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

INITIAL BRIEF OF SPONSOR FLORIDIANS FOR PATIENT PROTECTION

IN SUPPORT OF THE INITIATIVE

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THE PROPOSED INITIATIVE

BALLOT TITLE:

Public Protection from Repeated Medical Malpractice

BALLOT SUMMARY:

Current law allows medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida. This amendment prohibits medical doctors who have been found to have committed three or more incidents of medical malpractice from being licensed to practice medicine in Florida.

FULL TEXT:

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

a) Statement and Purpose:

Under current law, a medical doctor who has repeatedly committed medical malpractice in Florida or while practicing in other states or countries may obtain or continue to hold a professional license to practice medicine in Florida. The purpose of this amendment is to prohibit such a doctor from obtaining or holding a license to practice medicine in Florida.

b) Amendment of Florida Constitution:

Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read:

"Section 20. Prohibition of Medical License After Repeated Medical Malpractice.

"a) No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.

"b) For purposes of this section, the following terms have the following meanings:

"i) The phrase 'medical malpractice' means both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers' licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.

"ii) The phrase 'found to have committed' means that the malpractice has been found in a final judgment of a court or law, final administrative agency decision, or decision of binding arbitration."

c) Effective Date and Severability:

This amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

STATEMENT OF THE CASE

This matter comes before the Court upon a request for opinion submitted by the Attorney General on May 11, 2004, in accordance with the provisions of Article IV, Section 10, Florida Constitution, and Section 16.061, Florida Statutes. This Court has jurisdiction. Fla. Const., art. V, § 3(b)(10). This Brief is submitted by the Sponsor of the proposed amendment, Floridians for Patient Protection, in response to this Court's Order of May 12, 2004, accepting jurisdiction and inviting interested parties to submit briefs.

This Court's review addresses whether the proposed initiative amendment violates the single-subject[1] and ballot title and summary[2] standards.

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[1] Article XI, Section 3, Florida Constitution provides:
Section 3. Initiative – The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, *provided that, any such revision or amendment,* except for those limiting the power of government to raise revenue, *shall embrace but one subject and matter directly connected therewith*.

See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 890 (Fla. 2000); Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns, 693 So. 2d 972, 974 (Fla. 1997). In his request for an advisory opinion, the Attorney General did not express an opinion with respect to the validity of the amendment.

Most medical malpractice is committed by a tiny minority of doctors. "According to a study by Public Citizen, only 6.2 percent of Florida doctors had

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Emphasis added.

[2] Section 101.161(1), Florida Statutes (2003) provides:

101.161 **Referenda; ballots.**-- (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, *the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot* after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. Except for amendments and ballot language proposed by joint resolution, *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*. In addition, the ballot shall include a separate fiscal impact statement concerning the measure prepared by the Revenue Estimating Conference in accordance with s. 100.371(6) or s. 100.381. *The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.*
Emphasis added.

two or more malpractice payouts between 1990 and 2002. Those doctors were responsible for more than half the settlements and jury awards." Editorial, "Proposal Would Harm Patients," *Sarasota Herald-Tribune*, Sept. 14, 2003, available online at: http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20030914/NEWS/309140728/1030. The Public Citizen report, derived from data in the federal National Practitioner Data Bank, indicates that "just 2.2 percent of all doctors have made three or more malpractice payouts, amounting to 25.8 percent of all malpractice payouts in the state." Public Citizen, News Release, "New 2002 Government Data Dispute Malpractice Lawsuit 'Crisis' in Florida" (July 8, 2003), *available online at*: http://www.citizen.org/documents/FL_NPDB.pdf. Those doctors have not been disciplined. "Only 13.8 percent (199 of 862) of Florida doctors who made three or more malpractice payouts have been disciplined." *Id*.

Under current Florida law, the Department of Health may revoke or suspend the license to practice medicine of any physician, *inter alia*, for "[g]ross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." § 458.331(1)(t), Fla. Stat. (2003).

"Repeated malpractice" is defined by statute to include: "three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $50,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician. . . . Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph." *Id*.

Apparently, however, this power is rarely used. Public Citizen found 23 physicians who had committed ten or more instances of medical malpractice between 1990 and 2002. *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. Among the repeat offenders:

- Physician Number 98892 settled 18 malpractice lawsuits between 1991 and 1997 involving improper performance of surgery. The damages added up to some $2 million. This physician has never been disciplined.

- Physician Number 27908 worked in New York State, where he lost one malpractice suit and settled nine others for a total of $3.7 million. Around 1991, Physician 27908 moved his practice to Florida, where he settled seven more malpractice suits for a total of $3.3 million. This doctor, with 17 malpractice lawsuits totaling $7 million, finally surrendered his New York medical license in 1999, 15 years after the first incident. He still has not been disciplined by Florida authorities.

- Physician 69310 practiced medicine in Indiana, where he accumulated eleven lawsuits. Around 1996 he moved to Florida and settled 4 more, paying some $2 million in damages to injured patients. This physician has not been disciplined by either Indiana or Florida authorities.

- Florida has exported as well as imported questionable doctors. Physician Number 8269 settled 14 malpractice lawsuits in Florida between 1982 and 1992. Florida never disciplined this doctor. He moved on to Maryland, where he settled another lawsuit for $695,000. He finally relinquished his Maryland license in 1999.

Id.

The Department of Health's official records for the year ending June 30, 2003 (the latest year available) report that the Department initiated 107 investigations against doctors who had three or more closed malpractice claims in the prior five years, but 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),[3] *available online at*:

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[3] These figures can be found in Table 9 as "3 in 5 Initiated" and "3 in 5 Disciplines." A footnote explains that "*'3 in 5' – The Department is required to investigate reports of closed medical malpractice claims against medical, osteopathic or podiatric physicians when there are 3 or more received within a 5 year period with an indemnity paid in excess of $25,000 each [*sic*]." *Id.* at *. Because, as described below, the proposed amendment uses slightly different criteria than the "3 in 5" statute, this brief will use the term "3 in 5" when describing current law, and "three strikes" when describing the proposed amendment.

http://www.doh.state.fl.us/mqa/Publications/02-03appendices.pdf. The report does not indicate whether any of the three disciplined doctors had their licenses revoked.

Recently the Department of Health undertook a comprehensive review of the healthcare provider disciplinary process. *See* 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. The Workgroup Report concluded that the healthcare practitioner process "must seek to aggressively eliminate bad practitioners from the profession. . . ." *Id*. at 4.

Yet this comprehensive look at the healthcare practitioner disciplinary system does not even mention the "3 in 5" statutory requirement by that or any other name. Apparently the healthcare practitioner disciplinary system, currently and as the Workgroup envisions it in the future, does not include revocations of or denials of applications for medical licenses for those who have committed

repeated malpractice, despite the mandate of Section 458.331(1)(t), Florida Statutes.

The expressed purpose of this proposed amendment is to tighten and constitutionalize the enforcement of these protections against doctors who commit "gross or repeated malpractice," either in Florida, or in other states or countries. "The purpose of this amendment is to prohibit such a doctor [who has repeatedly committed medical malpractice in Florida or while practicing in other states or countries] from obtaining or holding a license to practice medicine in Florida." Text of Proposed Amendment, Preamble, "Statement and Purpose." The proposed amendment seeks to achieve its purpose by adding a new requirement that the Department of Health revoke or deny licensure to a person who has been found in three or more final proceedings to have committed malpractice; this mandatory limitation on licensure would be in addition to the current discretionary disciplinary power retained by the Department in other cases. The proposed amendment, in other words, will force the Department to take the "3 in 5" mandate seriously.

The standard of review in this proceeding is *de novo*, but with deference to the sovereign right of the People to amend the Constitution. *See Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("the court must act with extreme care,

caution, and restraint before it removes a constitutional amendment from the vote of the people."). Thus, the Court must approve an initiative unless it is "'clearly and conclusively defective.'" *Advisory Opinion to the Atty. Gen'l re: Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, Case No. SC03-857, Slip Op., at 3, __ Fla. L. Weekly __ (Fla., May 13, 2004) (quoting *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982)).

SUMMARY OF ARGUMENT

The proposed "Public Protection from Repeated Medical Malpractice" initiative (hereinafter "Public Protection amendment") complies with the single subject requirements of Article XI, Section 3, Florida Constitution, because it presents a single, unified subject to the voters: shall the Constitution be amended to prevent physicians who have committed medical malpractice three or more times from practicing in the State of Florida? Every aspect of the proposal is "matter directly connected" to this one subject. The proposed amendment simply sets a higher standard for physician licensing than current policy.

The Department of Health currently licenses medical practitioners and has discretion to revoke these licenses when physicians are found to have committed gross or repeated malpractice. The Department also collects information about these incidents in order to exercise its supervisory authority. Even when such incidents are reported, however, the Department has not revoked the licenses of many physicians who commit repeated malpractice.

The proposed Public Protection amendment does not reduce or alter the Department's responsibility under current law; it simply requires that the Department revoke or deny licensing to physicians who have been found to have committed repeated medical malpractice. As such, it only more specifically

defines agency discretion in the performance of its duty by raising the threshold for licensing. There are no other substantial effects on other branches of state government. Nor does the amendment have any substantial effects on multiple sections of the Florida Constitution.

The ballot title and summary are likewise clear and accurate statements of the chief purpose of the proposal. They explain that there is no existing bar on those who are repeatedly found to have committed medical practice from being licensed in Florida. The summary explains that the amendment will change the current law by preventing the licensing of anyone found to have committed medical malpractice three or more times. The title and summary do not mislead voters or attempt to sway them with emotional or rhetorical language. There are no hidden meanings or misleading technical language.

The proposed Public Protection amendment complies with the requirements of the Single Subject test and the statutory standards for ballot titles and summaries. It is not "clearly and conclusively defective." It is a clear policy response to an identified problem, and Florida citizens deserve the opportunity to weigh this proposal as a limited solution to this problem. Accordingly, this Court should allow the proposed Public Protection initiative amendment to be placed on the ballot.

ARGUMENT

I. THE PROPOSED AMENDMENT HAS ONLY A SINGLE SUBJECT, WHICH SIMPLY SUPPLEMENTS CURRENT LAW WITH A NEW MANDATORY REQUIREMENT IN CASES WHERE REPEATED FINAL FINDINGS ARE MADE BY COURTS, ADMINISTRATIVE AGENCIES OR BINDING ARBITRATION.

The single subject limitation of Article XI, Section 3, is intended to avoid multiple "precipitous" and "cataclysmic" changes in the Constitution. *See Advisory Opinion to the Atty. Gen'l re Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities*, 813 So. 2d 98, 100 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l - Save Our Everglades*, 636 So.2d 1336, 1139 (Fla. 1994). The rule was instituted because initiatives do not afford the same opportunity for public hearing and debate that accompanies the proposal and drafting processes in the Legislature. *See Advisory Opinion to the Atty. Gen'l re Fish & Wildlife Comm'n,* 705 So. 2d 1351, 1353 (Fla. 1998) (citing *Fine v. Firestone*, 448 So.2d 984, 988 (Fla 1984)).

Another reason for the single subject limitation is to prevent "logrolling," which is the combining of different issues into one initiative so that voters have to accept something they don't want in order to gain something they do want. *See Advisory Opinion to the Atty. Gen'l re Fla. Transportation Initiative for Statewide*

High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So.2d 367, 369 (Fla. 2000) (quoting *Advisory Opinion to the Atty. Gen'l re limited Casinos*, 644 So. 2d 71, 73 (Fla. 1994)).

This Court has used three major tests to determine whether a proposed amendment violates the single subject limitation:

- whether the proposal perform or substantially affect multiple functions and levels of government;
- whether the proposal substantially impacts or alters multiple sections of the Constitution; and
- whether the proposal has a "logical oneness of purpose" to prevent "logrolling" of disparate proposals into one initiative.

The proposed Public Protection amendment meets all three of these tests.

A. The Three Strikes Licensure Limitation Affects Only Executive Branch Functions at the State Level.

This test asks whether the proposed amendment performs, alters, or substantially affects multiple, distinct functions and levels of government. *Advisory Opinion to the Attorney General re: Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 496 (Fla. 2002); *Save Our Everglades*, 636 So. 2d at 1340; *Advisory Opinion to the Atty. Gen'l - Restricts Laws Related to Discrimination*, 632 So. 2d at 1020; *Evans v. Firestone*, 457 So.

2d 1351, 1354 (Fla. 1984) (when an amendment "changes more than one government function, it is clearly multi-subject"); *Fine*, 448 So. 2d at 990.

An initiative which "affects several branches of government will not automatically fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Treating People Differently Based on Race*, 778 So. 2d at 892 (quoting *Fish & Wildlife Conservation Comm'n*, 705 So. 2d at 1353-54); *Advisory Opinion to the Atty. Gen'l re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1308 (Fla. 1997) (finding impacts on special districts and local governments, as well as on the executive branch).

As noted *supra*, licensure and discipline of physicians is conducted by the Department of Health, a part of the executive branch, under authority granted by statute. *See, e.g.*, § 458.331(1)(t), Fla. Stat. (2003). The proposed Public Protection amendment supplements this statutory authority of the Department of Health, requiring it to deny or revoke licenses upon the "third strike" malpractice finding, in addition to the Department's existing discretionary authority to revoke or deny licenses in other cases. This change would be an alteration of the function

of the executive branch of state government, but it is the only branch of government at any level whose function is affected by the proposed change.

1) The Proposal Only Supplements Current Law by Removing Discretion From a Single State Agency to Ignore Final Decisions of Courts, Administrative Agencies and Binding Arbitration.

Under current law, as noted above, the Department of Health, a part of the state executive branch, already has the ability to revoke or deny licenses to persons who have committed "gross or repeated malpractice," defined, *inter alia*, as "three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $50,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician." § 458.331(1)(t), Fla. Stat. (2003). As noted above, the Department of Health apparently does not exercise this power of revocation or denial, even in cases of repeated or gross medical malpractice. *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 (Table 9 reports that only 3 of 107 "3 in 5" investigations resulted in discipline of any kind during program year 2003).

This “three strikes” initiative simply requires the Department of Health to do something in addition to current law (withhold or revoke license), in the few cases where there have been final findings by a court, administrative agency or binding arbitration that the physician has engaged in repeated malpractice. The proposed amendment supplements current law, in large part by removing the discretion of the Department of Health to ignore the final findings of malpractice by courts, administrative agencies and binding arbitration.

The proposed amendment slightly alters the current statutory requirements by dropping both the five-year look-back limitation and the requirement that there have been a $50,000 indemnity payment. In turn, however, the proposed Public Protection amendment requires that the physician be “found to have committed” the incidents of medical malpractice, meaning “that the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration.”

The net effect of these changes is to lessen the discretion of the Department of Health to ignore the final findings of courts, administrative agencies and binding arbitration that a particular doctor has committed repeated medical malpractice. Once the final findings of repeated malpractice have been made (presumably in a setting according the accused appropriate Due Process rights),

the Department of Health can no longer permit the licensing of a physician who has committed repeated malpractice.

The Department of Health could continue to apply current law in "3 in 5" cases where there were no final findings as set forth in the proposed amendment. It also can, of course, apply its own standards and discretion in any proceeding in which it is the appropriate "administrative agency" which is called upon to render a final decision on a claim of medical malpractice. In addition, the Department can continue to apply current law in non-"3 in 5" cases.

Thus, the sole effect of the proposed amendment would be only to remove discretion from the Department of Health in a limited number of "3 in 5" cases. There would be no other significant effect on other Executive Branch functions, either at the state level or on any other level of government.

2) The Proposal Has No Effect on the Judicial Branch.

The proposed amendment does not make any changes in judicial functions or structure, nor does the amendment undertake to perform a judicial function. As noted above, the "three strikes" restriction can be triggered by a final court judgment, but that trigger neither invokes nor performs a judicial function. Nor does the proposed amendment change the standards which courts use to determine whether medical malpractice has occurred. The proposal "does not usurp the

function of the judiciary. Rather, the amendment leaves the prime function of the judiciary intact," and comes into effect only after courts have acted. *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 496. The proposed amendment simply tracks and refers to general law related to health care providers' licensure.

It is possible to allege that the inclusion of extra-territorial acts would, in some fashion, require a court to interpret the scope of the phrase "any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice." Yet this anti-avoidance phrase simply tracks the current requirements of general law, and will require only limited judicial implementation, if any, to determine which particular set of facts constitutes the equivalent of malpractice in Florida. This is no different from the judiciary's general power to interpret the law. Thus, the proposed Public Protection amendment neither performs nor substantially alters any judicial function.

3) Although the Proposed Amendment Performs A Legislative Act, It Does No More Than Is Required For The Exercise of the Initiative Function, and Does Not Substantially Affect the Legislative Branch at Any Level of Government.

The proposed Public Protection amendment performs the legislative act of establishing the law in one limited area: it is a command to an executive branch agency supplementing current law, as described above. This is, however, an essential and necessary function of any initiative proposal. "A proposal that affects several branches of government will not fail; rather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Fish & Wildlife Conservation Comm'n*, 705 So. 2d at 1353-54; *cf. Advisory Opinion to the Atty. Gen'l re Fla. Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So.2d 367, 369-70 (Fla. 2000) ("[W]e find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent. However, this Court has held that a proposed amendment can meet the single-subject requirement even though it affects multiple branches of government.").

The proposed amendment does not inhibit the Legislature from enacting new legislation (except for that inconsistent with the specific directive to the Department of Health), and explicitly refers to general law – set by the Legislature – relating to health care providers' licensure. The retention of discretion by the Legislature has been viewed as a positive factor by this Court in considering

initiatives. *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). The amendment also preserves the ability of the Legislature to expand or narrow the definition of malpractice. Thus, the proposed amendment does not usurp or substantially alter the function of the legislative branch at any level of government.

B. The Proposed Public Protection Amendment Will Not Affect Other Sections of the Constitution.

The Court also looks at whether the proposed amendment causes substantial impact on multiple sections of the Constitution. *See Advisory Opinion to the Attorney General re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994) ("*Tax Limitation I*"); *Restricts Laws Related to Discrimination,* 632 So. 2d at 1019; *Fine*, 448 So. 2d at 989-90. An initiative will not be removed just because there is some "possibility that an amendment might interact with other parts of the Florida Constitution." *Advisory Opinion to the Attorney General re Term Limits Pledge*, 718 So. 2d 798, 802 (Fla. 1998). The test is whether there are multiple parts of the

Constitution which are substantially affected by the proposed initiative amendment, in order both to inform the public of the proposed changes and to avoid ambiguity as to the effects. *Tax Limitation I*, 644 So. 2d at 490; *Fine*, 448 So. 2d at 989.

As shown by the discussion above, the net effect of the proposed amendment is simply to supplement current law authorizing particular acts by an executive agency. Licensure to practice medicine is not a constitutional right, and there is no other section of the Constitution which provides for the sort of supplement to current law proposed by this initiative.

There might be concerns raised about the Due Process rights of health care professionals found to have committed repeated malpractice. These rights are not affected by the proposed amendment, however, since the initiative does not itself make any findings or determinations regarding individual cases or circumstances. The proposed amendment simply incorporates Due Process rights made available by other laws through reference to final decisions of courts, administrative agencies and binding arbitration.

Thus, the proposed Public Protection amendment does not affect multiple sections of the Constitution.

C. The Proposed Amendment Has A "Logical Oneness of Purpose."

The proposed amendment must have "a natural relation and connection as component parts of a single dominant plan or scheme. Unity of object and plan is the universal test ..." *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 339 (Fla. 1978) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)). This test is sometimes described as whether the proposed amendment has a "logical and natural oneness of purpose." *Advisory Opinion to the Attorney General re Local Trustees & Statewide Governing Board to Manage Florida's University System*, 819 So.2d 725, 729 (Fla. 2002) (quoting *Fine*, 448 So. 2d at 990).

As a practical matter, this test looks to whether there are multiple proposals which can stand separately. *See Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 495. If there are potentially free-standing proposals combined into one initiative, the question is whether there is one dominant purpose for which the other proposals are merely components or implementing details. This Court looks to whether the proposal is "functionally and facially unified." *Id.* at 496 (quoting *Advisory Opinion to the Atty. Gen'l - Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993)).

This proposed amendment cannot be so divided. It has a simple, one-sentence operative text, plus two definitions. The operative text cannot be further split, since it describes a specific prohibition. The definitions themselves are merely explanatory, as described above, indicating implementing details which are essential to understanding the dimensions of the operative text. *Cf. Advisory Opinion to the Atty. Gen'l Re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 599 (Fla. 2002) (definitions section part of a "functionally and facially unified" amendment proposal); *Advisory Opinion to the Atty. Gen'l Re Protect People from the Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d 415, 419 (Fla. 2002) (definitions section provided to make clear the scope and effect of the proposal).

Since the proposed amendment has "a single dominant plan" – to prohibit the licensure of those who commit repeated malpractice – there is no danger of log-rolling with this initiative. The instant proposal has the requisite "logical oneness of purpose," and thus contains only a single subject, affecting only a single branch of state government. Accordingly, the proposed Public Protection initiative does not violate the single subject rule.

II. THE BALLOT TITLE AND SUMMARY FOR THE PROPOSED PUBLIC PROTECTION AMENDMENT ARE ACCURATE, COMPLETE AND NOT MISLEADING.

The purpose of the Court's review of a proposed measure's ballot title and summary is to insure "that the electorate is advised of the true meaning, and ramifications, of an amendment." *Tax Limitation I*, 644 So. 2d at 490; *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). A voter "'must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.'" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976).

This Court requires that the summary and ballot title of a proposed initiative amendment be "accurate and informative." *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992). The Court, however, recognizing the statutory word limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982). The Court also recognizes that the voters "must be presumed to have a certain amount of common sense and knowledge" when reading the petition. *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).

The true meaning and ramifications of the proposed Public Protection initiative are clear on the face of the ballot title and summary. The proposed amendment's ballot title and summary, therefore, are not misleading, and meet the several individual tests for inclusion on the ballot.

A. The Ballot Title and Summary Accurately and Completely Explain the Major Purpose of the Initiative.

The first test for a ballot title and summary is whether they accurately convey the major purpose of the initiative. *See Smith*, 606 So. 2d at 621. The title and summary, which are statutorily limited in length, need not recite every purpose and every effect, but must describe enough so that voters are informed about the significant changes in law which would result from the adoption of the initiative. *See Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose*, 422 So. 2d at 305; *Advisory Opinion to the Attorney General English - The Official Language of Florida*, 520 So. 2d 11, 13 (Fla. 1988).

As noted above, the purpose of the proposed Public Protection amendment is to prohibit the issuance or continuation of a medical license to doctors who have

been found to have committed repeated medical malpractice. This is a supplement to the current "3 in 5" law, as described above.

The ballot summary first describes current law as allowing "medical doctors who have committed repeated malpractice to be licensed to practice medicine in Florida." This, in fact, is an accurate statement both of the statutory discretion of the Department of Health in "3 in 5" cases, under Section 458.331(1)(t), Florida Statutes, and of the actual outcome of "3 in 5" cases, as noted above. *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. Thus, voters are put on notice as to the state of current law, and what will be changed if the initiative is adopted.

The ballot summary then describes the major purpose of the proposed amendment as: "This amendment prohibits medical doctors who have been found to have committed three or more incidents of medical malpractice from being licensed to practice medicine in Florida." This is an accurate summary of both the purpose and the effect of the proposed amendment. The proposed amendment

seeks to prohibit the granting or continuation of licenses of doctors who commit repeated malpractice.

It is not essential for voters to be told that it is the Department of Health which will be affected by this change; the voters can be assumed to know that some executive agency is required under current law to grant or deny medical licenses. Nor is it necessary to include explicit definitions of medical malpractice, or even "found to have committed" medical malpractice. This test looks primarily to see if changes in the law are accurately described to voters, and the proposed amendment does not disturb the definitions of these factors in current law.

Thus, the ballot title and summary correctly and completely describe the major purpose of the proposed amendment. The ballot summary is fair and accurate and "advise[s] the voter sufficiently to enable him intelligently to cast his ballot." *Askew*, 421 So. 2d at 155 (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)).

B. There Are No Undisclosed Effects or Purposes of the Proposed Amendment Beyond Those Disclosed in the Ballot Title and Summary.

A ballot summary is defective "if it omits material facts necessary to make the summary not misleading." *Term Limits Pledge*, 718 So. 2d at 803 (quoting *Advisory Opinion to the Attorney General - Limited Political Terms in Certain*

Elected Offices, 592 So. 2d 225, 228 (Fla. 1991)). This Court has held, "We are most concerned with relationships and impact on other areas of law when we consider whether the ballot summary and title mislead the voter with regard to effects and impact on other constitutional provisions." *Second-Hand Smoke*, 814 So. 2d at 419 (citing *Treating People Differently Based on Race*, 778 So. 2d at 899-900).

As noted above, there are no significant impacts on other areas of the law from the proposed amendment. The effect of the proposal, if adopted, will be to supplement current law in a particular, limited fashion. This effect is disclosed to voters and there are no other legal effects. This ballot title and summary accurately reflect the purpose and major effect of the proposed amendment. The amendment is neither more nor less than it appears to be from the ballot title and summary.

C. The Proposed Amendment Does Not Use Undefined or Ambiguous Terms in a Manner Which Might Mislead Voters.

Although voters are presumed to have normal intelligence and common sense, they are not presumed to have special knowledge or legal expertise. *Cf. Tax Limitation II*, 673 So. 2d at 868. Voters should not be misled by ballot title or summary language which has a peculiar or ambiguous meaning and effect. *See*

Treating People Differently Based on Race, 778 So. 2d at 899 (term "bona fide qualifications based on sex" not defined and subject to broad and differing interpretations by voters); *People's Property Rights Amendments*, 699 So. 2d at 1309 ("common law nuisance" and "increases in tax rates" undefined).

Here the terms used are clear and specific. The only somewhat technical phrase in the ballot title and summary is the incorporation of the phrase "found to have committed three or more incidents of medical malpractice." This is not a "legal phrase" about which the "voters are not informed of its legal significance," as the Court said with regard to the initiative in *Treating People Differently Based on Race*, 778 So. 2d at 899 (discussing the phrase "bona fide qualifications based on sex"). The legal significance of the finding of malpractice is apparent both from the face of the summary, and from voters' common sense understanding of what constitutes a finding of medical malpractice under current laws.

This phrase is defined in the text of the amendment as meaning "that the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration." As defined, the phrase incorporates Due Process protections for medical doctors accused of malpractice. Voters can be assumed to know that some degree of Due Process protections (required by the state and federal constitutions) would be incorporated

into any such finding, and the specific phrase "Due Process protections" need not be included in the limited summary space to avoid misleading voters.[4] Even so, as this Court has often repeated, "it 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 *Save Our Everglades*, 636 So. 2d at 1341); *Advisory Opinion to the Atty. Gen'l re Limited Casinos*, 644 So. 2d 71, 74 (Fla. 1994).

Voters reading the ballot title and summary of the instant proposal will not require any special legal knowledge in order to understand the major purpose and effect of the proposed amendment.

D. Minor Differences in Wording Between the Summary and Text Are Not Misleading.

Significant divergent terminology between the text of a proposed amendment and its ballot summary has been a ground for invalidation of a ballot summary. Thus, in *Treating People Differently Based on Race*, the Court invalidated a summary which used the term "people," while the text of the

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[4] In contrast, for example, in *People's Property Rights*, the Court addressed a proposal which sought to require government to compensate owners of real property for any loss in value caused by governmental restrictions on its use. The Court found that the terms "common law nuisance" and "which in fairness should be borne by the public" were not understandable to the average voter and required definition. 699 So. 2d at 1309.

amendment referred to "persons," terms which the Court found legally distinct. 778 So. 2d at 896-97. Similarly, in *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, the Court invalidated a summary which used the term "citizens" in the summary, when the amendment used the legally significant term "natural persons." 705 So. 2d 563, 566 (Fla. 1998) (uncertain as to whether the terms and coverage were intended to be synonymous). There can be no such uncertainty about the minor differences between the amendment text and the ballot title and summary here.

The most obvious difference between the text of the proposed amendment and the ballot summary is that the amendment itself states "No person . . . shall be licensed. . . to provide health care services as a medical doctor," while the ballot summary states, "This amendment prohibits medical doctors . . . from being licensed. . . ." In other words, the ballot summary describes the major purpose and effect of the proposed amendment, while the text itself is the specific command to the licensing authority. In this regard, the difference in terminology is minimal, and less significant than variations found in summaries approved by this Court. For example, this Court approved the use of the term "first two offenses" in the summary for *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses* initiative. *See* 818 So. 2d at 497-98 (upholding a summary that did not point out

that first-time offenders "who committed multiple drug offenses as part of a single criminal episode would still be eligible for treatment upon offending a second time" because sponsors were required to work within the 75-word limit).

This difference between description of purpose and verbatim recitation of command reflects the statutory requirements for a ballot title and summary. Although this difference may be more significant for longer and more complex proposed amendments, there is no current requirement that short amendments should simply be included verbatim in the ballot summary.[5] 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). In the context of this Court's requirements for clarity to voters, it can be surmised that explanations

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[5] "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. 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." *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So.2d at 498 (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978)).

of the chief purpose may be more informative to voters than simple recitations of the specific text.

Indeed, this test can be seen as another means to insure that hidden or unexpected meanings are not slipped by the voters. Thus, a difference in terms which widen or narrow the expected scope of the measure might be objectionable, as in *People's Property Rights Amendments*. However, this summary and title most resembles that approved by this Court in *Local Trustees & Statewide Governing Board to Manage Florida's University System*, where even inconsistent use of such terms as "local," "accountable operation," and "procedures for selection," were found to be commonly understood and not likely to mislead voters. 819 So. 2d at 732.

Because the purpose and effect of this proposed amendment are clear and straightforward, and there are no such hidden meanings, any minor wording differences between ballot title and summary and the text of the proposed amendment are not misleading. They are intended to, and do in fact, clarify the major purpose and effect of the amendment for voters, exactly as is required by the statute.

Thus, the ballot title and summary of the instant proposal are accurate and not misleading to voters. Accordingly, this Court should allow the proposed amendment to appear on the ballot.

CONCLUSION

Because the proposed Public Protection amendment presents a single subject in compliance with Article XI, Section 3, and because the ballot title and summary are accurate and informative in compliance with Section 101.161, Florida Statutes, this Court should allow the proposed amendment to appear on the ballot.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF TYPEFACE COMPLIANCE

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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