while there were some cases where "reasonable minds could not differ" with respect to workplace safety, such as police officers needing firearms, where, as there, "reasonable minds can and do differ about a workplace safety issue, a discretionary call by a government official should not be disturbed." (*Id.* at pp. 831-832.) The court, therefore, affirmed the denial of the writ of mandate.

only issue a writ of mandate if petitioners meet their burden of proving that the Governor has abused that discretion. (*Carrancho, supra,* 111 Cal.App.4th at p. 1265.) The evidence shows that Governor Schwarzenegger reviewed the relevant facts, law, and other information pertaining to whether California requires supervision of CRNAs prior to deciding whether to request an exemption of the federal physician supervision requirement. (Kent Decl., ¶¶ 2-6.) As part of that process, he inquired of the BRN – the agency that regulates CRNA practice – as well as the California Medical Board – which does not – whether California law imposed any such requirement. (*Id.*, ¶¶ 3-4 & Exhs. A, B.) In response, the BRN stated that there was no requirement that a CRNA be supervised by a physician in order to administer anesthesia under Business and Professions Code, Article 7, § 2825-2833.6. (*Id.*, Exh. A.) The Medical Board confirmed that this question was more appropriately posed to the BRN, as it "falls within the jurisdiction of their laws relating to scope of practice and requirements for practice with advanced nursing certificates." (*Id.*, Exh. B.) The Governor also received numerous letters from medical professionals expressing support for requesting an exemption. (*Id.*, ¶ 5 & Exh. C.) He exercised his discretion to request an exemption of the federal Medicare reimbursement condition based on his conclusion that the exemption would be "consistent" with state law, (*Id.*, Exh. D), and CMS specifically approved his request. (*Id.*, Exh. E.) Petitioners have failed to show that the Governor's conclusion that opting out of the physician supervision requirement is "consistent" with State law constitutes a violation of State law or is an abuse of discretion in any other respect.

B. California Law Does Not Impose a Supervision Requirement on CRNAs

1. California statutes applicable to CRNAs do not impose a physician supervision requirement

California statutes applicable to CRNAs do not impose any requirement that they be supervised by a physician when administering anesthesia. The Nurse Anesthetists Act (NAA), which was added in 1983 to specifically recognize CRNAs, does not impose a requirement that physicians supervise CRNAs. (Bus & Prof. Code, §§ 2826 et seq.) The NAA did not alter the scope of practice of CRNAs, which is set forth in the Nursing Practice Act (NPA). Specifically, the NPA requires only that a physician or other specified health care provider "order" the anesthetic that the CRNA administers. (Bus. & Prof. Code, § 2725, subd. (b)(2).)

Petitioners concede that Section 2725(b)(2) is controlling here and that respondents "accurately note the Legislature did not use the word 'supervise' or 'supervision' in Section 2725." (Pets. Combined MPAs, at p. 7:24-26.) They nonetheless argue that because the section broadly encompasses the administration of medications or therapeutic agents beyond just anesthesia, the "Legislature cannot have believed" that the same degree of supervision would be appropriate with respect to the entire range of patient care services covered in that section. (*Id.* at p. 8:6-8.) However, petitioners' attempt to read a supervision requirement into Section 2725 based on their supposition regarding what the Legislature could have "believed" flies in the face of the cannon of statutory construction that courts begin by examining the statutory language, giving words their ordinary meaning, and if there is no ambiguity, must "presume the lawmakers meant what they said, and the plain meaning of the language governs." (*California Teachers Association v. Governing Board* (2002) 95 Cal.App.4th 183, 190-191.) Only where the statutory terms are ambiguous may courts resort to extrinsic sources, including legislative history. (*Id.*)

Section 2725's requirement that a physician "order" the anesthesia does not mean that he also must supervise the CRNA's administration of anesthesia. The Merriam-Webster Medical Dictionary defines "ordered" as "to give a prescription for: prescribe." (Merriam-Webster Medical Dict., http://www.merriam-webster.com/medical/ordered.) Because nurses have no authority to prescribe medication, it makes sense that a physician would need to prescribe the anesthesia. If the Legislature had intended that physicians *supervise* CRNAs when administering anesthesia, it would have said so explicitly. It did not. The court should not read into a statute words that the Legislature omitted. (*Troppman v. Valverder* (2007) 40 Cal.4th 1121, 1135.) The plain language unambiguously requires only that the anesthesia be "ordered" by a physician.

Petitioners fail to adequately rebut the Governor's contention that any argument that "ordered" or "directed" mean the same thing as "supervise" is belied by the fact that the Legislature did explicitly require physician supervision of nurses midwives and nurse practitioners elsewhere in the same statutory scheme. (*See, e.g.*, Bus. & Prof. Code, §§ 2746.5,

2736.1)[2] If the Legislature had intended to require physician supervision of CRNAs, it would have used the term "supervision" as it did with respect to certified nurse-midwives and nurse practitioners. (*McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 211 [statutes must be read as a whole, and its various provisions should be harmonized].)

Even if the language of Section 2725 were ambiguous (it is not), as set forth in respondent's moving papers and in CANA's motion for summary judgment, a review of the relevant legislative history of Section 2725 confirms that the Legislature did not intend to impose a physician supervision requirement on CRNAs.

Finally, petitioners fail to persuasively rebut the Governor's point that the Department of Health Care Services amended California Code of Regulations, title 22, section 51326 (which addresses reimbursement for Medi-Cal services), to *omit* the prior physician supervision requirement, because it concluded that the prior version was "inconsistent with the Business and Professions Code" as it did not permit CRNAs to administer anesthesia except under direct supervision, and further recognized that it had no authority to limit the practice of CRNAs beyond that specified in the Business and Professions Code." (Respondent's RJN, Exh. C)

2. No relevant Attorney General opinion requires a finding that the Nursing Practice Act imposes a physician supervision requirement

The Governor's conclusion that applicable State law does not impose a physician supervision requirement on CRNAs is consistent with the 1984 Attorney General opinion, which is the most recent Attorney General opinion on the general subject of a nurse administering a drug or medication, and the *only* one that specifically addresses the administration of anesthesia by CRNAs. (67 Ops.Cal.Atty.Gen. 122 (1984).) The opinion confirms that, pursuant to Section 2725, subd. (b)(2), CRNAs are "expressly" authorized to administer all forms of anesthesia when

[2] Petitioners claim that Business and Professions Code section 2762, subdivison (a) supports physician supervision. That section states that, "except as directed by a licensed physician and surgeon, dentist or podiatrist" it is "unprofessional conduct" for a registered nurse to furnish or administer any controlled substance or dangerous drug to another. (Bus. & Prof. Code, § 2762, subd. (a).) But Section 2762 is part of Article 3 of the NPA, regarding "Disciplinary Proceedings," not Article 2, regarding "Scope of Regulation," which sets forth the scope of practice for nurses. Thus, that section is meant to address the abuse of controlled substances, not the administration of controlled substances as part of the scope of practice. In any event, the use of the phrase "directed by" does not mean CRNAs must be "supervised."

"ordered by" a physician. (*Id.* at p. 139.) Petitioners argue that the opinion supports their position because the Attorney General found that a CRNA could not administer anesthesia pursuant to a "standardized procedure." Instead, the opinion concluded that a CRNA could administer anesthesia ordered by a physician on a case by case basis. (67 Ops.Cal.Atty.Gen. 122 , p. *11.) Thus, although the opinion found that a CRNA could not administer anesthesia pursuant to a standardized procedure, this does not mean that *supervision* is required. Petitioners also argue that the 1984 opinion supports their position, because it discussed two earlier cases -- *Chalmers-Francis v. Nelson* (1936) 6 Cal.2d 402 and *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74 (discussed below), and an earlier Attorney General opinion that suggested that physician supervision was required for registered nurses. Yet, although the 1984 opinion did review early case law that suggested that physician supervision was required for registered nurses, as well as a 1972 Attorney General opinion to that effect, the Attorney General *refrained* from expressing or implying a supervision requirement for CRNAs.

The 1984 Attorney General opinion specifically addressed CRNA administration of anesthesia and did not find any physician supervision requirement. In contrast, the Attorney General opinions from the 1970s either have been limited by subsequent legislative activity, predate the recognition of CRNAs, or are otherwise not on point. (See 56 Ops.Cal.Atty.Gen. 1 (1972); 56 Ops.Cal.Atty.Gen. 64 (1973); 57 Ops.Cal.Atty.Gen. 93 (1974).) For example, in the 1984 decision, the Attorney General overruled the 1972 Attorney General opinion that held that registered nurses could only administer *general* anesthesia (56 Ops.Cal.Atty.Gen. 1 (1972).) In addition, the 1981 and 1983 Attorney General opinions, on which petitioners primarily rely, did not specifically address CRNAs, but instead addressed registered nurses generally. (64 Ops.Cal.Atty.Gen 240 (1981); 66 Ops.Cal.Atty.Gen. 427 (1983).) Petitioners fail to acknowledge that, unlike the 1981 and 1983 opinions, the 1984 opinion specifically addressed CRNA administration of anesthesia, and did not find a physician supervision requirement.

///

///

3. The cases cited by petitioners regarding physician supervision are superseded or distinguishable

Petitioners largely base their argument that California law requires that CRNAs be supervised by a physician when administering an anesthetic on a case that was decided in 1936 – *Chalmers-Francis v. Nelson* (1936) 6 Cal.2d 402. *Chalmers-Francis* held that a registered nurse must be supervised by a physician when administering anesthetics. (*Chalmers-Francis*, *supra*, 6 Cal.2d at p. 404-405.) As explained in Governor Schwarzenegger's moving papers, the continued viability of this decision is highly questionable for a number of reasons. It substantially predated the legislative recognition of CRNAs in 1983 (Bus. & Prof. Code, §§ 2825 et seq.) Unlike registered nurses, which the decision addressed, CRNAs are highly trained with respect to administering anesthesia and must meet State certification requirements. (See, e.g., Bus. & Prof. Code, §§ 2826 et seq.) It also predated the NPA, which sets forth the scope of practice for nurses, and does not require CRNA supervision. (Bus. & Prof. Code § 2725(b)(2).) In fact, the decision purports to rely upon the apparent scope of practice regarding the administration of anesthesia by registered nurses in the 1930s. But the scope of CRNA practice has evolved over time, and in the 1974 amendments to the NPA, the Legislature explicitly recognized that more sophisticated procedures were being performed by registered nurses, including CRNAs, and that there had been an increase of sharing of functions between nurses and physicians. (*Id.*, § 2725, subd. (a).)

Likewise, *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, is outdated and distinguishable. It did not address the administration of anesthesia by a CRNA or even a registered nurse, but instead involved the administration of anesthesia by unlicensed persons (anesthesiologists trained in other countries) without physician supervision. (*Magit*, *supra*, 57 Cal.2d at pp. 79-80, fn. 3.) It noted in dicta that the since-superseded version of Section 2725 appeared broad enough to allow nurse to administer anesthesia "under the direction and supervision of a licensed physician." (*Id.* at p. 82.) But the source of the latter statement was *Chalmers-Francis* and not the NPA, and in any event the 1974 NPA amendments superseded former Section 2725 and *Magit's* dicta.

Petitioners attempt to bolster their argument that CRNAs must be supervised by a physician

in administering anesthesia by citing *Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1392-1399. Yet that case simply held that an operating surgeon was responsible as the "captain of the ship" for an assisting nurse's failure to remove a sponge during surgery. (*Id.* at pp. 1398-1399) Petitioners ignore *Cavero v. Franklin General Benev. Soc.* (1950) 36 Cal.2d 301, 302-303, 306-308, which held that the operating doctors were not responsible for a nurse anesthetist's negligent administration of anesthesia during an operation.[3] They also ignore the fact that, by statute, a CRNA is "responsible for his or her own professional conduct and may be held liable for those professional acts." (Bus. & Prof. Code, § 2828.)

4. The 2009 Legislative Counsel Opinion is Entitled to Little Weight

Petitioners rely on a November 6, 2009 Legislative Counsel opinion, which concludes that physician supervision of CRNAs is required. The opinion is not persuasive, and therefore it is of little weight. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238.) One of the primary grounds for deference to Legislative Counsel opinions is that they typically are prepared to assist the Legislature in its consideration of pending litigation, and therefore shed light on the legislative purpose. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) Here, however, State Senator Sam Aanestad requested the opinion from the Office of Legislative Counsel *after* the Governor already had opted out, and long after the Legislature enacted and amended the NPA. (See Declaration of Hon. Sam Aanestad, ¶¶ 2-3, Exh. D [submitted by petitioners in support of motion for summary judgment].) Thus, the opinion sheds no light on legislative purpose.

In addition, the opinion relied upon a statement regarding "direction," that previously appeared on the BRN's website as evidence that CRNAs must administer anesthesia under physician "supervision." (Aanestad Decl., Exh. D, at p. 6.) The BRN has since removed this statement and replaced it with the correct statement that a nurse anesthetist provides anesthesia services "ordered by" a physician, which accurately reflects the Nursing Practice Act. (Bailey

[3] Petitioners cite *Marvulli v. Elshire* (1972) 27 Cal. App.3d 180, 185, for proposition that "where anesthesia is administered by a physician anesthesiologist, the surgeon may not be obligated to direct and supervise the anesthesiologist's activities," but ignore that the same is true with respect to CRNAs. (Pets' Combined MPAs, at p. 2, fn 2.)

Decl. ¶ 4, Exh. K.) Moreover, the opinion's conclusion that "supervision" and "direction" are synonymous, relying on Section 2762, lacks merit. As explained above, that section is inapplicable, and, in any event, "direction" and "supervision" are not synonymous. Accordingly, the opinion is not persuasive.

C. The Board of Registered Nursing's Position Regarding Whether Supervision is Required is Entitled to Deference

The BRN has long interpreted California law as *not* requiring physician supervision of CRNAs with respect to the administration of anesthesia. The BRN is the sole state agency that may define or interpret the practice of nursing for registered nurses, including CRNAs, who are licensed pursuant to the provisions of the NPA. (Bus. & Prof. Code, § 2725, subd. (e); Bailey Decl., ¶ 2, Exhs. I, J.) As such, the BRN's conclusion must be given great weight and deemed authoritative unless clearly erroneous. (*Sara M. v. Superior Court*, 36 Cal.4th 998, 1011-12 (2005).) Petitioners argue that the BRN's conclusion is not entitled to any deference pursuant to the test set forth in *Yamaha Corporation of America v. State Board of Equalizatio* (1998)19 Cal.4th 1, 12-14). Specifically, whether judicial deference to an agency's interpretation is appropriate and, if so, how much weight it should be given is "situational." (*Id.* at p. 12.) It is undisputed that over the years, the BRN has expressed the view that physician supervision is not required of CRNAs with respect to administering anesthesia. (See Declaration of Louise Bailey, Exhs. A, B, E, G, I, J.) As set forth in detail in respondent's opening brief, in response to various inquiries between 1988 and 2005, the BRN unequivocally confirmed this position. (*Id.*) Although the BRN has not set forth its conclusion that no physician supervision is required in a regulation, its interpretation should be afforded deference.

Petitioners contend that the BRN's position has been inconsistent, and therefore the BRN's statements cited above are not entitled to any deference under *Yamaha*. Among other factors relevant to weight, *Yamaha* noted that evidence that an agency has consistently maintained the interpretation in question, especially if it is long-standing, weighs in favor of deference. (*Id.* at p. 13.) Petitioners allege inconsistency based on testimony from the January 2007 deposition of the former Executive Officer of BRN, in a case they brought against the BRN. (French Decl. In Support of Petitioners' Reply and Opposition, ¶ 8, Exh. 6) However, even though she stated that

the BRN currently was not taking a position on physician supervision in light of the litigation, in other portions of her deposition testimony she confirmed that the BRN's prior statements that supervision is not required are still accurate. (*Id.*, Exh. A, a pp. 126:4-8, 158:25-159:17, 181:13-182:2, 183:7-185:11.)[4] In any event, where a board alters its position in response to litigation, its "long continued contrary opinion is still entitled to consideration" in determining the effect of a statute. (*D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 724). And, notably, petitioners cite *no* evidence that the BRN has ever determined that physician supervision of CRNAs is required. Accordingly, the BRN's position is entitled to some deference.

II. PETITIONERS ARE NOT ENTITLED TO DECLARATORY RELIEF

Petitioners' "request" for declaratory relief fails for the same reasons their petition for writ of mandate fails, because requests for declaratory relief – regardless of how they are labeled – are remedies, and create no new substantive rights. (*R & A Vending Service, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1193-1194.) Moreover, where, as here, the declaratory relief request "derives solely from the allegations of the mandate claim," the ruling on the writ of mandate resolves the declaratory relief request. (*Coachella Valley, supra*, 176 Cal.App.4th at pp. 125-126.) By failing to address these arguments, petitioners have conceded that a denial of their petition for writ of mandate requires a denial of their request for declaratory relief.

CONCLUSION

For the foregoing reasons, there are no grounds for issuing a writ of mandate or declaratory relief. The court should therefore grant summary judgment in Governor Schwarzenegger's favor.

Dated: September 28, 2010

Respectfully Submitted,
EDMUND G. BROWN JR.
Attorney General of California
SUSAN M. CARSON
Supervising Deputy Attorney General

JENNIFER A. BUNSHOFT
Deputy Attorney General
Attorneys for Respondent

[4] Also, as noted above, subsequent to the deposition, in response to the Governor's office's specific inquiry regarding whether California law requires physician supervision for a CRNA to administer anesthesia, the BRN stated: "Business and Professions Code, Article 7, § 2825-2833.6 does not require a certified registered nurse anesthetist to have physician supervision to administer anesthesia." (Bailey Decl., ¶ 3, Exh. A.)