Written Statement of

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"Medical Liability Reform - Cutting Costs, Spurring Investment, Creating Jobs"

Dear Chairman Smith, Ranking Member Conyers, and Members of the Committee:

Thank you for the opportunity to submit this testimony on medical malpractice liability, cost cutting, and job creation. Public Citizen is a nonpartisan, nonprofit organization with over 225,000 members and supporters which advocates on behalf of consumers before the Congress, the executive branch, and the courts. Since its founding in 1971, Public Citizen has sought to improve patient safety as well as protect the rights of medical malpractice victims.

We write to explain the problems inherent in attempting to reduce health care costs by restricting patients' legal rights. Limiting patients' rights and shielding wrongdoers from accountability will only increase the costs to taxpayers and private third parties, such as health insurers. This, in turn, will burden employers. The better approach is to reduce the number of medical errors that injure or kill patients. Annually, this could save tens or hundreds of thousands of lives, as well as tens of billions of dollars.

Medical errors come with a high financial cost, and it's not caused by lawsuits.

Instead of liability limits, policymakers should direct their attention to the health care crisis that costs money and lives – medical errors. In the past decade, multiple studies have reported on the unacceptably large numbers of injuries and deaths from medical errors. In 1999, the Institute of Medicine's (IOM) issued a seminal report concluding that up to 98,000 Americans die in hospitals from medical errors.[1] A decade later, a 2009 examination of medical errors by Hearst newspapers deduced that approximately 200,000 Americans die every year from preventable medical errors and health-care associated infections.

Most recently, in November 2010, the Department of Health and Human Services Inspector General (HHS) reported that 1.6 million Medicare beneficiaries suffer injuries and 180,000 are killed each year by medical errors.[2] These numbers include only Medicare beneficiaries, not all Americans. The injury and death toll is staggering. Unfortunately, in the decade since the IOM study, there is little to no evidence that the health care industry has made improvements on patient safety.

These tragic and preventable deaths and injuries also come with significant monetary costs. In 1999, the Institute of Medicine estimated that medical errors cost between $17 billion and $29 billion annually for lost income, lost household production, disability, and health care costs. Adjusted for inflation, these numbers are $22.1 billion to $37.7 billion today. HHS estimated that medical errors cost taxpayers an estimated $4.4 billion a year from the payment of Medicare benefits. As the HHS study indicates, Medicare already bears

[1] Kohn LT, Corrigan JM, Donaldson MS, eds*. To Err is Human: Building a Safer Health System*. Washington, DC: National Academy Press, 2000.

[2] Department of Health and Human Services Office of Inspector General. *Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries*, November 2010, available at http://oig.hhs.gov/oei/reports/oei-06-09-00090.pdf.

a substantial burden of paying medical providers' mistakes. If the U.S. Congress restricts medical malpractice liability, the government will be forced to pay significantly more.

To save money—and lives—in the area of medical malpractice, the Congress should focus on reducing medical errors. Simple measures to improve patient safety could save tens or hundreds of thousands of lives and billions of dollars each year. For example, a 2009 Public Citizen report discussed 10 basic reforms that, conservatively, would save an estimated 85,000 lives and $35 billion annually.[3] In contrast, limiting patients' rights would wrongly ignore an epidemic of millions of unnecessary injuries and hundreds of thousands of deaths, while saddling the American taxpayer with an even higher bill for medical providers' mistakes.

Malpractice litigation costs declined as health costs increased.

Any discussion on changing the liability system to shield providers should include a determination on whether there is a genuine need for change. Proponents advocate changing the civil justice system because of alleged "skyrocketing" malpractice litigation costs and "runaway jury awards." But the data on malpractice litigation shows the opposite.

According to the National Practitioner Data Bank, medical malpractice litigation costs have been declining for many years. The number of malpractice payments from providers to injured victims has sunk to a record low since the NPDB was created in 1990, constituting only 0.14 percent of health costs.[4]

The value of malpractice payments has also fallen to its lowest level since 1999, according to the NPDB's data. In fact, in 2009, medical malpractice litigation's share of overall health care costs fell to less than 0.5 of one percent. Moreover, that figure is an overly inclusive estimate of costs. It represents not just payments to victims, but rather the total liability insurance payments by doctors and hospitals. That means it includes litigation defense costs and even liability insurers' profits and administrative costs.[5]

In truth, the vast majority of patients injured by malpractice do not sue, and baseless claims are exceedingly rare.[6] Indeed, medical malpractice litigation is so rare that using the low end of the IOM estimate along with the Hearst estimate, between 83 and 98 percent of deaths from medical negligence did not result in any liability payment.

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[3] Public Citizen. *Back to Basics - Ten Steps to Save 85,000 Lives and $35 Billion a Year in Health Care Delivery*, Dec. 2009, available at http://www.citizen.org/documents/BackToBasics.pdf.

[4] Public Citizen. *Medical Malpractice Payments Fall Again in 2009*, March 3, 2010, available at http://www.citizen.org/documents/NPDBFinal.pdf, *citing* A.M. Best & Co, cited in Americans for Insurance Reform, "True Risk," July 22, 2009, available at http://insurance-reform.org/TrueRiskF.pdf.

[5] Id.

[6] Institute of Medicine, To Err is Human, 1999. Patricia M. Danzon, "Liability for Medical Malpractice," in *Handbook of Health Economics*, Volume 1, Elsevier Science B.V., 2000, p. 1354; Tom Baker. *The Medical Malpractice Myth*, The University of Chicago Press, 2005, p. 27-30. David M. Studdert, et al., "Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado," *Indiana Law Review*, 2000, p. 1659.

Meanwhile, health care costs have jumped. Between 2000 and 2009, as U.S. health care spending rose 83 percent, medical malpractice payments fell 8 percent. The decline of malpractice litigation and its minimal role in health care costs indicate that there is no reason to change the liability system in an attempt to save money.

Excessive medicine increases profits for the health care industry, harms patients.

Proponents of liability limits also cite to a practice they refer to as "defensive medicine." That is, they claim that medical providers overuse medical tests and procedures due to a fear of lawsuits, and that limiting their liability will ease these anxieties. However, recent evidence bucks the "defensive medicine" conventional wisdom.

Doctors' fear of lawsuits is divorced from reality. A 2010 study found that physicians have a disproportionate fear of malpractice litigation and the most restrictive tort reforms do not alleviate those fears. The researchers said that "the level of liability concern reported by physicians is arguably out of step with the actual risk of experiencing a malpractice claim."[7] As the researchers observed, malpractice "lawsuits are rare," and physicians "tend to overestimate the likelihood of experiencing them."[8]

The study found that shielding providers from liability did not significantly affect their malpractice concerns. Even the most restrictive caps on noneconomic damages failed to curb providers' fears, despite severely reducing patients' ability to seek compensation in court.[9] The researchers surmised that the incessant drumbeat of tort reform lobbying by medical professional organizations may contribute to providers' unfounded dread of lawsuits. Regardless of the source of doctors' mistaken feelings, those feelings are no reason to limit patients' legal rights. Doing so would inflict considerable harm on patients and taxpayers while failing to cure doctors' phobia. Even if excessive medicine were caused by the fear of lawsuits, reducing lawsuits would do nothing to reduce excessive medicine because doctors' fear would remain.

Excessive medicine likely stems from the health industry's financial incentives in our fee-for-service health care system. Last year, for example, the *Baltimore Sun* published a series on a physician who inserted heart-artery stents in patients who didn't need them. The series led to an U.S. Senate investigation of the physician, the hospital for which he worked, and the pharmaceutical company which provided the devices for the procedures. [10] It was clear that all the players held a financial stake in the provider performing the highest number of procedures possible. The Senate report concluded that the physician may have implanted 585 medically unnecessary stents between 2007 and 2009. According to the

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[7] Emily R. Carrier, James D. Reschovsky, Michelle M. Mello, Ralph C. Mayrell, and David Katz. "Physicians' Fears of Malpractice Lawsuits are not Assuaged by Tort Reforms," *Health Affairs*, 29, no.9, at 1585-1592 (2010).
[8] Carrier, et al. "Physicians' Fears of Malpractice Lawsuits are not Assuaged by Tort Reforms," *Health Affairs*, 29, no.9, at 1585-1592.
[9] *Id.* at 1591.
[10] U.S. Senate Finance Committee, S. PRT.111–57, *Staff Report on Cardiac Stent Usage at St. Joseph Medical Center*, December 2010, at 9.

report, Medicare paid out $3.8 million of the $6.6 million charged for those unnecessary procedures.[11]

Unnecessary and excessive medical procedures also received significant attention in 2009 when author Atul Gawande examined the case of McAllen, Texas, "the most expensive town in the most expensive country for health care in the world."[12] McAllen had the second highest per capita Medicare costs in the country.

Gawande found the "overuse of medicine" as the reason why McAllen's costs continued to accelerate even after Texas passed its restrictive malpractice laws, including caps on damages for pain and suffering.[13] As Gawande observed, hospitals and home health organizations "know that if their doctors bring in enough business—surgery, imaging, home-nursing referrals—they make money; and if they get the doctors to bring in more, they make more."

Gawande also debunked the proposition that providers' fear of lawsuits, so-called "defensive medicine," was to blame: He found that costs in nearby El Paso, Texas are a fraction of McAllen's even though El Paso has similar demographics and operates within the same liability framework. In other words, the reason for the overuse of medicine in McAllen was profit.

In 2009, the *Washington Post* also reported on the apparent overuse of imaging and scanning machines as a way to turn a profit in the health industry. Multiple studies indicate that physicians who own their own testing equipment order many more tests than those who don't own the equipment.[14] The *Post* also reported that providers' share of Medicare revenue from imaging fees has grown significantly in the last decade.

The excessive use of tests and procedures can harm patients. The *Post* has reported that "as many as 1 percent of all cancers in the United States appear to be caused by radiation from medical imaging." In an examination of the use of another medical procedure – spinal fusion surgeries – a December 2010 *Bloomberg* report found that Minnesota hospitals earned a tidy profit from performing unnecessary spinal fusion surgeries, which further injured their patients.[15] The report described post-surgery patients who became addicted to powerful painkillers or who died from drug overdose to ease the burning of "screws and rods" that were implanted in their spines.[16]

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[11] U.S. Senate Finance Committee, S. PRT.111–57, at 10.
[12] Atul Gawande. "The Cost Conundrum: What a Texas town can teach us about health care," *New Yorker*, June, 2009, available at http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande.
[13] *Id*.
[14] Shankar Vedantam. "Doctors Reap Benefits By Doing Own Tests," *Washington Post*, July 31, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073004285.html.
[15] Peter Waldman and David Armstrong. "Highest-Paid U.S. Doctors Get Rich With Fusion Surgery Debunked by Studies," *Bloomberg*, Dec., 30, 2010, available at http://www.bloomberg.com/news/2010-12-30/highest-paid-u-s-doctors-get-rich-with-fusion-surgery-debunked-by-studies.html.
[16] Waldman and Armstrong. *Id.*

Even more alarming, while physicians charged patients and their private insurers hundreds of thousands of dollars for the procedure, researchers already had concluded that the fusion procedure was no better than physical therapy, a less expensive and less risky course, in many circumstances.[17]

Overutilization in the health industry certainly contributes to mounting health care costs, but the vast majority occurs for reasons other than providers' "fear of lawsuits."

In Texas, health care costs continue to rise despite its restrictive liability laws.

As health care costs escalate, numerous states already have restrictive liability laws in place – laws that apparently have done nothing to reduce costs for patients or taxpayers. Texas is a case study on the failure of liability limits. In 2003, Texas passed laws that severely restricted patients' right to seek compensation for injuries and shielded medical providers from responsibility for their medical errors. Since Texas passed those laws, medical malpractice payments to injured patients dropped by 67 percent. But this injury to Texans hurt by malpractice brought none of the promised benefits:

• The cost of diagnostic testing in Texas (measured by per patient Medicare reimbursements) has grown 50 percent faster than the national average;

• spending increases for diagnostic testing (measured by per patient Medicare reimbursements) have far exceeded the national average;

• the state's uninsured rate has increased, remaining the highest in the country;

• the cost of health insurance in the state has more than doubled;

• the growth in the number of doctors per capita has slowed; and

• the number of doctors per capita in underserved rural areas has declined.[18]

As the Texas experiment shows, medical liability restrictions neither cut health care costs nor help businesses that are forced to contend with high health insurance rates for their employees. In response to this analysis, the president of the Texas Medical Association, William Fleming, MD, stated: "The goal of tort reform was never cost containment."[19] Indeed. Simply put, changing liability laws should not be viewed as a means to cut costs and spur job growth. It does nothing but enriches liability insurers and shield medical providers at the expense of individual patients' health, legal rights, and wallets.

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[17] Waldman and Armstrong. *Id.*
[18] Public Citizen. *Liability Limits in Texas Fail to Curb Medical Costs,* Dec. 2009, available at http://www.citizen.org/documents/Texas_Liability_Limits.pdf.
[19] Cheryl Clark. *Don't Use Texas as Model for Tort Reform, Advocacy Group Warns*, HealthLeaders Media, Dec. 18, 2009, available at http://www.healthleadersmedia.com/content/PHY-243762/Dont-Use-Texas-as-Model-for-Tort-Reform-Advocacy-Group-Warns.

Tort law traditionally has been the purview of states.

Finally, state legislatures have been active in setting medical malpractice policy for their residents, and medical malpractice law has developed in the state courts over decades, through careful consideration of thousands of cases. In fact, many states have declared that certain liability restrictions, including caps on noneconomic damages, violate state constitutions. The federal government should be cautious about usurping states' traditional authority to protect their citizens from medical negligence. A one-size-fits-all federal policy on medical liability could easily miss important factors in particular states—and likely would create harmful unintended consequences in state court systems.

Passing federal laws to limit patients' legal rights will only worsen the safety and fiscal problems mentioned above, hurting millions of Americans and burdening state budgets with the unfunded federal mandate of bailing out negligent medical providers. Injured patients will be further restricted from seeking compensation from the private parties who caused the harm, forcing others to cover the costs. State and federal governments as well as patients' private health insurers will bear the brunt of covering the massive health care costs that arise when the wrongdoers responsible for injuries are shielded from liability. These costs will be passed through to American families and taxpayers.

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