Statement for the Record from the

Health Coalition on Liability and Access

before the

Senate Committee on the Judiciary

on the Topic

Examining Liability during the COVID-19 Pandemic

May 12, 2020

Chairman Graham, Ranking Member Feinstein, and members of the committee, thank you for the opportunity to submit testimony for the record on the topic of COVID-19 liability. The 38 member organizations of the Health Coalition on Liability and Access are tirelessly working to support healthcare professionals and facilities facing a challenge unlike anything in our modern medical history. Given the many challenges we are facing, the HCLA commends the committee for prioritizing medical liability issues and the threats they pose to physicians, patients and healthcare systems as a whole in the wake of the COVID-19 pandemic.

Our healthcare professionals and facilities are putting themselves at risk each day while facing workforce shortages, inadequate safety supplies, and insufficient information or changing guidance from federal, state, and local government officials. Despite this, they continue to go above and beyond, doing everything possible to treat the sick and bring comfort to others, often without regard to their own personal wellbeing. Acting now to provide targeted relief from the

threat of lawsuits is in the best interest of our country as we continue to combat the coronavirus and begin to emerge from this crisis.

The risks to pandemic responders

Healthcare providers have faced tremendous risk in treating patients during the COVID-19 pandemic response. Practitioner shortages have required providers to treat patients outside their general practice areas and prompted retired physicians to return to the workforce. For example, in New Jersey, an epicenter of the pandemic, over 400 retired providers reactivated their licenses as of mid-April.[1] The existing and returning practitioner workforce faces the reality of inadequate protective safety gear that could result in the inadvertent transmission of the virus. Facilities have scrambled to treat patients in the wake of a lack of essential medical equipment, including ventilators, which has spurred discussions and questions on rationing of care.[2] And not only has testing fallen short, causing insufficient or flawed diagnoses, but non-COVID-19 patients have also been forced to delay elective and other unrelated medical treatments to save resources. All of these situations increase the possibility of adverse patient outcomes while health professionals coped with overwhelming circumstances and personal risk.

None of this stopped our heroic healthcare providers and facilities from marching on. Nor were these actions or decisions the result of wrongdoing by caregivers or the facilities in which they operate. Instead, in some cases, these circumstances are unavoidable as healthcare professionals and the facilities in which they operate must shift limited resources to address urgent needs, including under the recommendations or guidance by government officials. In

[1] "More than 10K out-of-state health care workers approved to help N.J. fight the coronavirus," *NJ.com,* April 14, 2020. https://www.nj.com/coronavirus/2020/04/more-than-10k-out-of-state-health-care-workers-approved-to-help-nj-fight-the-coronavirus.html (accessed on May 11, 2020).

[2] "The coronavirus pandemic is forcing U.S. doctors to ration care for all patients," *Time,* April 22, 2020. https://time.com/5825145/coronavirus-rationing-health-care/ (accessed on May 11, 2020).

other situations, providers are limited by the tools at their disposal, even when already facing circumstances that are less than ideal. The result is that pandemic responders are now susceptible to the threat of substantial liability.[3]

Early evidence of medical lawsuit abuse

There is early evidence — based on personal injury attorney advertisements and aggressive domain name marketing — that solicitations for medical liability cases are on the rise.[4] These advertisements aim to, among other things, recruit as plaintiffs family members of those who became sick or died from COVID-19.[5] Anecdotal evidence from medical liability insurers cites notices received each week, informing them of potential claims being filed against their insureds.

The very healthcare professionals and facilities that are so dedicated to preserving and protecting the health of the American public should not face unwarranted legal action for their efforts to respond to the COVID-19 crisis. And yet, they still face the threat of medical liability lawsuits — which could come long after public memory of their sacrifices is forgotten — due to circumstances that are frequently beyond their control, such as closing offices and delaying elective surgeries or procedures as a result of government directives.

Above all else, Congress must do its part to ensure that our nation has as many healthcare professionals and facilities available as possible to treat the surge in patients brought on by the

[3] "U.S. doctors on coronavirus frontline seek protection from malpractice suits," *Reuters,* April 2, 2020. https://www.reuters.com/article/us-health-coronavirus-usa-lawsuits/u-s-doctors-on-coronavirus-frontline-seek-protection-from-malpractice-suits-idUSKBN21K2IQ (accessed on May 11, 2020).

[4] "COVID-19: Malpractice Risks When Treating Patients," *Medscape,* April 29, 2020. https://www.medscape.com/viewarticle/929635 (accessed on May 11, 2020).

[5] "Stopping a Lawsuit Epidemic," *The Wall Street Journal,* April 23, 2020. https://www.wsj.com/articles/stopping-a-lawsuit-epidemic-11587683263 (accessed on May 11, 2020).

outbreak. Our nation's healthcare system cannot achieve maximum capacity and capability, however, when healthcare professionals and facilities are asked to sacrifice so much while being simultaneously threatened with a future of numerous lawsuits based on circumstances not of their making.

Congress must protect patients

While more than a dozen states have taken early steps to protect pandemic responders and ensure their vital work can continue without the threat of medical liability lawsuits, a comprehensive pandemic response is unattainable if it is based on protections that vary from state to state.[6] The tremendous burden on our healthcare system created by COVID-19 has required many healthcare providers to practice across state lines, without the luxury of choosing to practice only in a state that has provided liability protections.

Additionally, not only are state liability waivers — whether through executive order or legislation — subject to challenge from personal injury attorneys, but many governors lack the legal authority to waive state laws, even during a situation as severe as the COVID-19 pandemic.

A national emergency needs a federal solution. Today, we are stating our unequivocal support for passing limited immunity with a targeted approach for healthcare providers, at the federal level.

Building on provisions adopted by Congress in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the HCLA supports incorporating language granting *targeted immunity from liability for healthcare professionals and the facilities in which they serve* in any

[6] "COVID-19 Liability Initiatives by State," *Health Coalition on Liability and Access.* http://protectpatientsnow.org/covid-19-resources/ (accessed on May 11, 2020).

future pandemic response legislation. Specifically, under the HCLA's proposal, this immunity provision would be triggered if:

- The act or omission occurred during the declared COVID-19 public health emergency or within 60 days of termination of the emergency;
- The act or omission occurred while providing or arranging care;
- The services were within the provider's scope of licensure/certification, without regard as to whether the service fell within the usual scope of practice; and
- The services were provided in good faith.

Additional actions covered by the provision would include those taken based on direction or guidance from any Federal, State, or local official/department/agency as well as those due to a lack of resources attributable to the declared emergency. Importantly, under the HCLA's proposal, healthcare professionals and the facilities in which they work would not be protected for gross negligence or willful misconduct. Furthermore, such protections are also distinctly different from liability issues faced by the business community, and in many ways, more urgent given the front-line role these pandemic responders have played from day one.

The HCLA's proposed legislative language, drafted with input from a range of key stakeholders, can be found in Appendix A.

Conclusion

Our nation's pandemic responders are already facing hundreds of medical liability lawsuits, which are likely to grow exponentially in the months ahead. Members of this committee, and your constituents, have been outspoken in support of healthcare providers in the wake of the COVID-19 pandemic. *You* now have the opportunity to help them by passing

targeted medical liability legislation that will protect their ability to continue to be there for patients when we need them most.

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Appendix A: Proposed COVID-19 Medical Liability Legislative Language

LIMITATION ON LIABILITY FOR HEALTH CARE PROFESSIONALS AND RELATED HEALTH CARE ENTITIES RELATED TO COVID-19 EMERGENCY RESPONSE.

(a) Limitation on Liability.--Except as provided in subsection (c), a health care professional and his or her related health care entity shall not be liable for damages under any law of the United States or of any State (or political subdivision thereof) for any harm caused by any act or omission of such health care professional or related health care entity in the course of arranging for or providing health care services if--

(1) the act or omission occurs during the public health emergency with respect to COVID-19 declared by the Secretary of Health and Human Services (referred to in this section as the "Secretary"') under section 319 of the Public Health Service Act (42 U.S.C. 247d) on January 31, 2020, or during the 60-day period following the date that the public health emergency is declared by the Secretary to have terminated;

(2) the act or omission occurs in the course of providing health care services that--

(A) are within the scope of the license, registration, or certification of the health care professional, as defined by the health care professional's State of licensure, registration, or certification;

(B) do not exceed the scope of license, registration, or certification of a substantially similar health professional in the State in which such act or omission occurs;

(C) may be outside the health care professional's normal area of practice; and

(D) are within the licensure and accreditation of the related health care entity; and

(3) the health care services in question were provided in good faith or were withheld for reasons related to the public health emergency.

(b) Additional Covered Acts.—Except as provided in subsection (c), the limitation on liability in subsection (a) shall apply to any act or omission--

(1) based upon any direction, guidance, recommendation, or other statement made by a Federal, State, or local official to address or in response to the public health emergency described in subsection (a) paragraph (1); or

(2) based upon any guidance published by any Federal, State or local department or any division or agency of such department in response to the public health emergency described in subsection (a) paragraph (1); or

(3) undertaken or omitted due to a lack of resources, including manpower, attributable to the public health emergency described in subsection (a) paragraph (1).

(c) Exceptions.--Subsections (a) and (b) do not apply if--

(1) the harm was caused by an act or omission constituting willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the health care professional or related health care entity; or

(2) the health care professional rendered the health care services under the influence (as determined pursuant to applicable State law) of alcohol or an intoxicating drug (other than where the health care professional is properly taking a prescription drug ordered by a physician).

(d) Preemption.--

(1) In general.--This section preempts the laws of a State or any political subdivision of a State to the extent that such laws are inconsistent with this section, unless such laws provide greater protection from liability.

(2) Volunteer protection act.--Protections afforded by this section are in addition to those provided by the Volunteer Protection Act of 1997 (Public Law 105-19).

(e) Definitions.--In this section--

(1) the term "harm" includes physical, nonphysical, economic, and noneconomic injury or losses;

(2) the term "health care professional" means an individual who is licensed, registered, or certified under Federal or State law to provide health care services;

(3) the term "related health care entity" means an entity with which a health care professional has a professional affiliation under which the health care professional performs health care services, including but not limited to a skilled nursing facility, hospital, academic medical center, ambulatory surgical center, group medical practice, or medical clinic;

(4) the term "professional affiliation" means staff privileges, medical staff membership, employment or contractual relationship, partnership or ownership interest, academic appointment, or other affiliation under which a health care professional provides health care services on behalf of, or in association with, the related health care entity;

(5) the term "health care services" means any services rendered or items provided by a health care professional or related health care entity, or by any individual working under the supervision of a health care professional, that relate to--

(A) the treatment, diagnosis, prevention, or mitigation of COVID-19;

(B) the treatment, diagnosis, or care with respect to an individual with a confirmed or suspected case of COVID-19; or

(C) the treatment, diagnosis, or care with respect to an individual who presents to a health care professional or related health care entity during the time period established in subsection (a) paragraph (1).

(f) Effective Date.--This section shall take effect upon the date of enactment of this Act.

Appendix B: HCLA Membership 2020

AMDA-The Society for Post-Acute and Long-Term Care Medicine American Academy of Dermatology Association
American Academy of Orthopaedic Surgeons
American Academy of Otolaryngology - Head and Neck Surgery
American Association of Neurological Surgeons
American College of Emergency Physicians
American College of Obstetricians and Gynecologists
American College of Surgeons
American Health Care Association
American Hospital Association
American Medical Association
American Osteopathic Association
American Society of Anesthesiologists
American Society of Plastic Surgeons
American Tort Reform Association
American Urological Association
Californians Allied for Patient Protection
Congress of Neurological Surgeons
Cooperative of American Physicians
COPIC Insurance Company
Federation of American Hospitals
ISMIE Mutual Insurance Company
MAG Mutual Insurance Company
Medical Assurance Company of Mississippi
Medical Insurance Exchange of California
Medical Professional Liability Association
Medical Protective Company
MLMIC Insurance
National Association of Spine Specialists
NORCAL Group
Physicians Insurance A Mutual Company
Piedmont Liability Trust
Premier health alliance
ProAssurance
Society for Vascular Surgery
SVMIC
Texas Alliance for Patient Access
Texas Medical Liability Trust
The Doctors' Company