
In the
Court of Appeal
of the
State of California
FIRST APPELLATE DISTRICT
DIVISION _____

A _____

MICHAEL E. BARRI, D.C.,
TRISTAR MEDICAL GROUP, PROFESSIONAL CORPORATION,
and COALITION FOR SENSIBLE WORKERS' COMPENSATION REFORM,
Petitioners,

v.

THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA,
Respondent.

WRIT PETITION FILED PURSUANT TO CALIFORNIA LABOR CODE § 5955
(RELIEF REQUESTED UNDER CCP § 1085, CHALLENGING SB1160 AND AB1244)

**PETITION FOR PEREMPTORY AND/OR ALTERNATIVE WRITS OF MANDATE,
PROHIBITION AND/OR OTHER APPROPRIATE RELIEF**

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION NO.**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court 8.208, 8.488, 8.495(c), or 8.498(d)

Court of Appeal Case Caption:

Michael E. Barri, D.C., et al., v. Workers' Compensation Appeals
Board

Court of Appeal Case Number: No.

Please check here if applicable:

There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person Information, if necessary.

/s/ Stephen Silverman

February 14, 2017

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PETITION

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT:

Petitioners Michael E. Barri, D.C. (“Dr. Barri”), Tristar Medical Group, Professional Corporation (“Tristar”), and Coalition for Sensible Workers’ Compensation Reform (collectively, the “Petitioners”), petition this Honorable Court pursuant to California Labor Code Section 5955 and California Code of Civil Procedure Section 1085 for a peremptory and/or alternative writ of mandate, prohibition, and/or other appropriate relief directing Respondent Workers’ Compensation Appeals Board (“WCAB”) to perform its duties under the United States Constitution, the California Constitution, and California law, to adjudicate Tristar’s workers’ compensation lien claims in the ordinary course, and to not enforce or attempt to enforce certain unconstitutional statutory provisions that took effect on January 1, 2017.

Petitioners further request that this Court take immediate action since their fundamental constitutional rights are endangered in the absence of such action.

In support thereof, Petitioners allege by this verified petition as follows:

INTRODUCTORY STATEMENT

1. This Petition challenges the constitutionality of certain provisions of two recently-enacted California workers' compensation laws known as Senate Bill 1160 ("SB 1160") and Assembly Bill 1244 ("AB 1244"). Absent immediate relief, which this Court has original subject-matter jurisdiction to order under California Labor Code Section 5955, Dr. Barri and other workers' compensation lien claimants in Dr. Barri's position face the loss of their constitutional right to counsel, and lien claimants across the state risk the cancellation of their valid workers' compensation liens and irreparable harm to their businesses.

2. Petitioners Dr. Barri and Tristar provided medical, chiropractic, and related services to injured workers. They provided such services without immediate payment in reliance on their statutory right under long-established California law to obtain compensation through workers' compensation "liens" filed in connection with the injured workers' claims against their employers. Through this action, Petitioners challenge three provisions of SB 1160 and AB 1244 that collectively amount to an improper attempt, in violation of the United States and California Constitutions, to destroy or significantly hamper the ability of lien claimants to collect on their liens and participate in the workers' compensation system. These three provisions are among the most recent

efforts in an ongoing legislative and regulatory effort to fight medical billing fraud, which has simply been taken too far.

3. First, Petitioners challenge a provision of SB 1160 that imposes an automatic stay on *all* workers' compensation liens filed by a provider who is criminally charged with workers' compensation or several other poorly-defined categories of fraud. Cal. Lab. Code § 4615 (a) (the "Lien Stay Provision"). Importantly, the Lien Stay Provision does not just stay any liens that are connected to the alleged fraud. Rather, the automatic stay applies even to untainted liens with no connection whatsoever to any alleged wrongful conduct. *Id.* The stay lasts until the criminal case is resolved, which in the case of complex medical billing fraud cases can take several years.

4. Under controlling United States Supreme Court precedent, the Lien Stay Provision violates the rights of charged lien claimants who rely upon their untainted liens to pay for counsel of their choice to defend themselves in a criminal proceeding. *See Luis v. United States*, __U.S. __, 136 S.Ct. 1083 (2016). The Lien Stay Provision also violates due process as well as the right to petition the courts under the United States and California Constitutions because: a) it authorizes such stays without any showing (not even a showing of probable cause) that the liens are connected to the conduct alleged in the criminal proceeding; b) it imposes indefinite and lengthy stays on the rights of lien claimants to adjudicate

their untainted liens before the WCAB; and c) as applied to organizational lien claimants, it results in a stay on liens brought on behalf of uncharged as well as charged providers.

5. Second, Petitioners challenge a provision of AB 1244 that creates a new administrative procedure for suspending providers from participating in the workers' compensation system because, among other reasons, they have been convicted of a broad range of poorly-defined criminal conduct. Cal. Lab. Code §§ 139.21 (a)-(d) (the "Suspension Provision"). The Suspension Provision violates the prohibition against ex post facto laws because it retroactively imposes additional punishments on those previously convicted of certain criminal offenses. The provision also is improperly vague under the United States and California constitutions because its applicability to convictions for various crimes is broadly worded and poorly defined, thus impermissibly permitting it to be applied on an arbitrary and discriminatory basis.

6. Third, Petitioners challenge a provision of AB 1244 that creates a new administrative procedure for adjudicating the liens of providers who have been convicted of the same broad range of poorly-defined criminal conduct at issue in the Suspension Provision. Cal. Lab. Code §§ 139.21 (a)(1)(A), (e)-(i) (the "Special Lien Proceeding Provision"). The Special Lien Proceeding Provision violates due process under the United States and California constitutions because it requires

providers to prove that none of their liens arise from, or are connected to, “criminal, fraudulent, or abusive conduct or activity”, Cal. Lab. Code § 139.21 (g), without any initial showing of probable cause that the liens actually are connected to their convictions. In other words, providers who have been convicted of any form of medical billing fraud, of even the slightest amount, having nothing to do with their workers’ compensation liens, are forced to prove in a special hearing that none of their liens are connected to any broadly-defined wrongful activities. This procedure violates well-established principles of due process.

7. For the same reasons as the Suspension Provision, the Special Lien Proceeding Provision violates the prohibition against ex post facto laws and is improperly vague under the United States and California constitutions.

8. The WCAB must comply with and enforce these new provisions, which became effective on January 1, 2017, notwithstanding these serious constitutional questions. *See* Cal. Const., art. III, § 3.5. Petitioners therefore seek immediate relief from this Court to prohibit Respondent WCAB from enforcing and complying with these unconstitutional provisions, and to compel the WCAB to adjudicate all lien claims, including those of Petitioners, on the merits in the ordinary course. This Petition raises purely legal questions, which do not require factual development in a lower court.

9. Prompt action is essential. The new provisions took effect on January 1, 2017. Dr. Barri and Tristar, along with similarly situated lien claimants, will suffer irreparable injury if the Court does not immediately grant the requested relief. California already has applied the Lien Stay Provision to Dr. Barri's liens, and approximately 200,000 other liens valued at over one billion dollars.

10. Absent immediate relief, under the Lien Stay Provision, Dr. Barri will be deprived of his constitutional right to secure counsel of his choice in the criminal proceeding pending against him. Without the income provided by untainted liens, Dr. Barri simply cannot afford capable counsel. In addition, lienholders like Tristar whose liens are indefinitely stayed will be unable to pay the filing fees for new liens (large filing fees were imposed beginning in 2013 pursuant to Senate Bill 863) and will permanently lose the right to file those liens as the statutes of limitations expire. Ultimately, businesses like Tristar whose accounts receivable are effectively frozen by the stay will be destroyed.

11. In addition, providers who are convicted of any charge that could potentially fall within the scope of the vaguely-worded triggers under the Suspension and Special Lien Proceeding Provisions will face the risk of suspension, the improper forfeiture of their liens, and the destruction of their businesses.

THE PARTIES

12. PETITIONER Michael E. Barri, D.C. resides in Dana Point, Orange County, California and is a former workers' compensation provider of chiropractic services to injured workers on a lien basis. Dr. Barri also has an ownership interest in Tristar, the medical group through which he treated patients and which filed liens for his services. Dr. Barri has a beneficial interest in this Petition because he is the subject of pending criminal charges, and the application of the Lien Stay Provision will result in the indefinite stay of liens seeking compensation for his services, none of which have any connection whatsoever to the pending charges. The liens that will be stayed provide Dr. Barri with his sole source of income, and a stay will make it impossible for Dr. Barri to pay his defense attorneys' fees and his living expenses. Dr. Barri also has a beneficial interest in this Petition because he has received a notice stating that as a result of the guilty plea he entered to certain criminal charges in 2016, before the Suspension Provision was enacted, he is to be suspended from participating in the workers' compensation system pursuant to the Suspension Provision. Finally, Dr. Barri has a beneficial interest in this Petition because he and Tristar will have the burden in a special lien proceeding of defending all the liens for Dr. Barri's services, even though absolutely no showing has been made that there is probable cause to believe Dr. Barri's liens are connected to his criminal conviction.

13. PETITIONER Tristar Medical Group, Professional Corporation (“Tristar”), is a professional corporation incorporated in the state of California with its principal place of business in Santa Ana, California. Tristar is a multi-specialty medical group that provided medical, chiropractic, and related services to injured workers on a lien basis. Dr. Barri provided his services through, and has an ownership interest in, Tristar. All liens for Dr. Barri’s services are filed by Tristar, including any liens that are stayed because of Dr. Barri’s pending criminal charges, or subjected to the special lien proceeding because of Dr. Barri’s former guilty plea. Tristar therefore has a beneficial interest in this Petition.

14. PETITIONER Coalition for Sensible Workers’ Compensation Reform (“Coalition”) is a nonprofit, mutual benefit corporation incorporated in California and with its principal place of business located in Los Angeles, California. It is an independent, voluntary association of workers’ compensation providers. The Coalition’s objective is to promote equitable and sensible reform of the workers’ compensation system with the goal of eliminating fraud, abuse and unfair business practices by providers and insurance carriers alike, while protecting the legal rights and interests of providers. As workers’ compensation providers, the members of the Coalition have a beneficial interest in this Petition.

15. RESPONDENT is the California Workers' Compensation Appeals Board. The WCAB is responsible for the judicial function of the workers' compensation system and for adjudicating lien claims. The WCAB's headquarters are located in San Francisco, California.

SUBJECT MATTER JURISDICTION

16. This Court has original subject matter jurisdiction over Petitioners' claims, which allege that certain provisions of the workers' compensation statutory scheme violate the United States and California Constitutions. *See* Cal. Lab. Code § 5955; *Greener v. Workers' Compensation Appeals Board*, 6 Cal.4th 1028 (1993) (constitutional challenges to workers' compensation statutes must be made by petition for writ to the California Court of Appeal; such challenges cannot be made in the WCAB or Superior Court).

GENERAL ALLEGATIONS

17. In the final days of the biennial legislative session in August 2016, the California legislature passed SB 1160 and AB 1244. These bills contain three provisions challenged in this lawsuit that went into effect on January 1, 2017: the Lien Stay Provision, Cal. Lab. Code § 4615 (a); the Suspension Provision, Cal. Lab. Code §§ 139.21 (a)-(d); and the Special Lien Proceeding Provision, Cal. Lab. Code §§ 139.21 (a)(1)(A), (e)-(i).

18. The Lien Stay Provision imposes an "automatic" stay on "[a]ny lien filed by or on behalf of a physician or provider of medical

treatment services”, upon “the filing of criminal charges against that physician or provider for an offense involving fraud against the workers’ compensation system, medical billing fraud, insurance fraud, or fraud against the Medicare or Medi-Cal programs.” Cal. Lab. Code § 4615 (a). The automatic stay applies to *all* of the charged provider’s liens, not just those that have a nexus to the alleged wrongful conduct. *See id.*

19. Moreover, the stay remains in effect “from the time of the filing of the charges until the disposition of the criminal proceedings.” *Id.* Criminal cases involving alleged medical billing fraud are typically complex and take years to resolve, meaning a provider’s liens will often be stayed for several years.

20. In effect, the Lien Stay Provision results in an automatic and indeterminate pretrial seizure of providers’ accounts receivable without any showing that those assets are in any way connected to the alleged criminal conduct. Moreover, the only way to apply an automatic stay to the liens of a criminally-charged provider who is employed by an organization is to stay all the liens of that organization, resulting in an arbitrary and over-inclusive application of the Lien Stay Provision and injuring other providers who are entirely innocent of any misconduct.

21. Such indefinite and overbroad seizures make it impossible for some criminally charged providers to retain counsel, prevent providers from adjudicating untainted liens in WCAB administrative proceedings,

will result in the extinguishment of future lien claims of claimants who cannot afford to pay filing fees due to the lien stay, and will effectively run many providers out of business by indefinitely freezing their accounts receivable.

22. The Suspension Provision creates a new administrative procedure for suspending providers from participating in the workers' compensation system. It requires the prompt suspension of "any physician, practitioner, or provider from participating in the workers' compensation system as a physician, practitioner, or provider" who has been convicted of a range of ill-defined crimes. Cal. Lab. Code § 139.21 (a)(1)(A).

23. The vague description of potential crimes covered by the Suspension Provision leaves it ripe for arbitrary application. It covers any felony or misdemeanor where the crime "involves fraud or abuse of Medi-Cal program, Medicare program, or workers' compensation system, or fraud or abuse of any patient"; "relates to the conduct of the individual's medical practice as it pertains to patient care"; "is a financial crime that relates to the Medi-Cal program, Medicare program, or workers' compensation system"; or "is otherwise substantially related to the qualifications, functions, or duties of a provider of services." Cal. Lab. Code § 139.21 (a)(1)(A).

24. The Suspension Provision also retroactively increases the punishment of lien claimants convicted for conduct that occurred before the

provision was enacted. The provision is essentially criminal because it is punitive in purpose and effect: it is triggered by a criminal conviction, it destroys the provider's existing business, and it permanently bars the provider from serving injured workers.

25. The Special Lien Proceeding Provision creates a new administrative procedure for dismissing the liens of providers who have been suspended under the Suspension Provision due to a criminal conviction. The Special Lien Proceeding Provision authorizes a "special lien proceeding attorney" to identify liens of the provider that are subject to disposition in the "special lien proceeding" – and thus initiate the process of dismissing liens without having to present a shred of evidence (much less probable cause) that the liens are connected to the wrongful conduct for which the lien claimant was convicted. Cal. Lab. Code § 139.21 (f).

26. Even worse, the bill creates a "presumption affecting the burden of proof" that all the liens and underlying bills and claims "arise from the conduct subjecting the physician, practitioner, or provider to suspension," and that payment is not due on the liens because they "arise from, or are connected to, criminal, fraudulent, or abusive conduct or activity." Cal. Lab. Code § 139.21 (g). The claimant has no right to payment unless he or she "rebutts that presumption by a preponderance of the evidence." *Id.* In other words, the special lien proceeding forces upon lien claimants the burden of proving a broadly-worded negative – that all

their liens are unconnected to any “criminal, fraudulent, or abusive conduct or activity” – when the state has not even established probable cause that such a connection exists.

27. The Special Lien Proceeding Provision also retroactively increases the punishment of lien claimants convicted for conduct that occurred before the provision was enacted. The provision is essentially criminal because it is punitive in purpose and effect: it is triggered by a criminal conviction, and rather than simply resulting in the disgorgement of illegally gained profits, it creates a procedure for cancelling all of a convicted provider’s liens if the provider cannot prove the absence of the broadly-worded negative.

28. In addition, as described above, the vague description of potential crimes that trigger the Suspension as well as the Special Lien Proceeding Provisions leaves it ripe for arbitrary application. The overbreadth of the Special Lien Proceeding Provision is made even worse by the fact that it applies not only to liens filed by or on behalf of the specific doctor or other provider convicted of a predicate offense, but to all liens filed by any entity in which the provider has an ownership interest, again subjecting doctors who are entirely innocent of any misconduct to potential forfeiture of their liens following an unprecedented procedure where their liens are presumed to be fraudulent and the burden of proof is reversed. Cal. Lab. Code § 139.21 (e).

CAUSE OF ACTION

WRIT OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF COMPELLING RESPONDENT TO FOLLOW ITS DUTIES UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

(Lien Stay Provision)

29. Petitioners incorporate by reference and reallege each and every allegation set forth in this Petition.

30. Under the Sixth Amendment to the United States Constitution and Article I, Section 15 of the California Constitution, Dr. Barri has the right to select and retain the counsel of his choice to represent him in the criminal proceedings pending against him.

31. Tristar's accounts receivable, which are comprised of its lien claims, are Dr. Barri's only significant asset and are the only substantial source of funds available to pay for his criminal defense attorney. None of Tristar's lien claims have any connection to the charges pending against Dr. Barri.

32. Because the Lien Stay Provision deprives Dr. Barri and Tristar of their untainted assets before Dr. Barri's trial, thereby depriving Dr. Barri of the financial means to defend the criminal charges against him, it violates Dr. Barri's rights under the United States and California Constitutions.

33. Petitioners have a constitutionally protected interest in their right to payment as reflected in Tristar's workers' compensation liens. Petitioners also have a constitutionally protected interest in Tristar's right to file claims for compensation pursuant to the liens process.

34. The automatic and indefinite application of the Lien Stay Provision to all of Tristar's liens without any showing of probable cause that the liens are connected to Dr. Barri's alleged wrongful activity, violates Petitioners' right to due process under the California and United States Constitutions, as well as their rights to petition for the redress of grievances under the California Constitution.

(Suspension Provision)

35. Petitioners incorporate by reference and reallege each and every allegation set forth in this Petition.

36. Dr. Barri has been notified that the Suspension Provision is to be applied to him, an improper application of a prospective law.

37. If interpreted to apply retroactively, the Suspension Provision violates the prohibition against ex post facto laws because it retroactively increases the punishment of providers convicted for conduct that occurred before the provision was enacted.

38. The Suspension Provision is unconstitutionally vague in that it fails to inform an ordinary person of the criminal conduct that would result in the application of the special lien proceeding to a convicted

provider's liens and, further, fails to provide reasonable standards to guide enforcement. It therefore may be unconstitutionally applied in an arbitrary and discriminatory basis.

(Special Lien Proceeding Provision)

39. Petitioners incorporate by reference and reallege each and every allegation set forth in this Petition.

40. Tristar has a constitutionally protected interest in its right to payment as reflected in its workers' compensation liens. Tristar also has a constitutionally protected interest in its right to file claims for compensation pursuant to the liens process.

41. Because Dr. Barri has been notified that he is subject to the Suspension Provision, and the Special Lien Proceeding Provision applies to any liens filed by a corporation in which a suspended provider has an interest, Tristar faces a risk that the Special Lien Proceeding Provision will be applied to Tristar's liens.

42. The anticipated application of the Special Lien Proceeding Provision to all of Tristar's liens without a showing of probable cause that any of the liens are connected to criminal conduct, while at the same time imposing a presumption that all the liens are connected to "criminal, fraudulent, or abusive conduct or activity," and thus subject to cancellation, violates Tristar's right to due process under the California and United

States Constitutions, as well as its right to petition for the redress of grievances under the California Constitution.

43. The Special Lien Proceeding Provision should apply prospectively. If applied retroactively, it violates the prohibition against ex post facto laws because it increases the punishment of lien claimants convicted for conduct that occurred before the provision was enacted.

44. Finally, the Special Lien Proceeding Provision is unconstitutionally vague in that it fails to inform an ordinary person of the criminal conduct that would result in the application of the special lien proceeding to a convicted provider's liens and, further, fails to provide reasonable standards to guide enforcement. It therefore may be unconstitutionally applied in an arbitrary and discriminatory basis.

(All Provisions)

45. Petitioners incorporate by reference and reallege each and every allegation set forth in this Petition.

46. With the adoption of SB 1160's Lien Stay Provision, as well as the adoption of AB 1244's Suspension and Special Lien Proceeding Provisions, the WCAB is required to implement these unconstitutional provisions, and is prohibited from performing its legal duty to adjudicate affected lien claims on their merits. The WCAB's continued enforcement of these new unconstitutional provisions thereby exceeds its lawful powers and authority.

47. Petitioners have a clear, present, legal right to compel the WCAB to perform its legal obligations by not implementing these new unconstitutional provisions and by allowing Tristar's lien claims to be adjudicated without imposing these unconstitutional provisions. Petitioners have a beneficial interest in the WCAB permitting Tristar's lien claims to be adjudicated in the usual course and without applying these unconstitutional provisions.

48. Issuance of a writ of mandate, prohibition, and/or other appropriate relief is required because there exists no plain, speedy, and adequate remedy in the ordinary course of law that would protect Petitioners' rights and interests.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court:

49. Immediately issue a peremptory writ of mandate, prohibition, and/or other relief:

(1) compelling the WCAB to follow its duties under the United States Constitution, the California Constitution, and state law, to adjudicate Tristar's lien claims in the usual course, and to not enforce or attempt to enforce the unconstitutional Lien Stay, Suspension, or Special Lien Proceeding Provisions; and

(2) commanding the WCAB, its agents, employees, officers, and representatives not to enforce or attempt to enforce the

unconstitutional Lien Stay, Suspension, or Special Lien Proceeding Provisions;

50. In the alternative, issue an alternative writ of mandate, prohibition, and/or other relief:

(1) compelling the WCAB to follow its duties under the United States Constitution, the California Constitution, and state law, to adjudicate Tristar's lien claims in the usual course, and to not enforce or attempt to enforce the unconstitutional Lien Stay, Suspension, or Special Lien Proceeding Provisions; and

(2) commanding the WCAB, its agents, employees, officers, and representatives not to enforce or attempt to enforce the unconstitutional Lien Stay, Suspension, or Special Lien Proceeding Provisions;

until further order of this Court, compelling the WCAB to show cause before this Court, at a time and place specified by this Court, as to why a peremptory writ of mandate, prohibition, and/or other relief should not issue;

51. On return of any alternative writ of review, and hearing on the Order to Show Cause, issue a peremptory writ of mandate, prohibition, and/or other relief:

(1) compelling the WCAB to follow its duties under the United States Constitution, the California Constitution, and state law, to

adjudicate Tristar's lien claims in the usual course, and to not enforce or attempt to enforce the unconstitutional Lien Stay, Suspension, or Special Lien Proceeding Provisions; and (2) commanding the WCAB, its agents, employees, officers, and representatives not to enforce or attempt to enforce the unconstitutional Lien Stay, Suspension, or Special Lien Proceeding Provisions;

52. Award to Petitioners their costs of suit; and

53. Grant such other and further relief to which Petitioners may

be justly entitled.

February 14, 2017

/s/ Glen E. Summers

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**VERIFICATION OF MICHAEL E. BARRI, D.C. AND
TRISTAR MEDICAL GROUP, PROFESSIONAL
CORPORATION**

I, Michael E. Barri, hereby declare as follows:

I am a Petitioner in this matter. I am also the CEO and a shareholder of Tristar Medical Group, Professional Corporation (“Tristar”), also a Petitioner in this matter.

I have read the PETITION FOR WRIT OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF and know its contents. The facts alleged in this matter regarding myself and Tristar are within my own personal knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed this 14th day of February, 2017, in Dana Point, California.

/s/ Michael E. Barri

Michael E. Barri, on his own behalf
and on behalf of Tristar Medical
Group, Professional Corporation

**VERIFICATION OF COALITION FOR SENSIBLE
WORKERS' COMPENSATION REFORM**

I, Glen E. Summers, hereby declare as follows:

I am counsel for Petitioner Coalition for Sensible Workers' Compensation Reform in this action. I have read the PETITION FOR WRIT OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF and know its contents. The facts alleged in this matter regarding the Coalition for Sensible Workers' Compensation Reform are within my own personal knowledge, and I know these facts to be true, based on my representation of the Coalition for Sensible Workers' Compensation Reform.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed this 14th day of February, 2017, in Denver, Colorado.

/s/ Glen E. Summers
Glen E. Summers

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioners Dr. Barri and Tristar are providers of medical care, chiropractic care, and related services to workers' compensation claimants. For many years, they served California's injured workers without immediate payment in reliance on their right under California law to obtain payment through workers' compensation liens. These liens give providers a security interest in the workers' claims, allow providers to participate in the prosecution of the claims, and permit providers to recover reasonable compensation for their services.

In the summer of 2016, the California legislature hastily enacted SB 1160 and AB 1244, two laws that dramatically restrict the rights of workers' compensation service providers, in a purported attempt to address fraud in the system. 2016 Cal. St. Ch. 868 (Ex. 1); 2016 Cal. St. Ch. 852 (Ex. 2). In reality, SB 1160's Lien Stay Provision has the effect of preventing providers like Dr. Barri from retaining counsel of their choice; freezing the untainted assets of providers like Tristar without probable cause and thus preventing them from paying the hefty filing fees for new legitimate lien claims and resulting in the forfeiture of those liens on statute of limitations grounds; and ultimately destroying businesses like Tristar whose untainted assets are indefinitely frozen. AB 1244's Suspension and Special Lien Proceeding Provisions effectively give the state unlimited

discretion to initiate permanent suspensions and lien cancellations as to a wide range of lien claimants like Dr. Barri who have been convicted of various poorly-defined offenses. The state seeks to apply these provisions retroactively to conduct that occurred before the provisions were enacted, in order to permanently shut down the affected providers' businesses and cancel their liens without any showing of probable cause. The businesses and liens impacted by SB 1160 and AB 1244 are valued in the billions of dollars, with California already having applied the Lien Stay Provision to 200,000 liens valued at over one billion dollars. (Ex 18 at 361, California Dept. of Indus. Relations, News Release, dated Jan. 18, 2017.)

For these reasons, the Lien Stay Provision of SB 1160, and the Suspension and Special Lien Proceeding Provisions of AB 1244 violate the state and federal constitutional rights of Petitioners. Petitioners will suffer irreparable harm unless this Court immediately enters a writ of prohibition, mandate, and/or other appropriate relief prohibiting the WCAB from enforcing the provisions and requiring the WCAB to continue adjudicating lien claims on their merits in the ordinary course and as if the provisions had not been enacted.

BACKGROUND

I. The Workers' Compensation System

Under the workers' compensation system, employers generally have a mandatory duty to make medical care available to workers who are

injured on the job. In exchange, the employer receives the benefit of a limitation on the injured worker's remedies under tort law. California, one of the first states to develop a comprehensive workers' compensation system, did so under legislation enacted pursuant to Article XIV, section 4 of the California Constitution. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 24 Cal.4th 800, 810-11 (2001); 1-1 Rassp & Herlick, *California Workers' Compensation Law* § 1.01 (Lexis 2016) ("Rassp & Herlick").

Where an employer fails to make medical treatment available to a worker, refuses to acknowledge that the employee's condition was the result of a work-related injury, or does not offer the specific treatment needed by the worker, the injured worker is often forced to "self-procure" care from outside medical providers. If the self-procured medical care is "reasonably required to cure or relieve the injured worker from the effects of his or her injury," the employer is liable for the costs of those services. Cal. Lab. Code § 4600 (a).

An employee may also seek reimbursement for "medical-legal" expenses, which are costs incurred for the purpose of proving a contested workers' compensation claim. Cal. Lab. Code § 4620 (a). Medical-legal costs include expenses associated with medical evaluations, and diagnostic services. *See id.*

An employee initiates a workers' compensation claim by submitting a claim form to his employer after a work-related injury. (Ex. 3 at 93, Cal. Dept. of Indus. Relations, *Workers' Compensation in California: A Guidebook for Injured Workers 12* (6th ed. Apr. 2016).) The employer, usually through a claims administrator who works for the employers' insurance carrier, may then approve or deny the claim in whole or in part. (*Id.* at 93-94.) Claim disputes between the employer and the employee are typically referred to a workers' compensation judge employed by the WCAB, which handles the judicial function of the workers' compensation system. Rassp & Herlick § 1.07 [2]. Decisions of a workers' compensation judge may be appealed to the WCAB. *Id.*

II. Workers' Compensation Liens

Most injured employees who self-procure medical, chiropractic, and related health care services are unable to pay for those services at the time of delivery. Decl. of Dr. Michael Barri, D.C. ¶ 5 (Barri Decl. at 2). Instead, providers of such services to injured workers typically do so without immediate payment in reliance on their legal right to seek compensation from the worker's employer or its insurance carrier through a workers' compensation lien filed with the WCAB. (*Id.*)

Liens therefore provide injured workers with an important mechanism for accessing medical care for work-related injuries when their employer does not provide needed care. Similarly, liens create a means by

which providers of such services can obtain payment for their services. (*Id.*); Pamela W. Foust, California Lien Claims § 2:04 (4th ed. 2012) (“California Lien Claims”); *Id.* § 1:11; *see also* Cal. Lab. Code § 4903 (authorizing liens on workers’ compensation liens for medical treatment, medical-legal expenses, burial expenses, attorneys’ fees and certain living expenses). Such providers are considered “parties in interest” in the WCAB proceedings, and the California Constitution affords them full due process rights, including the opportunity to be heard. *Vacanti*, 24 Cal.4th at 811; Rassp & Herlick § 17.111 [5].

Any unresolved lien issues after the conclusion of the injured worker’s case-in-chief are addressed at a “lien conference” before a workers’ compensation judge. Rassp & Herlick. § 17.113. A lien conference can be set when any party (including a lien claimant) files a “declaration of readiness,” or upon the WCAB’s own motion. *Id.* If, after the lien conference, there still remain unresolved issues, a lien trial may be set to adjudicate the lienholder’s claim. *Id.* Because liens are not resolved until after the workers’ case-in-chief is adjudicated, it typically takes years to recover on workers’ compensation liens for reasons that are beyond the lien claimant’s control. (Barri Decl. at 7 ¶ 23.)

III. Senate Bill 1160 and Assembly Bill 1244.

On the final two days of the legislative session, the California legislature enacted AB 1244 and SB 1160 on August 30 and 31, 2016,

respectively. (Exs. 7 at 252; 8 at 255, Complete Bill Histories, Senate Bill 1160 and Assembly Bill 1244.) SB 1160, which was originally drafted to improve the workers' compensation utilization review system, was amended to include the Lien Stay Provision on August 18, 2016. (Ex. 4 at 190, Senate Bill 1160 as amended on Aug. 18, 2016.) The Special Lien Proceeding Provision was added to AB 1244 on August 19, 2016. (Ex. 5 at 219-220, Assembly Bill 1244 as amended on Aug. 19, 2016.) The earlier version of AB 1244, which included the Suspension Provision, had simply prohibited suspended providers from pursuing any claim for payment that had not already been reduced to a final judgment. (Ex. 6 at 249, Assembly Bill 1244 as amended on Aug. 15, 2016.)

Presumably in recognition of the vulnerability of its legislation to constitutional challenge, the California legislature took the unusual step of adding an uncodified section at the end of SB 1160 that attempts to explain its intent in enacting its new, harsh laws and procedures. (Ex. 1 at 60-61 § 16.) Governor Brown signed the bills on September 30, 2016. (Exs. 7 at 252; 8 at 255.) They became operative on January 1, 2017. 2016 Cal. St. Ch. 868.

While the elimination of fraud and abuse is an important objective shared by all participants in the workers' compensation system, it must be accomplished in a way that does not diminish or destroy legitimate liens or unconstitutionally impact the rights of lienholders. SB 1160 and AB 1244

instead impose draconian and unconstitutional penalties on providers who serve injured workers under the lien system, which as a practical matter will put out of business virtually any lien claimant who is charged with, or has previously been convicted of, even a minor offense involving unrelated medical billing issues.

IV. The Lien Stay Provision and Its Impact on Petitioners

The Lien Stay Provision of SB 1160 will have a devastating impact on Petitioners and all other lien claimants whose liens are automatically stayed. California recently announced that it has already stayed 200,000 liens valued at over one billion dollars. (Ex 18 at 361, California Dept. of Indus. Relations, News Release, dated Jan. 18, 2017.) On January 4, 2017, three days after the Lien Stay Provision became effective, Petitioners discovered that liens filed on behalf of Tristar Medical Group Inc. were designated “stayed” in the Electronic Adjudication Management System (“EAMS”), California’s electronic filing and management system for liens. (Barri Decl. at 6 ¶ 17.) Tristar’s liens typically cover services provided to the same worker by multiple providers. As a result, the stay included liens that sought compensation for services provided by Dr. Barri *as well as by other doctors employed by Tristar*. (See *id.* at 5-6 ¶¶ 15, 18.) The stay also

included liens covering *solely the services of other providers* and not services provided by Dr. Barri. (*See id.* at 6 ¶ 18.)¹

The stay of Tristar liens that did not cover any services from Dr. Barri exceeds the state’s authority under the Lien Stay Provision, which permits the automatic stay only of “[a]ny lien filed by or on behalf of a physician or provider of medical treatment services...upon the filing of criminal charges against that physician or provider”. Cal. Lab. Code § 4615 (a). This overreach presumably resulted from the fact that until 2017, organizations filed their providers’ liens in EAMS under the organization’s name, rather than the providers’ names. (*See Barri Decl.* at 6-7 ¶ 20; Ex. 9, WCAB Notice and Request for Allowance of Lien Form.) As a result, there is no way to “automatically” target a stay solely at pre-2017 Tristar liens that include services provided by Dr. Barri. (*See Barri Decl.* at 7 ¶ 22.)²

Moreover, none of Tristar’s liens has any connection to the criminal conduct alleged against Dr. Barri. (*Id.* at 5 ¶ 15.) The liens seek compensation for unrelated medical services, including office visits for

¹ On January 18, 2017, the state created a list of charged providers with stays on their liens that includes Dr. Barri. (Ex. 15 at 296, 301, *DIR Fraud Prevention*, California Depart. of Indus. Relations, http://www.dir.ca.gov/fraud_prevention/ (last visited Jan. 19, 2017).)

² Beginning in 2017, the WCAB receives more detailed information when a lien is filed regarding which providers and services are included. (See Ex. 10, DWC District Office E-Cover Sheet.)

evaluations by primary treating physicians; consultant evaluations by specialists including orthopedic surgeons, neurologists, neurosurgeons, internists, and pain management specialists; chiropractic visits; physical therapy visits; nerve conduction (EMG/NCV) studies; acupuncture; X-rays; medical record reviews; and medical-legal evaluations. (*Id.*)

Tristar is no longer an operating medical practice, but continues to collect on its liens. (*Id.* at 3 ¶ 7.) It often takes years to recover on liens since they are adjudicated only after the worker's case-in-chief is resolved. (*Id.*, at 7-8 ¶ 23.) The workers' compensation liens accumulated by Tristar over the many years it served injured workers now comprise Tristar's accounts receivable and are what generate Tristar's income. (*Id.*) If Tristar is deprived of its current inventory of liens, its cash flow will effectively be cut off, and so will Dr. Barri's sole source of income. (*Id.* at 7-8 ¶¶ 23-24.) Consequently, Dr. Barri will be unable to pay his criminal defense attorney or living expenses, and Tristar will be unable to pay the \$150 filing fees for future liens, resulting in their forfeiture on statute of limitations grounds. (*Id.* at 8 ¶ 25.)

V. The Suspension Provision and Its Impact on Dr. Barri

Dr. Barri and other providers in his position face a permanent end to their ability to serve injured workers under the Suspension Provision enacted in AB 1244. As interpreted by the state, under the Suspension Provision, any provider that was convicted of a felony or misdemeanor

offense covered by the Suspension Provision's sweeping language – even before the provision was enacted³ – is prohibited from serving as a provider in the workers' compensation system.

Dr. Barri pleaded guilty on March 11, 2016 to criminal charges that relate to the improper acceptance of referral fees for referring a small number of patients to other providers for back surgeries. (Barri Decl. at 3 ¶ 8.) Dr. Barri has not yet been sentenced, but part of his plea agreement includes paying full restitution of approximately \$206,505. (*Id.* at ¶ 9.) Dr. Barri entered his guilty plea more than six months before AB 1244 was signed into law, and therefore had no way to know that his guilty plea could subject him to the additional significant penalty of permanently excluding him from participating as a provider in the workers' compensation system.⁴

VI. The Special Lien Proceeding Provision and Its Impact on Petitioners

The Special Lien Proceeding Provision of AB 1244 will have serious and lasting consequences for Petitioners and all other lien claimants whose

³ As discussed further below, under ordinary principles of statutory construction, AB 1244 should apply prospectively, and thus the state should not be permitted to suspend providers like Dr. Barri who were convicted before AB 1244 was enacted.

⁴ Dr. Barri has been notified that the state intends to apply the Suspension Provision to him, and a hearing has been scheduled for February 24, 2017. (*See* Ex. 16 at 307, Letter from the California Depart. of Indus. Relations, Division of Workers' Compensation to Dr. Michael E. Barri, dated Jan. 17, 2017; Ex. 19 at 364, Letter from Stephen A. Silverman to George Parisotto, dated Jan. 27, 2017; Ex. 20 at 371, Notice of Hearing and Designation of Hearing Officer, dated Feb. 6, 2017.)

liens are adjudicated in a special lien proceeding. Under that provision, once a provider is convicted of a felony or misdemeanor offense covered by the Suspension Provision's sweeping language, and that provider is suspended from participating in the workers' compensation system, all the provider's liens will be consolidated and adjudicated in a special lien hearing, at which the provider has the burden of proving each of the liens is not connected to criminal, fraudulent, or "abusive" conduct. Cal. Lab. Code §§ 139.21 (a)(1)(A), (e)-(i).

None of Tristar's lien claims – covering services provided to Tristar's patients by various providers over the course of many years – have any connection to the surgery referrals. (Barri Decl. at 5 ¶ 15.) Nonetheless, all of Tristar's liens are likely to be subjected to a special lien proceeding, and the state can compel such proceedings without any initial showing of probable cause that the liens are related to Dr. Barri's guilty plea – or any illegal activity at all. *See* Cal. Lab. Code §§ 139.21 (a)(1)(A), (e)-(i). In anticipation of such proceedings, several insurance carriers have proposed settling Tristar liens for pennies on the dollar, citing Dr. Barri's guilty plea. (*E.g.*, Barri Decl. at 8 ¶ 26, Ex. 11.)

At the special lien proceeding, Petitioners will have the burden of proving that each of Tristar's 3,060 outstanding liens, with a face value exceeding \$20 million for many years of legitimately-provided services from various providers (Barri Decl. at 4-5, 9-10 ¶¶ 14, 27-30), do not "arise

from the conduct subjecting the physician, practitioner, or provider to suspension,” and do not “arise from, or are connected to, criminal, fraudulent, or abusive conduct or activity.” Cal. Lab. Code § 139.21 (g). If Petitioners are unsuccessful proving this broad negative, Tristar will not be paid on its liens. *See id.*

ARGUMENT

I. This Court Has Original Subject Matter Jurisdiction

This Court has original jurisdiction over claims alleging that provisions of the workers’ compensation statutory scheme are unconstitutional. Section 5955 of the California Code provides:

No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.

Cal. Lab. Code § 5955.

In *Greener v. Workers’ Compensation Appeals Board*, 6 Cal.4th 1028 (1993), the California Supreme Court held that under Section 5955, challenges to the constitutionality of workers’ compensation provisions must be made through a petition for a writ filed directly with the California Court of Appeal. *Id.* at 1037. The Supreme Court held that California’s Superior Courts lack subject matter jurisdiction over a lawsuit that seeks to

invalidate workers' compensation statutes on constitutional grounds because such a proceeding would "interfere with" the WCAB in the performance of its duties. *Id.* at 1032-33, 1040-44. The Court also concluded that the WCAB cannot consider such challenges: Because administrative agencies are not permitted to determine the constitutional validity of statutes, the WCAB is required to comply with all workers' compensation statutes until this Court has determined their constitutionality. *Id.* at 1038 (citing Cal. Const., art. III § 3.5.).⁵

Here, Petitioners challenge the constitutionality of three provisions of the workers' compensation statutes. Unless and until the three provisions are held to be unconstitutional by this Court or the Supreme Court, the WCAB and the judges it supervises are required to enforce and comply with them by 1) refusing to proceed with the adjudication of liens stayed under the Lien Stay Provision; 2) refusing to adjudicate lien claims

⁵ Petitioners have requested that this Court take judicial notice of an unpublished decision, *Chorn v. Brown*, 80 Cal. Comp. Cases 637, 2015 WL 3799568 (Cal. Ct. App. June 17, 2015) ("*Chorn I*") (Ex. 12.) In *Chorn I*, the Court of Appeal held that pursuant to Section 5955 of the California Lab. Code, the courts of appeal and the Supreme Court had exclusive jurisdiction to consider a challenge to SB 863, because the requested injunction and declaration would prevent the WCAB from dismissing lien disputes for which no activation or filing fee had been paid. (Ex. 12, *Chorn*, 2015 WL3799568, at **5-6.) The Court of Appeal subsequently considered the petition for a writ on the merits. *Chorn v. Workers' Compensation Appeals Board*, 245 Cal.App. 4th 1370 (2016) ("*Chorn II*"). *Chorn I*'s reasoning applies here and confirms that this Court has jurisdiction over this proceeding, not the Superior Courts.

of providers suspended under the Suspension Provision who have provided services to injured workers; and 3) conducting the special lien proceedings required by the Special Lien Proceeding Provision. Petitioners' sole remedy, therefore is to petition this Court for a writ to invalidate the three provisions.

II. Legal Standard for Considering Writ Petitions on the Merits

The California Supreme Court has described the general criteria for granting a writ. *Omaha Indem. Co. v. Superior Court*, 209 Cal.App.3d 1266, 1274 (Ct. App. 1989) (citing cases). The applicability of these criteria depends on the facts and circumstance of each case. *Id.*; *see also* Cal. Code Civ. Proc. §§ 1086, 1103; *see also generally* Cal. Prac. Guide Civ. App. & Writs Ch. 15-A.

Here, Petitioners meet at least four of the general criteria developed by the California Supreme Court:

- Petitioners have no other adequate means for obtaining relief, such as a direct appeal, *see Omaha Indem. Co.*, 209 Cal.App.3d at 1274, since a constitutional challenge to workers' compensation statutes must be made by a petition for a writ in the Court of Appeal. *See Greener*, 6 Cal.4th at 1037.
- Absent relief from this Court, Petitioners will suffer irreparable injury, meaning harm or prejudice that cannot be corrected on appeal. *Omaha Indem. Co.*, 209 Cal.App.3d at 1274. Again, Petitioners are compelled

to make their constitutional claims through this Petition, and as discussed above (Background Sections IV and V), Petitioners will suffer irreparable injury absent relief from this Court.

- This Petition presents significant and novel constitutional issues described below. *Id.* at 1273.
- The issues presented in this Petition are of widespread interest, *see id.*, directly impacting workers' compensation providers and lien claimants across California (*see, e.g.*, Ex. 18 at 361, California Dept. of Indus. Relations, News Release, dated Jan. 18, 2017), and having an immediate and significant impact on the workers' compensation insurance industry and the workers' compensation system as a whole.

III. The Lien Stay Provision Violates Dr. Barri's Right to Retain Counsel of His Choice Under the United States and California Constitutions

The Lien Stay Provision violates Dr. Barri's right to counsel under the Sixth Amendment to the United States Constitution, which entitles a criminal defendant "to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. It also violates Dr. Barri's right to counsel under the California Constitution, which entitles "[t]he defendant in a criminal cause ... to have the assistance of counsel for the defendant's defense." Cal. Const., art. I, § 15.

A criminal defendant's right to counsel is a "fundamental constituent of due process of law" and includes the right to representation by a

qualified attorney whom the defendant can afford to retain. *Luis v. United States*, __ U.S. __, 136 S.Ct. 1083, 1093 (2016).

The United States Supreme Court addressed the precise issue presented here just last term in *Luis*. The Court held that a statute authorizing the pre-trial seizure of the petitioner’s “untainted” assets (i.e., assets unrelated to the alleged health care fraud), which the defendant needed to retain counsel of her choice, violated the defendant’s Sixth Amendment rights. *Luis*, 136 S.Ct. at 1087. Here, the Lien Stay Provision similarly violates Dr. Barri’s right to counsel, since it results in the pre-trial seizure of untainted assets that he needs to retain counsel of his choice. (Barri Decl. at 8 ¶ 24.)

In *Luis*, the petitioner was charged with federal crimes relating to health care fraud. 136 S.Ct. at 1085. The government sought a pretrial seizure of assets under the third category of a federal statute, which authorized seizures of assets (1) obtained as the result of the crime; (2) traceable to the crime; and (3) of equivalent value. *See id.* at 1087, citing 18 U.S.C.A. § 1345 (a)(2). The court issued an order prohibiting the defendant from dissipating her assets up to the equivalent value of the proceeds of the alleged fraud. *See id.* Believing that it would convict the defendant of the charged crimes, the government wanted to preserve the \$2 million remaining in the defendant's possession in order to secure the payment of restitution and other criminal penalties. *See id.*

Under the Sixth Amendment, Justice Breyer concluded, the government could not freeze assets of the defendant that were untainted by the alleged crime if doing so would effectively prevent the petitioner from being able to pay her lawyer. *Id.* at 1096. In doing so, Justice Breyer distinguished prior Supreme Court precedent rejecting Sixth Amendment right-to-counsel claims challenging the pretrial restraint of a criminal defendant’s potentially forfeitable assets because those cases involved assets that were “tainted”, in that they were traceable to the charged crime. *See id.* at 1089-91 (discussing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989)). “The nature of the assets at issue here differs from the assets at issue in those earlier cases,” Justice Breyer wrote, and “that distinction makes a difference.” *Id.* at 1089-90. In *Luis*, the seized assets were “untainted”, in contrast to “tainted” assets such as “a robber’s loot, a drug seller’s cocaine, a burglar’s tools, or other property associated with the planning, implementing, or concealing of a crime.” *Id.* at 1090.

The reasoning of *Luis* applies with equal or even greater force here. First, the government’s interest in staying Tristar’s untainted liens is even more attenuated than the government’s interest in freezing the assets at issue in *Luis*. In *Luis*, the government sought to preserve the petitioner’s remaining, untainted assets up to the equivalent value of the proceeds of the fraud so that those assets could be used to pay restitution and other criminal

penalties. *Id.* at 1093. But in this case, Tristar’s assets cannot be used to pay any restitution or other criminal penalties imposed on Dr. Barri, and the government has no legitimate interest in helping insurance carriers evade their obligations to pay on Tristar’s untainted liens. Under the (unconstitutional) Special Lien Proceeding Provision, even if Dr. Barri were convicted, Tristar remains entitled to proceed with the enforcement and collection of its untainted liens (albeit with the improper burden of having to overcome a presumption in a special lien proceeding that all of the liens are connected to criminal, fraudulent, or “abusive” conduct). *See* Cal. Lab. Code § 139.21 (i).

Second, the financial consequences of staying a lien claimant’s untainted liens are even more severe than the consequences of freezing the *Luis* petitioner’s assets. In *Luis*, the Court focused on the potential expenses of criminal fines and restitution orders:

How are defendants whose innocent assets are frozen in cases like these supposed to pay for a lawyer – particularly if they lack ‘tainted assets’ because they are innocent, a class of defendants whom the right to counsel certainly seeks to protect?

Luis, 136 S.Ct. at 1094-95. Here, not only does Dr. Barri face criminal charges that expose him to criminal fines and restitution orders which he will not be able to pay if Tristar’s liens are stayed, but a stay of Tristar’s liens also will make it impossible for Tristar to pay a filing fee on future

liens, meaning a further loss of assets and income for Dr. Barri. (Barri Decl. at 8 ¶ 25.)

Finally, limiting the government's freeze to tainted assets would be more straightforward here than in *Luis*. In *Luis*, the court held that even though the assets amounted to bank accounts and thus fungible money, it was appropriate to require the government to seize only tainted assets by segregating them through the use of tracing rules. *Id.* at 1095. Here, there is already a procedure in place for determining that liens are untainted by fraud: the adversarial administrative hearings in which the representatives for claimants and insurance carriers present their clients' positions and the validity of liens are adjudicated. Where fraud is suspected, insurance carriers also can request the consolidation of all of the provider's liens into one proceeding. *See* Cal. Code Regs. § 10589. This adversarial process already ensures that fraudulent or tainted liens are not paid, and only valid and untainted liens are paid.

In sum, the Lien Stay Provision violates Dr. Barri's Sixth Amendment right to counsel. For the same reasons, the Lien Stay Provision also violates Dr. Barri's right to counsel under the California Constitution. *See People v. Monge*, 16 Cal.4th 826, 844 (1997) (when California and United States constitutional provisions are similar, court interpreting state provision does not depart from U.S. Supreme Court's construction of comparable federal provision unless "cogent reasons")

exist); *see also People v. Ledesma*, 43 Cal.3d 171, 215 (1987) (construing federal and state constitutional rights to counsel the same).

IV. The Lien Stay Provision Violates Petitioners' Right to Due Process Under the California and United States Constitutions

The Lien Stay Provision violates Petitioners' state and federal constitutional due process rights. The Due Process Clause of the California Constitution provides: "A person may not be deprived of life, liberty, or property without due process of law...." Cal. Const., art. I, § 7 (a). The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

A. Petitioners Have an Interest in Tristar's Workers' Compensation Liens That is Protected by the Due Process Clause of the California Constitution

This Court first must determine whether Petitioners have interests that are protected by due process. Under California law, Petitioners must "identify a statutorily conferred benefit or interest of which he or she has been deprived." *Chorn II*, 245 Cal.App.4th at 1387 (quoting *Ryan v. California Interscholastic Federation—San Diego Section*, 94 Cal.App.4th 1048, 1069 (2001)). Workers' compensation liens are a statutorily-conferred benefit and therefore are protected under California's due process clause. *Id.* at 1388.

B. Petitioners Have an Interest in Tristar’s Claims for Payment that Is Protected by the Due Process Clause of the United States Constitution

Petitioners also have a federally-protected interest in Tristar’s claims for payment. The Supreme Court has recognized that a cause of action, including those made in administrative proceedings, “is a species of property protected by the Fourteenth Amendment’s Due Process Clause.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29, 102 S.Ct. 1148 (1982).

The Supreme Court specifically recognized that workers’ compensation claimants have a property interest in their “claims for payment”, and that the state therefore could not reject such claims “without affording them appropriate procedural protections.” *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 61 n.13, 119 S.Ct. 977 (1999) (citing *Zimmerman Brush Co.*, 455 U.S. at 430-31). As Justice Ginsburg, who provided the fifth vote on *Sullivan*’s due process analysis, explained in her concurring opinion, “due process requires fair procedures for the adjudication of respondents’ claims for workers’ compensation benefits, including medical care.” *Id.* at 62 (citing *Zimmerman Brush Co.*).

C. The Lien Stay Provision Violates State and Federal Due Process Rights

Once this Court finds that Petitioners have an interest protected by due process, it must determine the extent of procedural due process to

which Petitioners are entitled. Under the U.S. Constitution, this Court must consider: (1) the private interest at stake; (2) the risk of an erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893 (1976). Under the California Constitution, the Court must consider the three *Mathews* factors as well as the dignity interests of individuals in being informed of the nature, grounds and consequences of the action, and in being able to present their side of the story. *People v. Ramirez*, 25 Cal.3d 260, 268-69 (1979).

1. Significantly Delayed Post-Deprivation Hearing Violates Due Process

Here, the Lien Stay Provision effects an indefinite seizure of all of a criminally charged claimant's liens, often lasting for years as the underlying criminal case proceeds through trial and appeal. Dr. Barri, for example, was charged in June of 2014, and his case is expected to continue in the trial court for a year or more. (Barri Decl. at 4 ¶¶ 10-13.) As this Court is aware, an appeal could take another two years. In the event of a remand and further appeal, it could easily take more than five years before the criminal case is concluded. In effect, the procedure that the Lien Stay

Provision offers to claimants in Petitioners' position is a significantly delayed post-deprivation hearing.

Such a seizure, without probable cause and with the possibility of a hearing years down the road, violates due process under both the California and United States Constitutions. Post-deprivation hearings are generally sufficient to comport with due process only when: 1) they are provided promptly; and 2) they are "accompanied by a substantial assurance that the deprivation is not baseless or unwarranted." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240, 108 S.Ct. 1780 (1988); *see also People v. Litmon*, 162 Cal.App.4th 383, 396 (2008). Neither requirement is met here.

In determining whether a hearing is sufficiently prompt, the court must consider "the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Mallen*, 486 U.S. at 242.

All three of these factors weigh so heavily in Petitioners' favor that they confirm the delayed hearing is improper. First, the imposition of a stay on Tristar's liens will cause great harm, as it will render Dr. Barri unable to pay his attorneys' fees or living expenses. Second, the state cannot reasonably justify the new Lien Stay Provision as a necessary reform to combat fraud, because there are already procedures in place that

allow insurance carriers to request a consolidation of liens where a provider is accused of fraud. *See* Cal. Code Regs. § 10589. Those requests are heard by a workers' compensation judge, and the lien claimant is given the opportunity to be heard, *see id.*, in contrast to the Lien Stay Provision's imposition of an automatic stay without the minimal due process requirement of a hearing.

Third, a blanket stay upon all of Tristar's liens is "mistaken" given that none are related to Dr. Barri's criminal charges. The potential harm to a lien claimant in Tristar's position is particularly troubling given that the stay is applied to claimants who have been merely charged and not convicted of a crime. Of course, a criminally charged provider remains innocent until proven guilty.⁶ *E.g.*, *People v. Booker*, 51 Cal.4th 141, 185 (2011). There is a real risk that the imposition of automatic lien stays on all

⁶ Improper prosecutions for alleged medical billing fraud are not unheard of. In one high-profile case, for example, an 884-count indictment against a purported medical mill operator was dismissed in its entirety due to the government's withholding of evidence from the grand jury that medical experts found the center was operated appropriately and lawfully. (*See* Ex. 13, Bradley Zint, *Charges in Fraud Case Dismissed*, Los Angeles Times (Dec. 24, 2013, 2:57 PM), <http://www.latimes.com/tn-dpt-me-1225-sim-hoffman-20131224-story.html>.) That case, which began in May 2011, has since been re-filed, but the defense has stated it will continue to rely upon the medical experts' findings of no impropriety. (*See id.*; *see also* Ex. 14, Greg Jones, *Providers in Landmark Indictment Hold Millions in Liens*, Work Comp Central (July 8, 2014), <https://www.workcompcentral.com/news/print/id/c717ad7dad8cf1aa2f013d18187f8631g>.)

charged lien claimants will result in a profound injustice: the destruction of an innocent provider's liens and livelihood.

This conclusion is not foreclosed by *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 189–90, 121 S.Ct. 1146 (2001). In *Lujan*, the U.S. Supreme Court upheld a statute authorizing California to withhold payments owed to a public works contractor if a subcontractor failed to comply with California's prevailing wage law. 532 U.S. at 191. The court held that the subcontractor's property interest (the payment it claimed was contractually owed to it), which amounted to a "claim for payment", was adequately protected by a breach of contract suit. *Id.* at 194. Only "present entitlement" of "ownership dominion over real or personal property", or "to pursue a gainful occupation", require prompt post-deprivation hearings. *Id.* at 196. The government's retention of the payments for several years pending the outcome of the suit, "while undoubtedly something of a hardship", did not amount to a deprivation in violation of due process. *Id.* at 197.

Lujan does not control here for two reasons. Most importantly, while *Lujan* relaxed the due process requirements for a deprivation of a claim for payment, it did not diminish the principle that post-deprivation hearings are acceptable only when "accompanied by a substantial assurance that the deprivation is not baseless or unwarranted." *Mallen*, 486 U.S. at 240. Indeed, in *Lujan*, before the payments were withheld, the state

conducted the statutorily-mandated investigation and determined that the subcontractor had committed the statutory violations. *Lujan*, 532 U.S. at 193; *see also* Cal. Lab. Code §§ 1727, 1775. Here, in contrast, the Lien Stay Provision requires no investigation before imposing the stay, and if an investigation had been done it would have found all of Tristar’s liens to be untainted. This baseless and unwarranted deprivation of Tristar’s lien claims violates due process.

In addition, while the *Lujan* court characterized the delay in obtaining a hearing merely as “something of a hardship,” 532 U.S. at 197, here, an indefinite stay of Petitioners’ liens will have devastating consequences. The funds Tristar receives as its liens are adjudicated represent Tristar’s, and Dr. Barri’s, sole source of income. (Barri Decl. at 7-8 ¶¶ 23-24.) Without the income from those liens, Dr. Barri will be unable to pay the fees of his criminal defense attorney or his living expenses. (*Id.* at 8 ¶ 24.) Without that income, Tristar also will be unable to pay the lien filing fees on its pending liens that are not yet ripe for filing but will eventually lapse under the statute of limitations. (*Id.* at 8 ¶ 25.)

2. Lien Stay’s Overinclusive Application to Untainted Liens and Liens Covering Services From Unaccused Providers Violates Due Process

The overinclusive scope of the Lien Stay Provision also violates Petitioners’ state and federal due process rights. First, the Lien Stay Provision automatically applies to all of a lien claimant’s liens without even

a minimal showing that there is probable cause to believe that any of the claimant's liens are related to the alleged illegal activity. In this case, none of Tristar's liens are related to the criminal charges pending against Dr. Barri. (Barri Decl. at 5 ¶ 15.) This plainly violates due process. *See United States v. Monsanto*, 491 U.S. 600, 615, 109 S. Ct. 2657, 2666, 105 L. Ed. 2d 512 (1989) (indicted defendant's assets cannot be frozen prior to trial unless probable cause exists to believe the property will be forfeitable).

Second, when applied to a multi-provider lien claimant organization such as Tristar, the Lien Stay Provision results in indefinite stays upon the organization's multi-provider liens, and it loses the right to collect for the services rendered by providers who have not even been accused of any fraud or other wrongdoing, not just the services performed by the criminally charged provider. (*See* Barri Decl. at 6 ¶ 18.) Moreover, because the EAMS system does not show which provider's services are included in pre-2017 liens, there is no way for EAMS to target only liens that include the criminally-charged provider's services. Instead, the automatic stay applies to all of the organization's liens, including liens that cover no services whatsoever from the criminally-charged provider.

The Lien Stay Provision's over-inclusive and arbitrary application to 1) lien claimants without any showing of probable cause that the liens are tainted; 2) multi-provider organizations' lien claims that cover services from innocent providers as well as criminally charged providers; and 3)

multi-provider organizations' lien claims that cover services provided only by innocent providers, with any eventual hearing on its application delayed for an indefinite period that could amount to several years, violates due process under the California and U.S. Constitutions.

V. The Lien Stay Provision Violates Dr. Barri's Right to Petition the Courts Under the California Constitution

The Lien Stay Provision also violates Petitioners' right to access the courts under the California Constitution, which provides: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." Cal. Const., art. I, § 3 (a).

Under California law, the "right to petition" includes "the right to petition the judicial branch for resolution of legal disputes." *Vargas v. City of Salinas*, 200 Cal.App.4th 1331, 1342 (2011) (internal citations omitted). The right to petition is not absolute, but is subject to "[r]easonable, narrowly drawn restrictions designed to prevent abuse of the right". *Id.*

Here, the Lien Stay Provision is neither reasonable nor narrowly drawn. It unreasonably results in lengthy, unwarranted delays before lien claimants can finally litigate their lien claims on the merits, including untainted lien claims. The Lien Stay Provision also is not narrowly drawn, because the stay is imposed on all the charged claimant's liens, not just those for which the government can make some showing that the liens are

tainted. Further, as applied to organizational lien claimants, the Lien Stay Provision results in a stay of all the organization's liens, including liens that cover services from both uncharged and charged providers; and even including liens that contain no services from the charged provider. The Lien Stay Provision thus violates Petitioners' right of access to the courts under the California Constitution.

VI. The Suspension and Special Lien Proceeding Provisions are Prospective Laws and Thus Do Not Apply to Dr. Barri's Prior Criminal Conduct or Guilty Plea

The Suspension and Special Lien Proceeding Provisions contained in AB 1244 represent a significant change to the laws that apply to workers' compensation providers and lien claimants, and therefore must apply prospectively. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *McClung v. Employment Dev. Dep't*, 34 Cal.4th 467, 479 (2004). Thus, the legal effect of conduct is typically assessed under the law that existed when the conduct took place. *Id.* "[I]n the absence of a clear legislative intent to the contrary statutory enactments apply prospectively" where the statute changes the law. *See Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1193–94 (1988). Clear legislative intent may be demonstrated with "express language of retroactivity" in the statute itself, or other sources that clearly and unavoidably indicate a retroactive intent. *McClung*, 34 Cal.4th at 479.

Here, AB 1244 clearly changes the law, as it applies new penalties to convictions for billing-related fraud and various other offenses. There is no express language of retroactivity in AB 1244, nor do any other sources clearly imply a legislative intent for the bill to apply retroactively to pre-enactment conduct. AB 1244's Suspension and Special Lien Proceeding Provisions therefore cannot be applied retroactively. Dr. Barri entered his guilty plea on March 11, 2016, more than six months before AB 1244 was signed into law on September 30, 2016. The criminal conduct underlying Dr. Barri's plea occurred even earlier, from 2009 through 2013. *See* Ex. 16 at 319, Letter from the California Depart. of Indus. Relations, Division of Workers' Compensation to Dr. Michael E. Barri, dated Jan. 17, 2017. AB 1244's Suspension and Special Lien Proceeding Provisions therefore cannot be applied retroactively, either to Dr. Barri's conduct or to his guilty plea, nor can they be applied to any other lien claimants whose criminal conduct or convictions occurred before AB 1244 was enacted.

VII. The Suspension and Special Lien Proceeding Provisions Violate the Ex Post Facto Clause Under the United States and California Constitutions

As applied to Dr. Barri, the Suspension and Special Lien Proceeding Provisions violate the prohibition against ex post facto laws in the United States and California Constitutions. The Ex Post Facto Clause of the United States Constitution provides: "No State shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of

contracts.” U.S. Const., art. I, § 10, cl. 1. The Ex Post Facto Clause of the California Constitution similarly states: “A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.” Cal. Const., art. I, § 9.

A statute violates the prohibition against ex post facto laws when:

1) it is retroactive, meaning it applies to criminal conduct that occurred before its enactment; and 2) it disadvantages the person affected, by (among other things) increasing the punishment for the criminal conduct.

United States v. Baggett, 125 F.3d 1319, 1322 (9th Cir. 1997); *see also*

17 Cal. Jur. 3d Crim. Law: Core Aspects § 10 (Nov. 2016). Here, the

Suspension and Special Lien Proceeding Provisions are retroactive as

applied to Dr. Barri, since AB 1244 was enacted on September 30, 2016,

and Dr. Barri’s March 11, 2016 guilty plea predated the enactment of the

statute.⁷

The Suspension and Special Lien Proceeding Provisions contained

in AB 1244 unquestionably increase the punishment resulting from

criminal conduct. Under both the state and federal constitutions, legislation

is construed as effecting punishment when it is “essentially criminal.”

⁷ While California has not given a single fixed meaning to the term “conviction”, *see n. 11*, for purposes of the ex post facto analysis it is appropriate to deem Dr. Barri’s “conviction” as having occurred upon the entry of his guilty plea. *See In re DeLong*, 93 Cal.App.4th 562, 568 (2001) (when penal statute has two reasonable constructions, courts adopt the construction that is more favorable to the defendant).

People v. 25651 Minoa Dr., 2 Cal.App.4th 787 (1992), *modified* (Feb. 5, 1992). The fact that the Suspension and Special Lien Proceeding Provisions are applied through administrative proceedings, rather than traditional criminal proceedings, is not determinative: “[T]he ex post facto effect of a law cannot be evaded simply by giving a civil label to what in reality is a criminal proceeding.” *Id.*

In evaluating whether a statute is essentially criminal or civil, the court must consider: 1) whether the legislature indicated “either expressly or impliedly a preference for one label or the other”; and 2) if the legislature indicated it intended to create a civil penalty, whether the statute ““was so punitive either in purpose or effect as to negate that intention.”” *Id.* at 796 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984)).

Here, while the legislature arguably has implied that the Suspension and Special Lien Proceeding Provisions are civil, *see* Cal. Lab. Code § 139.21 (b) (describing suspension process to be performed by DWC administrative director and authorizing additional implementing regulations) and Cal. Lab. Code § 139.21 (i) (Special Lien Proceeding governed by same procedures as other matters before the WCAB), several factors confirm that the provisions nonetheless are so punitive in purpose and effect that they are essentially criminal. First, a statute is deemed essentially criminal when it requires scienter to be established, which

occurs here because both provisions come into play upon criminal convictions – in fact, the Special Lien Proceeding is triggered *only* by a criminal conviction, and Dr. Barri’s conspiracy plea specifically triggered the state’s application of the Suspension Provision. *See Minoa*, 2 Cal.App.4th at 796. A statute is also considered “criminal” for purposes of the Ex Post Facto Clause when the “behavior to which [the statute] applies is already a crime.” *Id.* Again, this factor is met since both provisions are triggered by criminal convictions, in this case, Dr. Barri’s guilty plea. This contrasts with the civil forfeiture statute that was found to be civil in *Minoa* in part because the forfeiture was “completely unconnected to any criminal conviction.” *Id.*

Finally, both provisions must be considered criminal because their effects are punitive rather than remedial, as they “promote[s] the traditional aims of punishment – retribution and deterrence”. *Id.* The effects of the Suspension Provision are clearly punitive rather than remedial. Rather than authorizing the state to evaluate each provider individually to determine on a case-by-case basis whether that provider should be excluded from the workers’ compensation system, the Suspension Provision mandates that all suspended providers remain indefinitely barred from providing services in the workers’ compensation field, thus permanently shutting down affected providers’ businesses and precluding the providers from ever again serving injured workers.

The Suspension Provision is also extremely broad in scope, covering among other individuals: 1) providers convicted of misdemeanors; 2) providers whose conviction “relates to the conduct of the individual’s medical practice as it pertains to patient care”; and 3) providers whose convictions are “otherwise substantially related to the qualifications, functions, or duties of a provider of services.” Cal. Lab. Code § 139.21 (a)(1)(A). The sweeping application of the Suspension Provision, and its harsh effect, establish that its goals are retribution and deterrence.

The Special Lien Proceeding Provision is equally punitive, as it is triggered by a suspension for a criminal conviction under the Suspension Provision. Cal. Lab. Code § 139.21 (e). The applicability of the Special Lien Proceeding Provision to all of a claimant’s liens also distinguishes it from comparatively narrow civil forfeiture laws that have been found to be civil because they serve the nonpunitive and remedial goals of confiscating property used in violation of the law, and disgorging the fruits of criminal conduct. *See United States v. Ursery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (finding certain in rem civil forfeiture statutes not “criminal” for purposes of Double Jeopardy Clause). By forcing lien claimants to defend *all* their liens against cancellation – not just those liens with some evidence of connection to the criminal conduct – the Special Lien Proceeding Provision punishes lien claimants beyond requiring them to simply return illegal profits. *See id.* at 283. It further punishes lien

claimants by requiring them to disprove more than the liens' nexus to the conduct underlying the conviction. Instead, they must do the impossible by proving a sweeping negative: that the liens are entirely innocent of any "criminal, fraudulent, or abusive conduct or activity." Cal. Lab. Code § 139.21 (g).

In sum, the essentially punitive nature of the Suspension and Special Lien Proceeding Provisions, applied retroactively to Dr. Barri and Tristar, causes those provisions to violate the prohibition against ex post facto laws.

VIII. The Suspension and Special Lien Proceeding Provisions are Void for Vagueness Under the United States and California Constitutions

The Suspension and Special Lien Proceeding Provisions also violate Petitioners' federal and state due process rights because they are unconstitutionally vague.⁸ "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Hunt*, 638 F.3d at 712.

⁸ Petitioners have standing to challenge AB 1244's Suspension and Special Lien Proceeding Provisions as improperly vague because it is unclear whether they apply to Dr. Barri. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 710 (9th Cir. 2011). Both provisions require Dr. Barri to have been "convicted", Cal. Lab. Code § 139.21(a)(1)(A). The term "conviction", left undefined in AB 1244, does not have "a fixed single meaning in California law." *Helena Rubenstein Internet v. Younger*, 71 Cal.App.3d 406, 418 (Ct. App. 1977). Dr. Barri pled guilty on March 11, 2016 but has not yet been sentenced.

“A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it incites arbitrary and discriminatory enforcement.” *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984). The vagueness doctrine serves several important purposes, including: (1) avoiding punishing people for behavior they could not have known was illegal; (2) and avoiding subjective enforcement of laws by governmental officers, judges and juries. *United States v. Dischner*, 960 F.2d 870, 879 (9th Cir. 1992). Moreover, a stricter standard of scrutiny applies “where criminal sanctions are involved.” *Hunt*, 638 F.3d at 712. Here, the Suspension and Special Lien Proceeding Provisions are void for both reasons.

The Suspension and Special Lien Proceeding Provisions are triggered by the identical vague language, which does not even cite the criminal statutes to which the provisions apply. Instead, the provisions apply to providers suspended for any felony or misdemeanor where the crime “involves fraud or abuse of Medi-Cal program, Medicare program, or workers’ compensation system, or fraud or abuse of any patient”; “relates to the conduct of the individual’s medical practice as it pertains to patient care”; “is a financial crime that relates to the Medi-Cal program, Medicare program, or workers’ compensation system”; or “is otherwise substantially related to the qualifications, functions, or duties of a provider of services.”

Cal. Lab. Code §§ 139.21 (a)(1)(A), (e).⁹ The provisions therefore could be applied to convictions for a panoply of offenses – misdemeanor or felony – involving billing errors, licensure issues, patient care, or virtually any other offense for which a provider of health care services could be prosecuted.

With respect to the Special Lien Proceeding Provision, this lack of clarity is compounded by the unconstitutionally vague standard that attempts to define the conduct resulting in a cancellation of the provider’s liens: the provider must prove that the liens neither “arise from”, nor are “connected to”, “criminal, fraudulent, or abusive conduct or activity.” Cal. Lab. Code § 139.21 (g). Once again, the provision does not cite the criminal statutes that are covered by “criminal, fraudulent, or abusive” activity, nor does it give any definitions or further explanations of this standard that the lien claimant must somehow meet by a preponderance of the evidence.

In sum, the lack of clarity in the Suspension and Special Lien Proceeding Provisions results in a fatal failure to give providers notice of the conduct that can result in their suspension from the workers’ compensation system and the cancellation of their liens. Accordingly, the

⁹ The Suspension Provision also is triggered by a provider’s suspension “due to fraud or abuse” from Medicare or Medicaid, or the suspension or revocation of the provider’s “license, certificate, or approval to provide health care”. Cal. Lab. Code §§ 139.21(a)(1)(B), (C). Again, those provisions are left unexplained and lack any citations to relevant statutes.

provisions are ripe for ad hoc and subjective application, giving the state every opportunity to impose them in an utterly arbitrary and discriminatory fashion. They are therefore unconstitutionally vague.

IX. The Special Lien Proceeding Provision Violates Dr. Barri's Right to Due Process Under the United States and California Constitutions

As discussed above, lien claimants have a protected interest under the California Constitution in the payments due under their liens, as well as a protected interest under the U.S. Constitution in their right to litigate their lien claims. (*See* Sections IV(A) and (B), *supra*.) Dr. Barri's guilty plea (Barri Decl. at 9 ¶ 27) appears to render Tristar's liens eligible for a Special Lien Proceeding Provision that shifts the burden onto Tristar to prove its liens neither arise from, nor are connected to, "criminal, fraudulent, or abusive conduct or activity." Cal. Lab. Code § 139.21 (g). That the special lien proceeding can be initiated without probable cause to believe the liens are tainted by any illegal conduct – much less the illegal conduct at issue in the underlying criminal conviction – violates Petitioners' state and federal rights to due process.

This critical flaw distinguishes the special lien proceeding from the forfeiture proceeding that the Ninth Circuit approved in *United States v. \$129,727.00 United States Currency*, 129 F.3d 486 (9th Cir. 1997). There, the court held that an analogous burden-shifting scheme in a civil forfeiture proceeding did not violate due process. *Id.* at 492-94. But in doing so, it

emphasized that “[t]o initiate forfeiture, the Government was required to show it had probable cause” to believe the seized currency was “specifically associated” with the drug trafficking that rendered the currency forfeitable, not “just with illegal activity in general.” *Id.* at 489. After making this threshold showing, the court characterized the resulting burden of proof as similar to the standard that the claimant proposed: “a preponderance of the evidence standard, albeit one in which the claimant bears the burden.” *Id.* at 492.

Under the Special Lien Proceeding Provision, however, the state can initiate the proceeding without probable cause to believe the liens are connected to the criminal activity that resulted in the conviction – much less probable cause to believe the liens are connected to any wrongful activity whatsoever. This, together with the presumption that effectively reverses of the burden of proof, means that the state can impose the special lien proceeding on all of a claimant’s liens and force the claimant to prove the liens’ “innocence” without even a shred of evidence that any of those liens are related to the claimant’s criminal conviction or even any wrongful conduct whatsoever. “Probable cause to believe that the property is involved in some illegal activity is not enough – the government must have probable cause to believe that the property is involved in the activity subject to the specific forfeiture statute it invokes.” *United States v. \$405,089.23 U.S. Currency*, 122 F.3d 1285, 1289 (9th Cir. 1997).

Again, the workers' compensation system already has a process for consolidating liens that are suspected to be fraudulent, *see* Cal. Code Regs. § 10589, in which both lienholder and insurance carrier have the opportunity to be heard in an adversarial proceeding. By allowing the state to create a shortcut around well-established procedures that balance the rights of lien claimants against the rights of those alleging such claims are fraudulent, the novel procedure enacted in the Special Lien Proceeding Provision sets a dangerous precedent and violates due process.

X. CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandate, prohibition, and/or other relief: (1) compelling Respondent WCAB to follow its duties under the U.S. Constitution, the California Constitution, and state law, to adjudicate Tristar's lien claims in the usual course, and to not enforce or attempt to enforce the unconstitutional Lien Stay Provision, Cal. Lab. Code § 4615 (a); Suspension Provision, Cal. Lab. Code §§ 139.21 (a)-(d); or Special Lien Proceeding Provision, Cal. Lab. Code §§ 139.21 (a)(1)(A) and (e)-(i); and (2) commanding the WCAB, its agents, employees, officers, and representatives not to enforce or attempt to enforce the Lien Stay Provision, Cal. Lab. Code § 4615 (a); the Suspension Provision, Cal. Lab. Code §§ 139.21 (a)-(d); or the Special Lien Proceeding Provision, Cal. Lab. Code §§ 139.21 (a)(1)(A) and (e)-(i).

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Tristar Medical Group, Professional Corporation*

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITION FOR PEREMPTORY AND/OR ALTERNATIVE WRITS OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES is proportionately spaced, has a typeface of 13 points or more, and contains 13,988 words.

February 14, 2017

/s/ Glen E. Summers

Glen E. Summers (176402)

Alison G. Wheeler (#180748)

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Attorneys for Petitioner Coalition for Sensible

Workers' Compensation Reform

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
Federal Express

I, Stephen Moore, declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

On 02/15/2017 declarant served the within: Petition for Peremptory and/or Alternative Writs of Mandate; Supporting Exhibits; and Motion Requesting Judicial Notice upon:

Copies	FedEx	USPS
ALL SERVICES EXECUTED VIA PERSONAL, HAND DELIVERY TO THE INDIVIDUALS LISTED ON THE ATTACHED DECLARATION OF PERSONAL SERVICE.		
Telephone numbers for the service parties were not readily available at the time of preparation of the Declaration of Personal Service		

Copies	FedEx	USPS

Copies	FedEx	USPS

Copies	FedEx	USPS

the address(es) designated by said attorney(s) for that purpose by depositing **the number of copies indicated above**, of same, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California, or properly addressed wrapper in an Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California

I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and** copies has/have been filed by third party commercial carrier for next business day delivery to:

ELECTRONICALLY FILED VIA TRUEFILING:

CALIFORNIA COURT OF APPEAL
First Appellate District
350 McAllister Street, First Floor
San Francisco, California 94102

I declare under penalty of perjury that the foregoing is true and correct:

Signature: /s/ Stephen Moore, Senior Appellate Paralegal, Counsel Press, Inc.

DECLARATION OF PERSONAL SERVICE

1. I, Toshinori Kawase, am employed by Toshi's Legal Connection, 3701 Sacramento Street, Suite 269, San Francisco, California 94118, and I am not a party to the legal proceedings that are the subject of this Declaration.

2. On February 15, 2017, I personally served the following documents for Petitioner in the case named,

MICHAEL E. BARRI, D.C.,
TRISTAR MEDICAL GROUP, PROFESSIONAL CORPORATION,
and COALITION FOR SENSIBLE WORKERS' COMPENSATION REFORM,
Petitioners,

v.

THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA,
Respondent.

California Court of Appeal, First Appellate District:

(A) Petition for Peremptory and/or Alternative Writs of Mandate, Prohibition and/or Other Appropriate Relief;

(B) Exhibits in Support of Petition for Peremptory and/or Alternative Writs of Mandate, Prohibition and/or Other Appropriate Relief;
and

(C) Motion Requesting the Court Take Judicial Notice and Additional Evidence on the parties listed at their addresses of record as identified on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct, and if called to testify could do so from my own knowledge. I declare that this Declaration was executed in San Francisco, California, on

February 15, 2017

/s/ Toshinori Kawase

Toshinori Kawase

Declarant

SERVICE LIST

Service of Petition for Peremptory and/or Alternative Writs of Mandate, Prohibition and/or Other Appropriate Relief; Supporting Exhibits; and Motion Requesting the Court Take Judicial Notice

<p><i>Service of Writ Petition, Supporting Exhibits and Motion Requesting the Court Take Judicial Notice</i> [Two (2) copies of each document]:</p> <p>Attention: WRITS Workers' Compensation Appeals Board 455 Golden Gate Avenue Second Floor San Francisco, California 94102</p> <p><i>Respondent</i></p>	<p><i>Service of Writ Petition only</i> [One (1) copy of Writ Petition]:</p> <p>Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, California 94102</p>
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