IN THE SUPREME COURT OF FLORIDA
Case No. SC04-778

Upon Request from the Attorney General
for an Advisory Opinion as to the
Validity of an Initiative Petition

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: PUBLIC PROTECTION FROM
REPEATED MEDICAL MALPRACTICE

ANSWER BRIEF OF SPONSOR FLORIDIANS FOR PATIENT PROTECTION

IN SUPPORT OF THE INITIATIVE

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SUMMARY OF ARGUMENT

Opponents of the proposed Public Protection amendment first challenge the ballot title and summary as inaccurate and misleading. The ballot title and summary, however, accurately and clearly describe its chief purpose: to prevent medical doctors found to have committed three or more incidents of malpractice from continuing to practice in Florida. They explain to the average voter how the proposal would change current law and provide sufficient information to allow the voter to cast an informed ballot.

Opponents, in their briefs, challenge the phrase "Public Protection" in the ballot title as rhetoric. In fact, this Court has expressly held that "use of the term 'protect' does not constitute impermissible political rhetoric or the adjudication of a fact." *Advisory Opinion to the Attorney General Re Protect People From the Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d 415, 421 (Fla. 2002). Contrary to the opponents' claims, that decision does not turn on, or even mention, use of identical terminology in the title and text.

Nor is the summary's statement of current law incorrect, as even opponents concede. Although current law has as its express goal protecting Floridians from the "dangers" of incompetent medical doctors, even the opponents concede the undisputed fact that the system does not prevent these individuals from practicing.

Describing this mismatch between goal and operation to Florida voters is not misleading.

Opponents' other arguments against the validity of the ballot title and summary are similarly baseless. The terms used in the summary, including "medical malpractice," and "found to have committed" are clear and understandable to the voter of average knowledge and experience. The same is true for other terms attacked by opponents: the phrase "medical doctor" is used by the state in its websites designed for citizens, and the phrase is always used in the ballot summary in conjunction with the phrase "licensed to practice medicine." The phrase "three or more incidents" is similar to that used in Florida Statutes relating to malpractice, and is understandable to voters.

Opponents further contend that the summary does not disclose the possible effect of the amendment on the standard of proof used in physician disciplinary processes. Yet no such change will take place, since the existing disciplinary and licensure systems are not replaced, only supplemented in one small area.

The proposed Public Protection amendment poses a limited, single question to voters: whether physicians with three or more incidents of medical malpractice shall be licensed to practice medicine in this state? There is no logrolling, as opponents concede. There is likewise no usurpation of the powers or substantial

effect on multiple branches of state government. The amendment works a single policy change, removing the current discretion of the Department of Health to allow doctors with three or more incidents of malpractice to be licensed. This limited impact falls uniquely on the executive branch, with no other effect on the Legislature or on the judiciary. The amendment is far less intrusive on the functions and structure of state government than others approved by this Court.

Because the proposed Public Protection amendment presents a single subject and because its ballot title and summary clearly explain to voters the chief purpose and likely effect of the proposal, this Court should uphold the amendment and allow it to appear on the ballot.

ARGUMENT

I. THE USE OF THE PHRASE "PUBLIC PROTECTION" IS NEITHER INACCURATE NOR MISLEADING, SINCE IT SIMPLY REASSERTS THE CURRENT LEGISLATIVE FINDING AND PURPOSE BEHIND THE REGULATORY SCHEME WHICH THE OPPONENTS DEFEND.

The initial briefs of the proponents and opponents of this initiative have a single fundamental difference: the opponents believe that the current system of physician licensing and discipline is working, with an occasional glitch, while the proponents believe that there is a problem which can be solved. In large part, this disagreement is a factual one and one of perception. Nevertheless, this disagreement does not mean that the ballot title and summary are inaccurate or misleading.

A. Protecting the Public From Medical Malpractice Is The Express Purpose of Current Law.

All parties seem to agree that there are current laws which are intended to prohibit the practice of medicine in Florida by "physicians who commit repeated malpractice or are incompetent or otherwise present a danger to the public." Initial Brief of Florida Medical Association, Inc. (hereinafter "Doctors' Br.") at 12 (citing § 458.301, Fla. Stat. (2003)) ("It is the legislative intent that physicians who fall below minimum competence or who otherwise present a danger to the

public shall be prohibited from practicing in this state."); Initial Brief of Florida Dental Association (hereinafter "Dentists' Br.") at 7 (the Legislature "has expressly acknowledged the importance of ensuring physicians coming to Florida do not pose a threat to the public" and citing § 458.301, Fla. Stat. (2003) ("recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners.")).

Thus, it is neither novel nor misleading to express the goal of licensing laws as protecting the public from the practice of unsafe and incompetent physicians.

B. The Parties Disagree On Whether The Current System Is, In Fact, Protecting The Public From Repeated Medical Malpractice.

Where the parties disagree is whether that goal of protecting the public from that danger is being achieved by the current licensing and disciplinary system. The opponents both contend that the current system is working well. "[The ballot title] suggests the public in Florida is not already protected from repeated malpractice. This is simply not true." Dentists' Br. at 16. "[The ballot summary] misrepresents the current state of the law, which already provides that physicians who are incompetent or dangerous shall not practice in Florida." Doctors' Br. at 3. These assertions, however, are simply restatements of the prior point - that Florida law, on its face, appears to protect the public against repeated malpractice.

The proponents, on the other hand, focus on the actual implementation of the laws. The proponents pointed out numerous specific examples of physicians who had committed repeated malpractice in Florida and elsewhere, and who were allowed to maintain their licenses. *See* Initial Brief of Floridians for Patient Protection (hereinafter "FPP Br.") at 2-5. Among those examples were four physicians who between them had 65 specific instances of medical malpractice in 12 years. *Id.* at 4. None of those physicians was ever disciplined by Florida.

In addition, the federal government has established a National Practitioner Data Bank to record information about physicians' malpractice histories, and proponents noted that a recent survey of that data found 23 physicians who had committed ten or more instances of medical malpractice over a twelve-year period. *Id.* The proponents also pointed to the State's own data, which indicates that less than three percent of doctors who have been found to have committed more than three instances of malpractice in the prior five years have been disciplined in any way. *Id.* at 5.

Finally, the proponents pointed to the most recent State study of the disciplinary and licensure system in Florida. *Id.* (citing Florida Dept. of Health, *Healthcare Practitioner Disciplinary Workgroup Final Report* (Jan. 2004), *available online at*:

http://www.doh.state.fl.us/mqa/Publications/rpt_discipline.pdf). This comprehensive report was commissioned because "there was concern expressed about the regulatory controls over practitioners who had malpractice judgments filed against them but who were not disciplined by their respective licensing boards." *Id.*, Executive Summary, at 3.

In other words, the opponents defend the status quo by claiming the existence of an elaborate procedure: "The Legislature has developed extremely comprehensive criteria under which the Board may refuse to license a person as a physician, or may discipline or revoke the license of a physician." Doctors' Br. at 13 (citing §§ 458.331, 456.072(2)(b) (Board authority to suspend or revoke an existing license)). The proponents concede the existence of the elaborate procedure but say that it does not produce the intended results.

The fact that the two sides to an initiative disagree does not automatically mean that any language used by either side is inaccurate or misleading. Otherwise, this Court could only approve initiatives whose every term and explanation was agreed upon by all sides. That is not the test.

This Court does not sit to adjudicate or accept statements in ballot titles and summaries. In *Protect People From the Hazards of Second-Hand Smoke*, this Court held:

> Our opinion did not in any way indicate that the appearance of the proposed amendment on the ballot constituted our adjudication or acceptance, as fact, that the proposals would actually be effective. . . . Nor does our authorization for this proposed amendment to appear on the ballot constitute an adjudication of whether second-hand smoke is hazardous or whether the proposal will be effective in protecting citizens from any actual or perceived harm attendant to second-hand smoke. As mentioned above, those considerations are reserved for the voters.

814 So. 2d at 421.

The proponents have provided more than sufficient specific factual information to buttress their position that the public needs additional protection from repeated medical malpractice. It is up to the voters to determine whether they wish to be protected only by a comprehensive scheme which apparently does not function as intended, or if they wish to supplement the existing system by adding a less forgiving, more specific restriction on who may practice medicine in Florida.

C. The Opponents Misrepresent the Reasoning in *Protect People from the Health Hazards of Second-Hand Smoke*.

This Court has already flatly declared that "use of the term 'protect' does not constitute impermissible political rhetoric or the adjudication of a fact." *Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 421. Nevertheless, the opponents claim that the phrase "Public Protection from

Repeated Medical Malpractice" is misleading and inaccurate because it does not appear in the ballot summary or body of the proposed amendment. *See* Doctors' Br. at 7; Dentists' Br. at 18 ("holding [in *Protect People from the Hazards of Second-Hand Smoke*] does not apply here. First, in that case the Title did track the language of the summary and amendment.").

These assertions misread *Protect People from the Hazards of Second-Hand Smoke*. That decision says nothing about using the same language in the title, summary and text. In fact, there is no requirement for using the same language in the ballot title and summary and the body of a proposed amendment:

> It is true . . . that certain of the details of the [text] as well as some of its ramifications were either omitted from the ballot question or could have been better explained therein. That, however, is not the test.
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> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting.

Advisory Opinion to the Atty. Gen'l re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses, 818 So.2d 491, 498 (Fla. 2002) (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978)). The Court, in *Protect People from the Hazards of Second-Hand Smoke*, also noted that the term "protection" was found to be acceptable in two of the initiatives upheld in an

earlier initiative amendment. 814 So. 2d at 421 (citing *Advisory Opinion to the Atty. Gen'l re Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1127& 1129 (Fla. 1996)).

The statute does not require that the operative text appear in the ballot title and summary; it requires only that "the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the **chief purpose of the measure**." § 101.161(1), Fla Stat. (2003) (emphasis added).[1] Given the terms used by the Legislature, the federal and state studies of physician discipline, and the private reviews of Florida's lack of discipline for physicians who have committed repeated medical malpractice, it is not misleading to describe the purpose of this initiative as "public protection from repeated medical malpractice."

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[1] In addition, the ballot title is not read in isolation. As the Doctors' Brief indicates, "The Court considers the ballot title and the ballot summary together to determine whether the title and summary are clear and unambiguous, whether they state the primary purpose and legal effect of the amendment itself, and whether they are accurate, informative, and not misleading." Doctors' Br. at 5 (citing *Advisory Opinion to the Atty. Gen'l re Voluntary Universal Pre-Kindergarten Educ.*, 824 So.2d 161, 166 (Fla. 2002)). Thus, even if the words "Public Protection" did not appear in the body of the initiative, the phrase is comprehensively explained by reference to the ballot summary.

II. THE DESCRIPTION OF CURRENT LAW AS PERMITTING PHYSICIANS WHO HAVE COMMITTED REPEATED MALPRACTICE TO BE LICENSED IN FLORIDA IS NOT MISLEADING BECAUSE THERE IS A SUBSTANTIAL LEGAL AND FACTUAL BASIS FOR THE ASSERTION.

Much of the same discussion also applies to opponents' next assertion - that the first sentence in the ballot summary, "Current law allows medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida," is misleading and inaccurate. *See* Dentists' Br. at 20 ("This is a very vague, and even misleading, statement. While it might be technically true that some physicians can hold a license in Florida after having been 'found to have committed' three incidents of malpractice, Florida law does not simply 'allow' them to practice here."); Doctors' Br. at 11-12 ("at best, a misleading half-truth . . . This statement may be literally true in some circumstances.").

As opponents concede, the statement is true. *See id.* That a comprehensive system exists and is intended to protect the public from repeated medical malpractice does not alter the fact that the system is designed to permit a doctor who has committed repeated malpractice to hold a license. That is the specific result of the application of the criteria and procedural steps relied upon by the opponents.

As shown above, the law permits, and history show that doctors who have

committed as many as 18 instances of medical malpractice in twelve years have been allowed to retain their Florida license to practice medicine. *See* Public Citizen, *Florida's Real Malpractice Problem: Bad Doctors and Insurance Companies Not the Legal System* (Sept. 2002), at 8-9, *available online at*: http://www.citizen.org/documents/FLAreport.pdf. In fact, those doctors generally are not disciplined at all.[2] Thus, the criteria and procedural steps relied upon by the opponents result, in actual fact, in the continued holding of licenses by physicians who have committed repeated medical malpractice.

In their brief, the Dentists analogize the summary of the instant proposal to that rejected by this Court in *In re Advisory Opinion to the Attorney General re: Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995). *See* Dentists' Br. at 21. This comparison is misplaced. The summary rejected in *Casino Authorization* began, "This amendment prohibits casinos unless approved

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[2] Department of Health records for 2002-2003 (the latest year available) report 107 investigations initiated by the Department against doctors with three or more closed malpractice claims during the past five years, but report that only three of those doctors were disciplined in any way. *See* Florida Dept. of Health, Div. of Medical Quality Assurance, *Annual Report to the Florida Legislature, Appendices, Table 9: Performance Statistics for Medical Malpractice Claims* (2003), *available online at*: http://www.doh.state.fl.us/mqa/Publications/02-03appendices.pdf. The report provides no information about whether any of the three disciplined doctors had their licenses revoked.

by the voters . . . ." 656 So. 2d at 467. In other words, *an initiative intended to permit casinos* had a summary which deceptively attempted to lure voters into believing it would prohibit casinos.[3] This Court noted, "the summary creates the false impression that casinos are now allowed in Florida. It fails to inform the voter that most types of casino gaming are currently prohibited by statute." *Id.* at 469; *cf. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (invalidating a summary which gave "the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence"). In the instant case, however, there is no duplicity: the amendment seeks to prevent those who have committed malpractice three or more times from continuing to practice medicine in Florida, and the summary makes that fact clear to voters. As discussed above and admitted by opponents, the summary is literally

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[3] This element of duplicity was also found in the summary invalidated in *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). That summary held itself out as an amendment to prohibit former legislators from lobbying within two years of leaving office, but allowed such lobbying if financial disclosures were filed. *Id.* at 153. The summary made no reference to the fact that the Constitution then contained an *absolute* two-year ban, and that this amendment would lessen that protection. *Id.* The proposed Public Protection summary, however, correctly identifies both that, under current law, there is no ban on practice for those with multiple incidents of medical malpractice, and that the proposed amendment would add a ban for those with three or more incidents of malpractice. The summary is accurate and in no way attempts to deceive voters by selling the amendment as something it is not. It does not "fly under false colors."

true in the information it provides to voters.

There may be perfectly good reasons for the criteria and procedures which, under current law and practice, operate to prevent the removal of medical licenses for doctors with multiple incidents of malpractice. There may be arguments that the opponents can make to voters as to why they should reject the proposed amendment in favor of a system which does not protect the public from repeated malpractice. But those good reasons do not make the first sentence of the summary an inaccurate or misleading statement of the law. They simply demonstrate, as above, that the opponents and proponents disagree on the need for a change in policy.

III. THE REMAINDER OF THE BALLOT TITLE AND SUMMARY IS NEITHER INACCURATE NOR MISLEADING.

The opponents also offer a variety of other complaints about the ballot summary, including a failure to tell the voters that there are definitions in the proposed amendment, Doctors' Br. at 17-19, that some terms are undefined, *id.* at 19-22, and that the ballot title and summary do not include a prediction that "physicians will be under tremendous pressure to settle virtually every claim of malpractice asserted against them." *Id.* at 22. The Dentists add a failure to alert the voters to the fact "that the standard of proof required in Florida in license

revocation cases is effectively repealed by the proposal." Dentists' Br. at 24 (omission could mislead voters who were familiar with the existing license revocation process).

None of these four objections is anything more than the same type of policy disagreement described above.

A. The Ballot Title and Summary Need Not Say "Provides Definitions" to Avoid Being Misleading.

The Doctors' Brief contends that the terms "medical malpractice" and "found to have committed" are "specially defined" in the proposed amendment. Doctors' Br. at 17. They contend that "the terms do not mean what the average voter probably would think they mean." *Id.* Thus, they argue, the ballot title and summary should "warn" the voters of these special definitions. *Id.* at 19. Yet even the opponents concede that "the average person has a general understanding that 'medical malpractice' is an act that results in tort liability, such an understanding being based on very common news or anecdotal reports of claims of medical negligence and the lawsuits they spawn." *Id.* at 17-18.

In fact, the average voter has a general understanding of "malpractice" which is perfectly suited for understanding the purpose of the amendment. This amendment is intended to affect licensing of physicians who commit repeated

malpractice, and this definition is intentionally tied to general law. The amendment does not change current law in any way in regards to defining medical malpractice and explicitly permits the Legislature to adjust that definition as it wishes.

This Court permits initiatives which rely on voters' understanding of current law. *See Advisory Opinion to the Attorney General re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996) ("*Tax Limitation II*") (voters, by learning and experience, would understand the general rule that a simple majority prevails). This Court has further encouraged initiatives which provide flexibility to the Legislature to adjust their terms by general law. *See, e.g.*, *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 493 (defining terms both in text and by reference to statutes); *Advisory Opinion to the Attorney General re Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1128 (Fla. 1996) (defining of amendment coverage by reference to statutes).

Opponents' complaints boil down to concern about a possible change in the standard of proof used in different adjudications. Doctors' Br. at 18. Leaving aside the question of whether the amendment actually changes in any way the burden of proof in such matters (treated further *infra*), even if the complaint were correct, it would not affect the legal standard used to determine whether this ballot

title and summary were accurate.

The ballot title and summary must describe only the major purpose of the initiative. "[I]t is not necessary to explain every ramification of a proposed amendment, only the chief purpose." *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 497 (quoting *Advisory Opinion to the Atty. Gen'l - Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994)); *Advisory Opinion to the Atty. Gen'l re Limited Casinos*, 644 So. 2d 71, 74 (Fla. 1994).

Changing the standard of proof is neither the purpose nor even a major likely effect of the proposed amendment. The proposed amendment leaves intact the current system of license adjudication, only removing some discretion from the Department of Health in a few specific cases. Opponents might prefer to add sentences to the ballot summary discussing various burdens of proof and production in various adjudications, so that voters might better hear the opponents' positions, but that is not required. Adding substantial discussion about disputes over standards of proof would not aid the voter in understanding the single and simple purpose of the proposed amendment.

B. The Ballot Title and Summary Do Not Contain Ambiguous Undefined Terms.

Opponents also complain that the "summary also is ambiguous for using the

undefined phrases 'medical doctor' and 'three or more incidents.' " Doctors' Br. at 19. Yet these phrases are not used in a technical sense that differs from common understanding.

Opponents complain that the proposed amendment uses "medical doctor" where the statute uses "physician." Doctors' Br. at 19. Yet "medical doctor" is not an uncommon term used to describe physicians. Indeed, the Department of Health's website uses this exact term (and six variations, such as "Medical Doctor Restricted") for public searches for licensee information. *See* http://ww2.doh.state.fl.us/IRM00PRAES/PRASLIST.ASP. Furthermore, whenever used in the summary, the term "medical doctor" is accompanied by the phrase "licensed to practice medicine in Florida." The joinder of these phrases forecloses any possibility of confusion for voters having "a certain amount of common understanding and knowledge."[4] *Advisory Opinion to the Atty. Gen'l re Local Trustees & Statewide Governing Bd. to Manage Florida's Univ. Sys.*, 819 So. 2d 725, 732 (Fla. 2002) (citing *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419).

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[4] Indeed use of the term "medical doctor" together with "licensed to practice medicine" prevents voters from mistakenly supposing that the proposed Public Protection amendment will apply to other professionals such as dentists, osteopaths or chiropractors.

The phrase "three or more incidents" is not used in a technical sense either. This clear and understandable term closely tracks language used in Florida Statutes. *See, e.g.*, § 458.331(1)(t), Fla. Stat. (2003) ("three or more claims for medical malpractice . . . which incidents involved negligent conduct by the physician"). Likewise, the statute of limitations speaks of "incidents" of medical malpractice. Section 95.11(4)(b), Florida Statutes, provides that "[a]n action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered . . . ." If the average voter can understand current law, then the average voter can understand that three or more incidents means having been "found to have committed" medical malpractice three or more times.

C. The Summary Does Not Omit Any Material Information.

The opponents then contend that the ballot "summary is fatally flawed for the additional reason that it fails to track the key operative provisions of the amendment accurately." Doctors' Br. at 22. This contention is further explained later as meaning that the summary "does not explain that the amendment will mean that physicians will be under tremendous pressure to settle virtually every claim of malpractice asserted against them." *Id.* The opponents contend that this

effect will mean that settling doctors will continue to be licensed. *Id.* at 22-23.

Yet ballot summaries need not describe predicted effects of passage. *See Save Our Everglades*, 636 So. 2d at 1341. The only requirement is a description of the major purpose. Clearly the major purpose of the amendment is to remove the few doctors who commit most of the malpractice.

For physicians who do not have three or more malpractice claims against them, the existing disciplinary and licensure systems will remain intact, without any change at all. It is most likely that there will be no effect of the proposed amendment on 98 percent of all physicians in Florida. Only two percent of physicians in Florida have three or more malpractice claims against them. *See* Public Citizen, News Release, "New 2002 Government Data Dispute Malpractice Lawsuit 'Crisis' in Florida" (July 8, 2003), *available online at*: http://www.citizen.org/congress/civjus/medmal/articles.cfm?ID=8282.

Nor does the history of medical malpractice litigation bear out any threat of "tremendous pressure to settle" cases which have no merit. In fact, the vast majority of malpractice claims in the United States are unsuccessful. *See, e.g.*, Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts In Large Counties, 2001* (U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin No. NCJ 202803, April 2004), at 1, *available online at*:

http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf (noting that plaintiffs prevailed in only 27% of medical malpractice trials). The proposed Public Protection amendment, by design, only considers those cases which have been adjudicated by formally-constituted bodies with considerable expertise and appropriate due process protections: courts, administrative agencies subject to the Florida Administrative Code, and binding arbitration entered into by parties.

D. The Proposed Amendment Does Not Shift the Burden of Proof and Thus Need Not "Disclose" Any Such Shift to Voters.

The dentists propose that "the standard of proof required in Florida in license revocation cases is effectively repealed by the proposal." Dentists' Br. at 24. They argue, therefore, that the ballot title and summary are misleading because they do not disclose this repeal. *Id.* However, the standard of proof is not repealed by the proposed amendment. The existing regulatory and supervisory authority exercised by executive agencies over the medical profession is retained. Only in the case of repeated medical malpractice does this proposed amendment even come into play. As shown above, this is a very small universe of cases.

Even assuming that such a repeal takes place in those cases, the summary adequately discloses the change in law which is proposed by the amendment. The requirement for disclosure is that the summary must inform the voter of the change

which will take place. The summary accurately states that the current law permits a license to be retained even after three incidents of malpractice, and that the law would change so that a license could not be issued or retained after the third incident. This is adequate disclosure. Voters have "fair notice of the decision [they] must make." *Askew*, 421 So. 2d at 155.

IV. THE PROPOSED AMENDMENT HAS ONLY A SINGLE SUBJECT, AFFECTING ONLY THE EXECUTIVE BRANCH AND ONLY IN A LIMITED SET OF CIRCUMSTANCES.

Opponents make no argument that the proposed amendment constitutes "log-rolling," the combining of disparate subjects into one initiative. Dentists' Br. at 6 n.3. On its face, the proposed amendment has only a single subject and poses only one unified question to voters. It is "functionally and facially unified." *See Advisory Opinion to the Atty. Gen'l - Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993). The opponents, however, do contend that the proposed amendment usurps the functions of multiple branches of government. Dentists' Br. at 6; Doctors' Br. at 24. Their analyses, however, both misconstrue the amendment and include political, rather than legal, reasoning.

As the proponents showed in their initial brief, the specific effect and purpose of this amendment is to remove the licensing agency's discretion to ignore repeated malpractice. *See* FPP Br. at 11-18. This removal of discretion would be

an effect on the executive branch. It would not be a usurpation of the function of either the legislative or judicial branches.

Opponents' major error is to ignore the fact that this proposed amendment does not displace or largely affect the existing structure for physician discipline and licensure. The discipline and licensing functions are retained intact. Only when a physician is found, by a final decision of a court, administrative agency, or binding arbitration, to have committed her third malpractice incident does this amendment apply at all. Thus, except for that small category of cases, there will be no effect on any branch of government from this proposed amendment.

The test for single subject violations, as the opponents concede, is not whether there is an effect on other branches: "An initiative that affects multiple branches of government will not automatically fail, of course." Doctors' Br. at 24; *cf. Limited Casinos*, 644 So. 2d at 74 ("It is difficult to conceive of a constitutional amendment which would not affect other aspects of government to some extent."). The test is whether the proposed amendment usurps the power of multiple branches, or substantially affects the powers of these branches. *See Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 496; *Limited Casinos*, 644 So. 2d at 74.

The opponents first complain that the proposed amendment usurps the

delicate balance struck by the Legislature. *See* Doctors' Br. at 25. Yet even the opponents concede that "in most instances a new constitutional amendment will necessitate changes in the statutes." *Id.*; *cf. Advisory Opinion to the Atty. Gen'l re: Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So.2d 972, 975-76 (Fla. 1997). The proposed amendment, however, does not invalidate or change existing statutes in any significant way. Accordingly, it leaves the "prime function" of the Legislature intact. *Cf. Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 496. The proposed Public Protection amendment simply removes the permissive discretion of the licensing agency in a very limited set of cases: where the applicant or licensee has three or more malpractice incidents. As discussed above, the agency already has the power to revoke licenses, but chooses not to exercise it, even in egregious cases. This amendment is intended to remove that discretion in a few cases.

For that reason, the assertions that there will also be effects on the legislative and judicial branches do not withstand scrutiny. The doctors, for example, contend that this direction to the licensing agency will somehow "usurp core judicial branch functions" by requiring the agency to consider the final finding of a court. Doctors' Br. at 27. Yet the agency is already entitled to consider those court findings, and apparently does so, as part of the "3 in 5"

process described in the proponents' initial brief. *See* FPP Br. at 5 n.3. (Though, as noted above, the agency usually does not take action in those cases.) The opponents' argument means that the agency usurps a core judicial function even under the current system; this conclusion is illogical. There is an effect on the agency discretion, but it is one which cannot reasonably be described as a "substantial effect," given the retention by the agencies of their core discretionary functions of licensing and discipline.

The Public Protection initiative is far less intrusive into government functions than other initiative amendments approved by this Court. For example, in *Local Trustees & Statewide Governing Board to Manage Florida's University System*, this Court held that an initiative which created a new executive agency in the Constitution and endowed it with plenary supervisory and regulatory powers over higher education only presented one subject. 819 So. 2d at 729-30 (citing *Advisory Opinion to the Atty. Gen'l re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1354 (Fla. 1998)) ("we find that the sole purpose of the proposed amendment is to create a governance of the state university system"). The Public Protection amendment, by contrast, is far more limited, proposing a single, specific policy change working entirely within the existing regulatory and disciplinary system. The instant proposal has far fewer impacts on the executive

branch, which retains its prime functions of supervision, regulation and discipline; and on the legislative branch, which retains its prime function of policy-making, save in the one area of medical doctors who have three or more incidents of malpractice. A more limited and targeted amendment could scarcely be posited.[5] As this Court said with regard to another initiative, "[w]hile the initiative may affect more than one branch of government, we cannot say it substantially changes or performs the functions of multiple branches of government in violation of article XI, section 3." *Fish & Wildlife Conservation Commission*, 661 So. 2d at 1205 (responding to arguments that a similar initiative affected multiple branches and levels of government). Here there is no creation of a new agency or governmental entity, no wholesale transfer of powers. Rather, the instant proposal makes a single, limited policy change. There are no other substantial effects on

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[5] *See also Fish & Wildlife Conservation Commission*, 705 So. 2d at 1354 (approving an initiative which removed regulatory powers over marine fish and aquatic life delegated by the Legislature to one executive agency, the Marine Fisheries Commission of the Department of Environmental Protection, and transferred these powers to an entirely different constitutional body built upon the old Game & Fresh Water Fish Commission); *Advisory Opinion to the Attorney General re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("*Stop Early Release II*") (allowing an initiative requiring prisoners to serve at least 85% of their sentences and also mandating that parole or conditional release could not reduce more than 15% of the sentence). Both these initiatives had greater impacts on legislative and executive functions than the proposed amendment, but even these impacts were not deemed "substantial."

other branches or levels of state government.

Thus, the proposed Public Protection amendment has a logical oneness of purpose, and only one subject. Opponents may well raise questions as to the wisdom of the policy decision offered by Sponsors. However, that decision, as this Court has often repeated is a matter for the voters. *See Protect People from the Hazards of Second-Hand Smoke,* 814 So. 2d at 418 (quoting *Advisory Opinion to the Atty. Gen'l re Tax Limitation*, 644 So. 2d 486, 489 (Fla. 1994) ("*Tax Limitation I*") ("This Court does not have the authority or the responsibility to rule on the merits or the wisdom of the . . . proposed initiative amendments."). The proposed Public Protection amendment meets the requisite constitutional and statutory standards for initiative amendments, and should thus be allowed on the ballot.

CONCLUSION

Opponents have failed to demonstrate that this initiative proposal is "clearly and conclusively defective." Because the ballot title and summary of the proposed Public Protection amendment are accurate and informative in compliance with Section 101.161, Florida Statutes, and because the question presented by the proposed amendment contains a single, unified subject in compliance with Article XI, Section 3, this Court should allow the amendment to appear on the ballot.

RESPECTFULLY SUBMITTED,

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I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP. P.

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