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14 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 CITY AND COUNTY OF SAN FRANCISCO

17 MATERNAL AND CHILD HEALTH
18 ACCESS,

19 Petitioner,

20 vs.

21 MANAGED RISK MEDICAL
INSURANCE BOARD and CLIFF
ALLENBY, Chair of the Managed Risk
22 Medical Insurance Board,

23 Respondents.

CASE NO. CPF-08-508296

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR ISSUANCE OF
PEREMPTORY WRIT OF MANDATE
AND INJUNCTIVE RELIEF**

Hearing Date: November 25, 2008

Hearing Time: 9:30 a.m.

Judge: The Hon. Patrick J. Mahoney, Presiding
Dept.: 302

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INTRODUCTION

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2 Respondents dispute neither the facts (Opposition 2:18) nor the merits of Petitioner's
3 United States and California Constitutional claims. Instead, they assert that MRMIB, as an
4 administrative agency, lacks authority under Article III, § 3.5 to refrain from implementing the
5 six-month in-state residency requirement set forth in Insurance Code § 12698(a)¹ until an
6 *appellate* court determines the statute is unconstitutional. Opp. at 1:13-14; 4:14-17 and 26-28;
7 5:1-3.

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9 None of the authorities Respondents cite support this view, while ample authority,
10 starting with one of the earliest United States Supreme Court decisions, confirms the power of
11 this trial court to "say the law" and have its orders enforced. The addition of Article III, § 3.5 to
12 the California Constitution in 1978 limits the power of administrative agencies, not the judiciary.
13 Once this Court concludes that § 12698(a) is unconstitutional and issues its writ and related
14 orders, Respondents will indeed be legally obligated to comply with them. "When a superior
15 court issues a writ directed to an administrative agency to not enforce a statute because it is
16 unconstitutional. . .the administrative agency must obey that mandate." *Fenske v. Board of*
17 *Administration*, 103 Cal.App.3d 590, 595 (1980).

18
19 Moreover, because peremptory writs under CCP § 1085 redress public rights and enforce
20 public duties for groups of people (*see, e.g., Green v. Obledo*, 29 Cal.3d 126 (1981)),
21 Respondents will be bound to refrain from implementing § 12698(a)'s durational residency
22 requirement with respect to *any* woman. *See, Fenske, supra*, at 595-96.

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28 ¹ All references are to the California Insurance Code unless otherwise indicated.

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ARGUMENT

I. **An Administrative Agency Must Obey a Writ of Mandate Issued by a Superior Court Based on that Court's Determination that a Statute Is Unconstitutional, Regardless of Whether an Appellate Court has Previously Made a Similar Determination.**

Article III, § 3.5 was added to the California Constitution to clarify that state administrative agencies lack the authority to declare a statute or regulation unconstitutional after conflicting appellate decisions on the issue. *Southern Cal. Labor Mgmt. Operating Eng'rs Contract Compliance Comm. v. Aubry*, 54 Cal.App.4th 873, 887 (1st DCA 1997), quoting *Reese v. Kizer*, 46 Cal.3d 996, 1002 (1988) ("The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature."); 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 74, p. 165.

"The power of the administrative agency, and not the power of the superior court, is the subject matter of section 3.5." *Fenske*, 103 Cal.App.3d at 595.

Article III, § 3.5 was not intended to, and did not, divest California's trial courts of the inherent judicial authority to declare laws unconstitutional. Nor did it eliminate the authority of the trial courts to enforce their orders concerning statutes they determine to be unconstitutional in cases where the respondent happens to be an administrative agency. *Id.* at 595. "The power of the judiciary to declare laws unconstitutional is firmly entrenched as a basic principle of our government." *Id.* at 595, citing *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803).

The *Fenske* case involved a CCP § 1094.5 "administrative mandamus" action in which an employee challenged her individual retirement classification before the Board of Administration of the Public Employees' Retirement System (PERS). The trial court ruled that the state statute followed by PERS in reaching its decision violated equal protection. In

1 affirming on the merits, the Court of Appeal rejected the agency's contention that under Article
2 III, § 3.5, superior courts lacked the authority to decide constitutional questions. It also made
3 clear that administrative agencies may not use Article III, § 3.5 to avoid complying with a
4 superior court's ruling on a constitutional issue before an appellate court affirms:

5 When a superior court issues a writ directed to an administrative agency to not enforce a
6 statute because it is unconstitutional as it relates to an individual petitioner, or class of
7 petitioners, *the administrative agency must obey that mandate. . .*

8 *Id.* at 595 (emphasis added). As to the references in Article III, § 3.5(a) and (c) to appellate
9 court determinations, the *Fenske* Court explained that these simply reflect the doctrine of stare
10 decisis, *i.e.*, that only appellate courts can create binding precedent that must be applied in all
11 future cases. *Id.* at 595-96; *see also, Neary v. Regents of University of California*, 3 Cal.4th 273,
12 282 (1992) and *Henley v. Phillip Morris, Inc.*, 93 Cal.App.4th 824, 836, fn. 5 (1st DCA 2001),
13 both quoting *Fenske* at 596.

14 *Fenske* confirms that Article III, § 3.5 does not restrict judicial authority in any way or in
15 any type of proceeding. Trial courts may rule on the constitutionality of state laws and have their
16 orders applied against an administrative agency respondent just the same as in all other types of
17 cases.

18
19 Consistent with these principles, the writ issued by the trial court in *Fenske* under CCP §
20 1094.5 was effective when issued. Since "administrative mandamus" actions are inherently
21 limited to review of an administrative agency's action against a particular person, the *Fenske*
22 writ enjoined application of the statute only as to Ms. Fenske herself. Where, as here, the action
23 is brought under CCP 1085 for a "public interest" peremptory writ to declare a law
24 unconstitutional on its face, a trial court writ is likewise immediately effective, but also has a
25 correspondingly broader effect and applies to all affected individuals, as discussed immediately
26 below.
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1 **II. Once this Court Issues its Peremptory Writ Under CCP § 1085, Respondent Will**
2 **Be Legally Prohibited From Applying the Unconstitutional Provision of §12698(a)**
3 **in the AIM Program to Any Woman.**

4 Petitioner MCHA seeks a “peremptory writ of mandamus” under CCP § 1085
5 challenging § 12698(a) on its face, to redress a public right on behalf of all women injured by
6 AIM’s unconstitutional durational residency restriction and to enforce a public duty to refrain
7 from discriminating against *all* pregnant women eligible for health insurance under AIM who
8 have exercised their constitutional right to travel freely among states and to settle in California.
9 In CCP § 1085 peremptory writ actions in the public interest, a trial court can enjoin an
10 administrative agency from implementing an unconstitutional law challenged on its face with
11 respect to *any* affected individual.

12 In *Green v. Obledo*, 29 Cal.3d 126 (1981), the Supreme Court reaffirmed long-standing
13 precedent that a single petitioner, even one without a personal stake in the outcome, may seek to
14 compel enforcement of a public duty for a large group of affected persons through a CCP § 1085
15 peremptory writ proceeding:
16

17 [W]here the question is one of public right and the object of the mandamus is to
18 procure the enforcement of a public duty, the relator need not show that he has any legal
19 or special interest in the result, since it is sufficient that he is interested as a citizen in
20 having the laws executed and the duty in question enforced. . . The exception promotes
the policy of guaranteeing citizens the opportunity to ensure that no governmental body
impairs or defeats the purpose of . . . a public right.

21 29 Cal.3d at 144, citing *Bd. of Soc. Welf. v. County of L.A.*, 27 Cal.2d 98, 100 (1945).

22 California courts have regularly followed *Green* and commanded state officials in CCP §
23 1085 peremptory writ proceedings brought by individual petitioners to comply with the law for
24 the benefit of the public interest and all affected persons. *See e.g., Conlan v. Bontá*, 102
25 Cal.App.4th 745, 763 (1st DCA 2002) (CCP § 1085 writ compelling State Department of Health
26 Services (DHS) to meet its public duty to provide a mechanism for reimbursing health care bills
27 paid by potentially millions of Medi-Cal beneficiaries issued in action brought by only three
28

1 individual petitioners who had already been reimbursed); *Timmons v. McMahon*, 235
2 Cal.App.3d 512, 518 (1991) (State Department of Social Services' (DSS) duty to correctly
3 determine eligibility for public benefits for all affected persons enforced in CCP § 1085 action
4 brought by one petitioner whose individual public benefits case had already been resolved);
5 *Hansen v. Department of Social Services*, 193 Cal.App.3d 283, 287 (1987)(CCP § 1085 writ
6 issued compelling DSS to lawfully administer public assistance to all homeless applicants in
7 action brought by non-homeless individuals).

8
9 In cases involving a question of public right, such as the instant one, organizations, like
10 Petitioner Maternal and Child Health Access, may also avail themselves of CCP § 1085
11 peremptory writ proceedings to compel a state administrative agency to comply with its public
12 duty for the benefit of large groups of persons. *See, e.g., California Housing and Homeless*
13 *Coalition v. Anderson*, 31 Cal.App.4th 450, 457 (1st DCA 1995).

14
15 Respondents attempt to minimize the impacts of AIM's unconstitutional durational
16 residency requirement on otherwise eligible pregnant women with several contentions that are
17 irrelevant to the constitutional issues. Whatever the accurate number of affected women is,
18 Respondents' public duty is not to discriminate against *any* new migrants who would otherwise
19 qualify for AIM during their pregnancies.

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21 Moreover, Respondents' "facts" are speculative or inaccurate and reflect a profound
22 misunderstanding of the world in which uninsured working poor women seek to survive.

23
24 First, Respondents claim that only 32 women at most each year are denied health
25 insurance during their pregnancies as a result of AIM's durational residency requirement. Opp.
26 3:22-23. Yet even the Governor in his 2007 veto message for the bill that would have ended
27 AIM's unconstitutional eligibility rule gave an estimate of almost triple that amount.
28 Declaration of Lynn Kersey, M.A., M.P.H., ¶ 8; Exh. 9 (2007 AB 1328 Veto Message; Exh. 3

1 (Senate Budget Committee Estimate, AIM). Experts believe it may be even higher. Kersey
2 Dec., ¶ 9. And Respondents' estimate utterly ignores the number of women who delay applying
3 for AIM until after their sixth month as California residents, or whose applications are rejected
4 because by the time the sixth month of California residency arrives, the 30-week (about 7 ½
5 months) of the pregnancy has passed, which disqualifies the woman from AIM on that separate
6 ground. *See*, Title 10, California Code of Regulations, § 2699.201(d)(1)(H).

7
8 Second, Respondents speculate that only women who fail to sign their AIM applications
9 are among those potentially affected by AIM's unconstitutional durational residency
10 requirement. *Opp.* 3:16. This view conveniently ignores the significant deterrent effect from
11 the broad publication of AIM's eligibility rules: it is far more likely that, rather than submit an
12 unsigned application, newcomer women simply decline to apply for AIM when they learn they
13 do not meet the published eligibility requirements. Kersey Dec., ¶¶ 5-6.

14
15 Respondents also seem to imply that women may obfuscate the length of residence in
16 this state when applying for AIM, since the format of the declarations page makes it impossible
17 to know which of the several statements is untrue and the program allegedly does nothing to
18 verify the truth of any of the declarations. *Opp.* 3:7-15. There is no proof whatsoever that
19 women who have resided in California for less than six continuous months attempt to obtain
20 AIM benefits by somehow concealing their newcomer status during the application process. To
21 the contrary, applicants for state-funded programs, including AIM, are often terrified of being
22 accused of providing false information or withholding the truth and of the serious risks they
23 perceive from such conduct.²
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26 ²As recently as this month, for example, a criminal conviction was upheld against a woman who
27 was found to have provided inaccurate information about where her young child lived when she
28 applied for welfare cash assistance and Food Stamps. *People v. Ramirez*, 2008 Cal.App. LEXIS
1732 (Nov. 6, 2008). *See also*, *People v. Garcia*, 39 Cal. 4th 1070 (2006) (felony conviction in
welfare overpayment case where an administrative hearing officer had previously ruled that the

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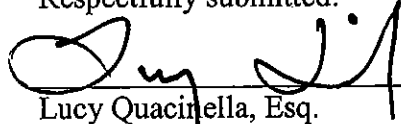
CONCLUSION

AIM's six-month in-state residency requirement discriminates against bona fide "new" California residents seeking vital health services during pregnancy and thus violates the United States and California Constitutions under a long line of federal and state decisions reaching back nearly 40 years to *Shapiro v. Thompson*, 394 U.S. 618 (1969).

This Court should issue a peremptory writ of mandamus and a permanent injunction under CCP § 1085 ordering Respondents to refrain from implementing § 12698(a)'s durational residency requirement in the AIM program.

Dated: November 18, 2008

Respectfully submitted:



Lucy Quacintella, Esq.
American Civil Liberties Union Foundation
of Northern California
Bay Area Legal Aid
Lawyers' Committee for Civil Rights
of the San Francisco Bay Area

Attorneys for Petitioner

overpayment was the result of the administrative agency's error in processing information from a mother about where two of her four young children lived; remanded to Court of Appeal for further proceedings on collateral estoppel.)

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Maternal and Child Health Access v. Managed Risk Medical Insurance Board,
Case No, CPF008-508296

I, Nigar Shaikh, declare that I am employed in the City and County of San Francisco, over the age of 18 years, and not a party to the within action or cause. My business address is 39 Drumm St., San Francisco, CA 94111. On November 18, 2008, I served a copy of the attached:

- 1) **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ISSUANCE OF PEREMPTORY WRIT OF MANDATE AND INJUNCTIVE RELIEF**
- 2) **DECLARATION OF LYNN KERSEY, M.A., M.P.H. IN SUPPORT OF MOTION FOR ISSUANCE OF PEREMPTORY WRIT OF MANDATE AND INJUNCTIVE RELIEF**
- 3) **COPIES OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF REPLY MEMORANDUM**

by sending the documents via facsimile, based on an agreement of the parties to accept service by fax. I also served a copy of the aforementioned documents by placing a true copy in a sealed envelope and personally delivering them to:

Benjamin J. Riley
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 18, 2008 at San Francisco, California.



Nigar Shaikh