IN THE SUPREME COURT
OF FLORIDA

No. 93,649

NATHAN MIZRAHI and AVA RUTHMAN,
Co-Personal Representatives of the Estate of MORRIS MIZRAHI, deceased,

Petitioner,

v.

NORTH MIAMI MEDICAL CENTER, LTD., d/b/a PARKWAY REGIONAL MEDICAL CENTER; EMSA LIMITED PARTNERSHIP; LEONARD FRANK, M.D.; HOWARD SUSSMAN, M.D.; RICHARD B. FIEN, M.D.; SUSSMAN, STALLER & FIEN, M.D., P.A.; HOWARD PARMET, M.D.; HOWARD PARMET, M.D., P.A.; JORGE MORDUJOVICH, M.D.; and DRS. RUTECKI, PRESSER, FRANKFURT and MORDUJOVICH, P.A.

Respondents.

AMICUS CURIAE, ASSOCIATION FOR RESPONSIBLE MEDICINE, BRIEF ON THE MERITS IN SUPPORT OF PETITIONER

(Certified Question from Third District Court of Appeal)

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BRIEF OF AMICUS CURIAE,

ASSOCIATION FOR RESPONSIBLE MEDICINE,

IN SUPPORT OF PETITIONERS

The Association for Responsible Medicine (ARM) respectfully submits this Brief as *Amicus Curiae* in support of the Petitioners. Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, ARM files simultaneously with this Brief its Motion for Leave to Appear as an Amicus Curiae and to File an Amicus Curiae Brief.

STATEMENT OF INTEREST

ARM, a not-for-profit Florida corporation, is a patients' rights group established in 1994 as a 501(c)(4) non-profit corporation. The mission of ARM is to reduce medical mistakes which cause patient injury and death. ARM members believe that the more knowledge available to the medical consumer the better the chances of the consumer to avoid medical mistakes and the resulting injury and death, and to reduce health care costs.

ARM's thrust is education and legislation. It supports more open access to information on doctors and health plans, and stronger informed consent laws and other laws to inform and protect the medical consumer. It has maintained an Internet Web site since December 1, 1997, and within 6 months more than 15,000 people have

clicked onto it. It also publishes a quarterly newsletter, *The Patient Advocate*.

Ordinary, hardworking people formed ARM, and ordinary, hardworking people continue to join and actively support ARM. Its members believed that when they needed medical care, they would receive safe and adequate care but instead they or their loved ones became victims of medical mistakes. This is the common denominator among most ARM members -- they have experienced medical mistakes.

This common experience provides a strong impetus for them to reduce the epidemic of medical mistakes that the insurance and medical industries and the Florida Legislature, like most legislatures, prefer to ignore. ARM participates actively in the legislative process. This past year its members participated at every Constitutional Revision Commission (the CRC) meeting at which public testimony was taken.

ARM continually attracts the mass support of national and local media. Yet, even with this media support, the Florida Legislature has drowned the voice of ARM. Simply put, ARM does not have the financial resources to be heard over the mega-dollars of the insurance and medical industries. For example, ARM has actively supported the repeal of section 768.21(8) of the Florida Statutes.[1] Many of its

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[1] Section 768.21 of the Florida Statutes enumerates the available damages in a wrongful death action. The most relevant sections are:

> (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost

members are the victims of section 768.21(8), and have testified before the Florida Legislature and the CRC on their victimization but to no avail. *See* Aff. of Bonnie Strickland, victim of section 768.21(8) and ARM member, at App. Exh. 1. In fact, at this juncture, no Florida legislator can get a proposed bill to repeal section 768.21(8) on the legislative agenda due to the politically powerful insurance and medical lobbyists. The victims of section 768.21(8) effectively are locked-out of the legislative process. *See* Aff. of Senator Ginny Waite-Brown, at App. Exh. 2; *see* Aff. of Representative Mary Brennan, at App. Exh. 3.

The interest of the *Amicus* in this proceeding is quite clear. Since many of the members of the *Amicus* are victims of section 768.21(8), they have a personal, direct interest in this Court finding reversible error in the Third District Court of Appeal decisions and declaring that statutory section unconstitutional.

> parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.
>
> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.
>
> (8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by § 766.106(1).

For some of these victims, their statute of limitations is running. For these victims, this Court's decision will determine whether they can hold the medical professionals who negligently or willfully caused the death of their loved ones responsible for their acts. This Court's decision will further determine whether the life of their deceased loved one had meaning and value. These victims have an urgent[2] and direct need for this Court to reverse the Third District Court of Appeal decisions and declare section 768.21(8) unconstitutional.

Even the victims whose statute of limitations has run and who are thus barred from filing a lawsuit still have a personal, direct interest in ensuring that the life of their deceased loved one killed by a medical mistake had meaning and value, and that no other loved one or any other person becomes a victim of section 768.21(8). The interest of all these victims inures not only to themselves but to all future victims.

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[2] Appellant counsel herein filed on behalf of ARM members Denver and Audrey Walker, as the Co-Personal Representatives of the Estate of James W. Walker, their son, a State Wrongful Death action, *Walker v. Public Health Trust of Dade County, Florida, d/b/a Jackson Memorial Hospital*, Case No. 97-23316(CA 06), which, in all probability, they will not be able to continue litigating unless this Court declares section 768.21(8) unconstitutional. Further, this past month, the same counsel talked to three persons who each believed that a loved one was killed by a medical mistake but were advised by medical malpractice counsel that they could not take their case even if the medical professional(s) committed gross or willful negligence because of section 768.21(8). The statute of limitations for these persons is running. They will soon become additional victims of section 768.21(8) unless this Court finds that the Third District Court of Appeal committed reversible error and declares section 768.21(8) unconstitutional.

SUMMARY OF THE ARGUMENT

The victims of section 768.21(8) of the Florida Statutes respectfully ask this Court to find that the Third District Court of Appeal committed reversible error in not declaring section 768.21(8) unconstitutional. They ask this of the Court since they personally know of the arbitrary, discriminatory impact of section 768.21(8). Each had a loved one who died due to a medical mistake when in the condition of being over 24 years of age and single or widowed or without minor child, and thus could not hold responsible the medical professional(s) who killed their loved one. Section 768.21(8) bars them from giving meaning and value to the life of their deceased loved one in a court of law simply based on age, familial status, and who caused the death.

The insurance and medical interests heavily lobbied the Florida Legislature for this spot legislation — the unconstitutional exception/exemption for the medical profession, which allows the medical profession to escape total liability for nonpecuniary damages for their medical negligence resulting in the Wrongful Death of a Class of persons based upon their condition at the time of their death while holding all others liable for nonpecuniary damages for their negligence resulting in the Wrongful Death of all persons in Florida. The Legislature in 1990 gave these lobbyists with their mega-dollars what they wanted. It willingly allowed itself to be a party to a deal with the politically powerful lobbyists. It enacted section 768.21(8) for the benefit of the

insurance and medical interests to the detriment of the medical consumer who, often unknowingly, belongs to the burdened Class.

As recently as this year, the Florida Legislature was unwilling to rectify the injustice and inequality created under section 768.21(8), and will not in the near future change its position and right the wrong it created. Based on these facts, the Third District Court of Appeal improperly applied the legal standard "Can You Conceive" Mere Rational Scrutiny rather than the proper legal standard of Sensitive Rational Scrutiny. When a statute burdens a class based on its condition, and the class is politically powerless in the legislative process so that the legislature gives the class no credence, as with the instant victims, the proper legal standard is Sensitive Rational Scrutiny. Therefore, this Court should find that the Third District Court of Appeal committed reversible in applying "Can You Conceive" Mere Rational Scrutiny rather than applying the proper legal standard of Sensitive Rational Scrutiny.

Based on the record and this Court's power to take judicial notice, this Court should apply Sensitive Rational Scrutiny. Such an application will prove that no legitimate state objective exists, and even it one "conceives" of such objective, section 768.21(8) is not rationally related to achieve that "conceived" objective. In fact, no conceived objective has been alleged which has a basis <u>in fact</u> and does not denigrate the legislative intent of the Wrongful Death Act — "to shift the losses resulting when

wrongful death occurs from the survivors of the decedent to the wrongdoers."

Section 768.21(8) is the epitome of big money deal-making gone wrong by harming beyond any rational reason the politically powerless burdened Class. It most heavily impacts the senior citizen population, whether a Florida resident or a person from another state merely vacationing, doing business, or voluntarily seeking medical care in Florida. It singles out an arbitrary Class from receiving nonpecuniary damages in a Wrongful Death action based on medical malpractice without extending such a favorable position to any other interest, profession, or individual, and further effectively denies the arbitrarily created Class Access to the Court.

Florida stands alone in favoring the economic profits of the insurance and medical interests over the value of human life — over safe medical practice, and over the wrongful, tortuous death of the medical consumer. This is unprecedented and against our society's belief in equal justice for all under the law. This Court should correct such injustice and inequity by finding reversible error in the Third District Court of Appeal decisions and declare section 768.21(8) unconstitutional.

ARGUMENT

I. SECTION 768.21(8) OF THE FLORIDA STATUTES RAISES A QUESTION OF GREAT PUBLIC IMPORTANCE.

The Third District Court of Appeal in *Mizrahi v. North Miami Medical Center,*

Ltd., d/b/a Parkway Regional Medical Center, 712 So. 2d 826 (1998), on reclarification certified the following question to this Court as one of great public importance:

> DOES SECTION 768.21(8), FLORIDA STATUTES (1995), WHICH IS PART OF FLORIDA'S WRONGFUL DEATH ACT, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FLORIDA AND FEDERAL CONSTITUTIONS, IN THAT IT PRECLUDES RECOVERY OF NONPECUNIARY DAMAGES BY A DECEDENT'S ADULT CHILDREN WHERE THE CAUSE OF DEATH WAS MEDICAL MALPRACTICE WHILE ALLOWING SUCH CHILDREN TO RECOVER WHERE THE DEATH WAS CAUSED BY OTHER FORMS OF NEGLIGENCE?

Then, on the same day,[3] the Third District of Appeal, in *Garber v. Snetman*, 712 So. 2d 481 (1998), certified "the same question of great public importance certified in *Mizrahi*." *Id*. In addition, and most important to *Amicus* and the public, Chief Judge Schwartz, *specially concurring* in *Garber*, stated that he "would prefer that the certified question similarly reflect that the issue involves both due process and equal protection." *Id.* at 481 n.1. He explained:

> I concur because I am bound to do so by *Mizrahi*. [cites omitted.] I believe that it is contrary to the requirements of substantive due process (n1) and equal protection to discriminate between survivors of the

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[3] Shortly after the Third District Court of Appeal decided *Mizrahi* and *Garber*, the First District Court of Appeal, in *Stewart v. Price* (on rehearing, reclarification, and reconsideration) found section 768.21(8) constitutional under the Equal Protection and Due Process clauses of the Federal and Florida Constitutions and the Access to the Court section of the Florida Constitution. *Stewart v. Price*, 704 So. 2d 594 (Fla. 1st DCA 1998). The reasoning or lack of reasoning of the First DCA did not differ substantially from the Third DCA's reasoning.

> victim of a wrongful death on the basis of their age only to accomplish the stated purpose of making medical malpractice insurance somewhat less expensive. To my mind, it is no less 'unreasonable, arbitrary, capricious, discriminatory [and] oppressive', 10 Fla. Jur. 2d Constitutional Law § 427, at 740 (1997), and cases cited, to restrict the right to recover on this basis than it would be for the legislature to do so as to survivors with blue eyes or -- heaven forfend?-- of less than a certain height.

Id. at 481.

Amicus urges this Court to consider Chief Judge Schwartz's *special concurrence*, and to rephrase the certified question to include Due Process. *Amicus* further points out to this Court that section 768.21(8) bars both the surviving adult children and parents from recovering nonpecuniary damages. Yet, the Third District Court of Appeal certified the question solely for the surviving adult children. This is probably because both *Mizarhi* and *Garber* had only surviving adult children as parties. However, many members of the *Amicus* are the surviving parents and should not have to wait until a case with a surviving parent as a party works its way through the courts to this Court for a determination of the constitutionality of section 768.21(8). *Amicus* thus further urges this Court to rephrase the certified question to include the surviving parents. This is prudent based on judicial economy and important public necessity.

Section 768.21(8) directly impinges upon the most basic and fundamental right of all — the value of a human being. Its absolute bar to nonpecuniary damages effectively denies the surviving parent(s) and/or adult child(ren) a remedy for the wrongful

death of their adult child or parent, respectively. Such denial implies that a person, who wrongfully dies at the hand of a medical professional and is in the condition of being 25 years or older and unmarried or without minor child, had a worthless, meaningless life (the Class). Such a person's life had no value, not even to the parents or adult children. Almost every state in our country permits this Class of persons to sue for wrongful death on all forms of negligence. **No other state in our country has such an arbitrary, discriminatory law, one that allows the medical profession to escape total liability for its own negligent and willful acts while subjecting all other individuals, professionals, and entities to liability for negligent and willful acts.** Florida stands alone in declaring that the Class of persons burdened by section 768.21(8) has no value — emotional or financial. *Amicus* urges this Court to give value and meaning to the life of **all** people who live, work, and vacation in the state of Florida.

A further public necessity exists for this Court to rephrase the certified question — section 768.21(8) may, in fact, cause death. It may provide an overwhelming temptation to a medical professional or hospital who commits a negligent act on a patient and knows he, she, or it can escape total liability by letting that patient die. In *Young v. St. Vincent's Medical Center, Inc.*, 653 So. 2d 499, 506-07 (Fla. 1st DCA 1995) (Mickle, J., *concurring)*, explained that "a physician, facing liability for injur-

ing a child before or during birth, would fare better legally by permitting the child to die before it has been expelled rather than by attempting to save it" because then the physician would be immune from suit under the Wrongful Death Act, and further explained "[t]his result contradicts the public policy of this state, declared in section 768.17, Florida Statutes, to wit, to shift losses from the survivors to wrongdoers."

Section § 768.21(8) implicates the same concern as that expressed by Judge Mickle. Senator Campbell at a Florida Senate Judiciary Committee meeting in early 1997 asked what would prevent a doctor from letting a patient who was on the edge die in order to avoid a wrongful death case?

At the next committee meeting on March 12, 1997, a response was given that (1) "they would probably be guilty of murder;" (2) "I think all doctors do the best they can in every situation and I have never seen one that did not;" and, (3) "I do not think physicians go into a family history when they are working on a patient." Senator Silver at the same meeting gave a fourth reason: the Hippocratic Oath.

Amicus urges this Court to find none of these reasons sufficient, to the extent that (1) the state attorney's office generally does not even look at complaints in which a death occurred while the decedent was a patient in a health care facility -- *Amicus* could find only one case in the state of Florida in which a doctor was criminally prosecuted although a few more may exist -- it just does not happen; (2) even assuming

that all doctors do their best, to which *Amicus* takes exception, their best may not be good enough, and they may view their own well-being and the well-being of their families as paramount to a person who they believe has a poor quality of life or has only a few short months to live; (3) doctors, nurses, and hospitals do go into the family history of their patients -- in fact, the failure to review family history could result in negligence; and, (4) if our world were a perfect world, then, maybe, the Hippocratic Oath would, in and of itself, be sufficient to ward off any temptation for self-preservation. However, in our not-so perfect world, the Hippocratic Oath, without more, is insufficient.

Some doctors, like some people, are beyond reproach and would not put their self-interest before the interest of their patients, but not all doctors fit into this category. Doctors are people, some are good and some are bad. When a person's life is at stake, a real and concrete deterrent is needed. A license to practice medicine in the state of Florida does not transform a person into a perfect person.

Amicus asks, why put the medical profession — doctors, nurses, hospitals, etc., in this position; why put the temptation before them? This Court can eliminate the temptation and safeguard the public by rephrasing the certified question to state:

> DOES SECTION 768.21(8), FLORIDA STATUTES (1995), WHICH IS PART OF FLORIDA'S WRONGFUL DEATH ACT, VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF

> THE FLORIDA AND FEDERAL CONSTITUTIONS, IN THAT IT PRECLUDES RECOVERY OF NONPECUNIARY DAMAGES BY AN ADULT (0VER 24 YEARS OF AGE) DECEDENT'S SURVIVING PARENTS AND ADULT CHILDREN WHERE THE CAUSE OF DEATH WAS MEDICAL MALPRACTICE WHILE ALLOWING SUCH PARENTS AND CHILDREN TO RECOVER WHERE THE DEATH WAS CAUSED BY OTHER FORMS OF NEGLIGENCE?

and then finding that the Third District Court of Appeal committed reversible error in holding section 768.21(8) of the Florida Statutes constitutional, and finally declaring that statutory section unconstitutional.

II. UNDER THE FEDERAL EQUAL PROTECTION CLAUSE, THE THIRD DISTRICT COURT OF APPEAL ERRED IN APPLYING A "CAN YOU CONCEIVE" RATIONAL SCRUTINY TEST RATHER THAN THE PROPER "SENSITIVE" RATIONAL SCRUTINY TEST.

A. The Guiding Principles of the Federal Equal Protection Clause.

Equal Protection under the Fourteenth Amendment of the U.S. Constitution provides "no State shall...deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, § 1, U.S. Const. This mandate "is essentially a direction that all persons similarly situated should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). The legislature is empowered with enforcing this mandate. Amend. XIV, § 5, U.S. Const. "[B]ut absent controlling congressional direction, the courts have themselves devised standards

for determining the validity of the state legislation. . ." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Since the 1970s, the U.S. Supreme Court has used three scrutiny tests to analyze Equal Protection claims based on the classification of persons and burdens placed on that class used by the legislature to protect state interest. These tests are: (1) strict scrutiny; (2) immediate-level scrutiny; and, (3) mere rationality scrutiny.

The Court applies strict scrutiny to the traditional suspect classes, such as race and national origin, wherein the class is "deemed to reflect prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others", *City of Cleburne*, 473 U.S. at 440, and the legislature is unlikely to rectify such discrimination, *see, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (applying strict scrutiny to invalidate minority set-aside), or when the classification impacts a "fundamental right" or interest. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (applying strict scrutiny to invalidate annual poll tax of only $1.50). Strict scrutiny requires a law to be necessary to achieve a compelling governmental interest. *See, e.g., Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954) (applying strict scrutiny in treating discrimination against Mexican-Americans for jury service same as discrimination against African-Americans).

The Court applies intermediate-level scrutiny to gender, alienage, illegitimacy, and, perhaps, other biological factors. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982) (applying intermediate-level scrutiny to invalidate Mississippi's policy of barring men from its School of Nursing). Intermediate-level scrutiny requires a law to be substantially related to achieve an important governmental objective. *See, e.g. Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (applying immediate scrutiny to find statute forbidding sale of "3.2 beer" to males under 21 and to females under 18 denies equal protection to males 18 to 20).

The Court applies mere rationality scrutiny to all others -- the non-suspect class for which the court presumes "that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985) (applying mere rationality scrutiny to invalidate Alabama statute taxing out-of-state insurance companies at a higher rate than in-state ones). Mere rationality scrutiny requires the law be rationally related to achieve a legitimate legislative objective, using a "can you conceive" standard. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

These scrutiny tests serve merely as a baseline for deciding if a law passes constitutional muster. During the last 20 years, the federal courts have altered or mix-matched these tests depending upon the nature of the class and the claimed failure of the government to provide equal protection to the class and the individuals of the class. *City of Cleburne,* 473 U.S. at 451("Our cases reflect a continuum of judgmental responses to differing classifications... never been persuaded that these so-called 'standards' adequately explain the decisional process.") (Stevens, J., *concurring*).

Most relevant, a Heightened or Sensitive Rational Scrutiny test has emerged from "Can You Conceive" Mere Rationality Scrutiny. The test remains the same — the law must be rationally related to achieve a legitimate legislative objective -- but a more considered approach is placed upon the "Can You Conceive" standard. The court takes evidence on the: (1) purpose of legislative objective and its legitimacy, including motive and intent; (2) type of class burdened and whether subjected to "tradition of disfavor" by our laws; (3) burdens on class and their impact; (4) justifications for burdening class; and, (5) likelihood law will achieve legislative objective. *See, e.g., Zobel v. Williams*, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982) (invalidating Alaskan scheme paying residents $50 for each year residing in state).

Unlike "Can You Conceive" Mere Rationality Scrutiny, Sensitive Rationality Scrutiny does not presume improvident decisions eventually will be rectified by the

democratic processes. *See, e.g., Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (applying rational basis in striking down Colorado constitutional amendment preventing homosexuals from obtaining statutory protection since only possible motivation was "animus" against class of citizens and, thus, amendment failed to advance any legitimate government end); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (finding exclusion of "hippie communes," a politically unpopular group, from federal food stamp program is an illegitimate objective). Sensitive Rational Scrutiny puts "bite" into Mere Rational Scrutiny. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (applying Sensitive Rationality Scrutiny to invalidate classification for filing claim as irrational to achieve objective).

B. <u>The Sensitive Rational Scrutiny Test is the Proper Legal Standard</u>.

ARM contends that the Third District Court of Appeal's application of "Can You Conceive" Mere Rational Scrutiny to the Federal Equal Protection challenge to section 768.21(8) is reversible error. ARM urges this Court to find that the Sensitive Rational Scrutiny test is the proper legal standard under the Federal Equal Protection clause since section 768.21(8) impinges on the value of a human being — the

meaning and viability of life itself.[4] Further, two more reasons exist for applying Sensitive Rational Scrutiny: (1) the enactment of section 768.21(8) created a politically powerless/unpopular Class of people; and, (2) medical malpractice victims historically have been powerless although not a suspect class.

1. Section 768.21(8) created a politically powerless Class.

The enactment of subsection 8 to section 768.21 of the Florida Statutes, *see* ch. 90-14, § 2, Laws of Fla., created a politically powerless/unpopular Class of persons within the state of Florida based on the wrongful death of a loved one whose condition at the time of death was over 24 years of age, unmarried or without minor child, and died due to medical malpractice. The Florida Legislature singled out this Class to be denied nonpecuniary damages which effectively denied the Class Access to the Courts in Florida no matter how egregious and reprehensible the conduct of the medical professional, and no matter the value of the decedent to his or her family.

This lack of popularity and political power is demonstrated by ARM's

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[4] *Amicus* further urges this Court to consider that section 768.21(8) impinges on Familial Associational Rights under Federal Substantive Due Process. In fact, that section goes to the heart of the Familial Associational Right, that of parent and child, and then destroys it. *See Perez-Oroeza v. INS*, 56 F.3d 43, 45 (9th Cir. 1995) (explaining close, unique relationship between parent and child); *see, e.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982). This is obvious on the face of section 768.21(8). *Amicus* raises this impingement of Familial Association solely as an additional justification for applying Sensitive Rational Scrutiny.

treatment in the Florida Legislature. None of the legislation supported by ARM has come to a floor vote in both the House and Senate during the same legislative session. The insurance and medical industries have the political and financial clout to effectively ensure that the Florida Legislature continues to provide them with protective legislation at the expense of the medical consumer. Point in fact is ARM's attempt during three separate Florida legislative sessions to have section 768.21(8) repealed. Each of ARM's attempts resulted in the insurance and medical lobbyists setting in motion their political maneuvers which prevented the enactment of the repeal. ARM and the victims of section 768.21(8) are politically powerless to accomplish the repeal. The democratic process cannot overcome the political and financial clout of the insurance and medical industries. *See* Affs. of Strickland, Brown-Waite, Brennan, at App. Exhs. 1, 2, 3, respectively. The residents of Florida and the out-of-state[5] tourists and business people will continue to be victimized by section 768.21(8) if this Court does not find that the proper legal standard under the Federal Equal Protection clause is the Sensitive Rational Scrutiny test, and then

[5] The state of Florida is a vacation haven and draws a large number of out-of-state vacationers. Faced with a serious illness or injury while in Florida, those out-of-state vacationers who are over 24 years old and single or widowed or without minor child could unwittingly become part of the Class of victims who will be treated quite differently if an illness/injury results in a medical malpractice induced death. Anywhere else in this country, this would not be the case.

declare section 768.21(8) unconstitutional. *See also Coburn v. Agustin*, 627 F. Supp. 983, 994-96 (D. Kan. 1985).

2. Victims of medical malpractice historically have been powerless although they are not a suspect class.

Medical malpractice victims "generally have no control over the inception of their afflictions or illnesses and even less choice concerning the medical mis-, mal- or nonfeasance practiced on them. Moreover, victims of medical malpractice are relegated to a position of political powerlessness." *Coburn*, 627 F. Supp. at 994-95. They do not contemplate the remote risk of becoming a victim, their number is not large enough to generate public reaction, and public notice of restrictions on the rights of such victims is very limited. *Id.* "[O]nce injured, medical malpractice victims may very well lack physical faculties and <u>financial</u> resources to mount a successful challenge to laws curtailing their rights." *Id.* at 995. (emphasis added).

This powerless status of medical malpractice victims requires an application of the Sensitive Rational Scrutiny test in the Federal Equal Protection challenge to section 768.21(8) of the Florida Statutes. *Amicus* thus contends that the Third District Court of Appeal committed reversible error by applying the improper legal standard.

C. <u>The Application of Sensitive Rational Scrutiny Proves that Section 768.21(8) of the Florida Statutes Violates the Federal Equal</u>

Protection Clause.

Under Sensitive Rational Scrutiny, the Court first looks at the legitimacy of the legislative objective (the state interest). If the legislative objective is legitimate, then the Court looks at whether the enacted law is rationally related to achieve that objective. *See, e.g., Allegheny Pittsburgh Coal Co. v. Webster County,* 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989). In the instant appeal, *Amicus* strongly contends that no legitimate legislative objective exists, and even if one "conceives" of a legitimate objective, section 768.21(8) of the Florida Statutes is not rationally related to achieve that alleged objective.

Amicus sets forth the following analysis to prove that section 768.21(8) is an unconstitutional exception to section 768.21(3) and (4), and an illegitimate exemption thereto for the medical profession — it is illegal spot legislation. The threshold determination is whether the Legislature stated its objective in enacting section 768.21(8). This determination must begin with an examination of the legislative history of section 768.21(8).[6]

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[6] *Amicus* reviewed relevant Journals, Laws of Florida and accompanying Staff Analysis. They also listened to at least 12 Florida House and Senate committee tapes from 1990 and 1997 on sections 768.18(1), 768.21(3)(4)(8). They further analyzed numerous studies and reports including those produced by the Academic Task Force for Review of the Insurance & Tort Systems: Preliminary Fact-Finding Report on Medical Malpractice, 08/14/87; Discussion Draft of the

(continued...)

Prior to 1990, a parent of an adult child/decedent and/or an adult child of a parent/decedent had no state statutory right to recover for nonpecuniary damages stemming from wrongful death by any tortfeasor. Section 2 of Chapter 90-14 of the 1990 Laws of Florida amended subsections (3) and (4) of section 768.21, providing nonpecuniary damages such as pain and suffering. And further, prior to 1990, the definition of "Survivors" in section 768.18 of the Wrongful Death Act included minor children but not adult children. Section 1 of Chapter 90-14 of the 1990 Laws of Florida amended the definition of "Survivors" to include adult children by deleting “minor” preceding “children” which now is codified in section 768.18(1).

The Florida Legislature finally recognized what the people of Florida always felt and knew -- the bond between the parent and child grows as the child grows from the helpless infant into the "terrible twos" and then emerges as the happy pre-school child into the inquisitive school child who blossoms into the pre-teen and then the challenging and, perhaps, defiant teenager who transforms into the young, intelligent adult and, finally, the faithful, mature adult companion. This transformation from infancy to mature companion commits the heart and soul of both the parent and child

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[6](...continued)
Medical Malpractice Reform Alternatives, 10/02/87; Medical Malpractice Recommendations, 11/06/87; and, Final Fact-Finding Report on Insurance & Tort Systems, 03/01/88.

to a life-long bond which is broken only upon the death of the parent or child. The breaking of the bond results in wrenching heart-felt pain at whatever point on the life-line the bond breaks.

The 1990 amendments to section 768.18 and subsections (3) and (4) to section 768.21 ended the inequitable and unlawful discrimination between minor children and adult children and conformed section 768.21, the Wrongful Death damage section, to the legislative intent enunciated in the Wrongful Death Act:

> **It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoers. Sections 768.16-768.27 are remedial and shall be liberally construed.**

§ 768.17, FLA. STAT. (1996) (originally, ch. 72-35, § 1, Laws of Fla.).

But, the Legislature, being bombarded by the insurance and medical lobbyists, could not leave well enough alone, it had to tack subsection (8) onto section 768.21, and recreate the inequity based on age and familial status (marriage and children) when the wrongful death is caused by medical malpractice. Some Legislators might say that they had no choice, because the Florida Medical Association (FMA) threatened to kill the entire bill (H.B. 709).[7] So, late at night, behind closed doors, out of

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[7] "Sen. John Grant, R-Tampa, said the 1990 effort faced stiff opposition from doctors and was headed for certain failure before lawmakers exempted malpractice cases as a compromise. 'We knew then that we'd get half the apple

(continued...)

sight of the public, and without any recordings, the deal was made.[8] The Legislators succumbed to the powerful lobbyists and added subsection (8) even though they knew it was fundamentally unfair and discriminatory to allow everyone but a small Class of medical malpractice victims to recover pecuniary damages for wrongful death. As the saying goes, "money talks!" The Legislators allowed the inequality to continue, clearly contrary to their stated intent to end the discrimination.[9]

In allowing the medical profession to escape total liability for nonpecuniary

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[7](...continued)
and have to come back for another bite,' said Grant, one of several Judiciary Committee members who spoke in favor of the bill [repealing exemption but in 1997 the bill was tabled] . . ." Michael Griffin, *Tough job: Punishing doctors who kill*, THE ORLANDO SENTINEL, Feb. 19, 1997, at C1, C4.

[8] On information and belief, *Amicus* represents that the FMA and the Academy of Florida Trial Lawyers (the Academy) made an informal agreement that the FMA would not oppose the 1990 inclusion of proposed subsections 3 and 4 to section 768.21 so long as the medical profession was excluded from their professional liability for nonpecuniary damages, and the Academy would not litigate the constitutionality of this exclusion/exemption. This, perhaps, explains the Academy's vocal support, through Paul Jess, for subsection 8, the exception/ exemption for the medical profession. *See infra* p. 27.

[9] "I would say to you that we constantly look at the intact family, we constantly talk about family structure. I think, again, as I said, that we have a discriminatory attitude in the wrongful death act. Those people who are over the age of 25 can love their parents as much as those under 25 and those parents who are widows or widowers surely can understand the nature of their need for their additional family." Rep. Lippman's taped comments on H.B. 709, codified § 768.17, § 768.21(3)(4)(8), Court Systems, Prob. & Consumer Law Subc., H. Judiciary 4/4/90.

damages, the Legislature also violated its explicit legislative intent.[10] This denigration is obvious on the face of subsection (8) -- it prohibits Plaintiffs from shifting their nonpecuniary losses to the medical wrongdoers. It "is clearly irrelevant to the stated purposes of the Act." *United States Dept. of Agriculture v. Moreno*, 413 U.S. at 534 (striking down statutory classification based on illegitimate objective). If it is to be sustained, the exemption must rationally further some legitimate governmental objective other than stated in section 768.17. *Id.*

"Regrettably, there is little legislative history that does exist." *Id*. Consumer Graham, testifying regarding H.B. 709, on April 16, 1990, at the full committee meeting of the Florida House Judiciary, explained that when a bill on the same matter came through the House in 1989, it did not have the medical malpractice exemption, "and it got killed on the House floor . . . tells me one thing, that there is no rational basis based on public policy in the State of Florida to do that . . . the rational basis is they do not want hospitals, FMA lobbyist killing this bill or working the bill like they should be doing. They should be in here with us, with the rest of the consumer

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[10] Rep. Davis: "I would like to understand what the logic is behind excluding certain medical providers from the application of your bill?" Rep. Lippman: "Political reality."
Chairman: "When there is no logic, always check the political considerations."...
Chairman: "Do you expect us to be logical, political and equal all at the same time? (ha ha). *Id*.

people fighting this . . . ." But they were not, and only a handful of comments were made about the exemption for medical professions.

James A. Dickson, of the Florida Defense Lawyers Association, commented at the April 4, 1990 subcommittee (CSP & CL of HJ), "Our particular concern is the political reality of the exemption of the medical profession. Why not exempt ambulance attendants and EMT's, for that matter, why not exempt lawyers? It is just not a realistic approach. I think in the long run, it will be found to be discriminatory and unconstitutional." At the same meeting, Paul Jess, Academy of Florida Trial Lawyers, explained:

> There was actually a study on this that was done last year for the bill,[11] . . . , based on the data that they had, and . . . used the 1980 census data. They estimated that it would raise general liability rates by only 2.5%. They also estimated that it would raise malpractice, medical practice liability rates by approximately 4.5%, and I believe that was the explicit rationale last year for the exception that was put in there about medical malpractice. It was not merely an arbitrary distinction, it was a distinction based on the reality of that cost, and that was done, I believe, in the insurance committee. But in any event, the point is that it does not have a dramatic effect on insurance rates and further we believe that the study that was done last year and the assumptions that were used in that were high, . . . did not take into account the fact that we know cases brought

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[11] This bill did not contain the exception/exemption for medical malpractice. *See* Senate Staff Analysis and Economic Impact Statement for CS/SB 175 by Insurance and Senator Weinstein, April 12, 1989, which included the Department of Insurance's estimates of the economic impact on medical malpractice liability insurance rates of the proposed subsections 3 and 4 to section 768.21 without subsection 8, the exception/exemption for the medical professional.

> by adult children, for example, might fall under this act are not going to bring in the same kind of damages awards as cases brought for minor children. These are things that the jury system and the court system, itself, works out. The assumption made in that study was that the damages would be the same as those currently for minor children and parents of minor children -- we don't believe that would be so. We don't think this is going to have any kind of a significant impact on insurance rates, but more importantly than that, this bill is just plain the right thing to do. It ends the unfair discrimination that says, under current Florida law, that adult children and parents of adult children don't care as much about each other as minor children and parents of minor children.

So, now, there is the "explicit rationale" for exempting doctors. Their liability rates may increase about 4.5%, just 2%[12] above the 2.5% estimated increase in all other forms of liability insurance from the propped amendments without the exception/exemption for the medical profession. Assuming the accuracy of that figure, to which *Amicus* takes exception, the Legislature surely did not conceive a doctor has no ability to pay an additional 4.5% but a small business, with a cash flow far less than a doctor's, could pay 2.5%. That is not conceivable. However, this Court need not imagine. The reason has been printed -- a deal was made with the FMA.[13]

This deal created a new Class of victims based on one's condition — it impacts most heavily on the senior citizen population, whether a Florida resident or an out-of-state tourist, and it also impacts any one over 24 years of age, single and without a

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[12] This 2% increase may be less than the error margin for such studies.

[13] *See supra* pp. 24-25 and note 8.

minor child whether that person is a resident of Florida or is merely in Florida for business, vacation, or medical care.[14] **Florida stands alone in this arbitrary discrimination.** "Discrimination of an unusual character especially suggests careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633, 116 S. Ct. at 1628. The Legislature transformed innocent individuals into an unpopular group[15] so the medical profession could

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[14] The need for specialized medical care is what brought the decedent adult son of ARM members Denver and Audrey Walker to a Florida hospital. Since the Walkers discovered this illogical, constitutionally unsupportable section 768.21(8), they frequently express their horror and dismay that they cannot hold responsible the medical professionals who caused their son's death just because his death occurred in a Florida hospital rather than a hospital in their home state of Illinois. They also wonder why anyone with the knowledge of this exception/ exemption for the medical profession's liability for nonpecuniary damages would choose medical care in Florida if the care could be obtained in any other state. What an absurd dilemma: does one potentially obtain treatment from a physician who is one of the most renowned in his or her specialty but practices only in Florida when one knows that one's life is worth nothing if negligent medical treatment results in death? The Walkers now know that this would have been the dilemma for their son had they or their son known of section 768.21(8) but they did not know as most people do not know. *See supra* p. 4 and note 2.

[15] During the past three sessions of the Legislature, *Amicus* and a few Legislators attempted to repeal section 768.21(8). These attempts failed. The Legislators came back for a "another bite" at the apple but they did not get it. Having created an unpopular group, the Legislature could not return the group to its prior popular or, at least, neutral status. This new class has now become the unpopular group and exists solely to benefit the medical profession who has the political clout to overpower the unpopular. *See* Affs. of Strickland, Brown-Waite, Brennan, at App. Exhs., 1, 2, 3, respectively. *Amicus* urges this Court to do what

(continued...)

escape a slight increase (compared to their income and other business expenses) on their liability rates.[16] This is an illegitimate purpose. *See, e.g.*, *Hegeman Farms Corp. v. Baldwin*, 294 U.S. 158, 170, 55 S. Ct. 370, 79 L. Ed. 829 (1934) ("The Fourteenth Amendment does not protect business against hazards of competition."); *Primary Care Physicians Group v. Ledbetter*, 102 F.R.D. 254, 256 (N.D. Ga. 1984) ("if the only purpose for the statute was to protect the economic interests of private physicians and hospitals . . . would violate the equal protection clause").

Furthermore, the legislative history does not indicate, and no evidence exists,

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[15](...continued)
the Florida Legislature cannot, or will not, do because of "political reasons" -- find the elderly, unmarried, and those without a minor child equal under the law.

[16] Sen. John Grant at the Sen. Banking & Ins. Comm. meeting on 04/08/97, again, explained the history of section 768.21(8):

> Prior to 1990, adult children who were non-dependent did not have the right to recover any kind of civil justice action for negligence. A bill was filed that would give them that right across the board. It was determined for political reasons and for no other reasons, that we would exempt medical malpractice. And, we would provide that the right of coverage of products liability, for ah, automobiles accidents or whatever would be a right to recover. What we're trying to do now is fill that hole. And say, if your life's been taken as a result of the negligence of someone, you ought to be able to recover. And, you shouldn't be discriminated against because a life was taken by a negligent doctor, as opposed to a negligent driver. And, that's what this bill is about. It has nothing to do with disciplining doctors.

that a maximum increase of 2% to 4.5% would cause the residents in the state of Florida to be left without adequate health care. No evidence exists that health care providers would leave Florida because of a 2% to 4.5% increase in their medical malpractice premiums, or that insurers would leave Florida because they could not operate at a profit which might result in doctors en mass leaving Florida because of the unavailability of medical malpractice insurance, possibly leaving the people of Florida without doctors. If this was the rationale and a basis existed in fact for it, then the exemption may pass Sensitive Rationality Scrutiny.[17] However, this is inconceivable. It is absurd not only on its face but also because: (1) the perceived insurance crisis of the 1970s and 1980s was resolved with the enactment of tort reforms, which contained costs[18]; (2) the United States is paying medical schools not to enroll

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[17] But, will out-of-state doctors with questionable skills and/or ethics view Florida as a haven to establish their practice because of immunity from lawsuits for wrongful death based on their medical negligence and, thus, incidents of wrongful death will increase?

[18] In 1988, the Legislature enacted major reforms in the Medical Malpractice Act, as a reaction to the perceived insurance crisis. These reforms included presuit investigation/filing and arbitration for two purposes: (1) to discourage frivolous lawsuits, and (2) to resolve claims, in certain instances, without a lawsuit. These reforms coupled with profitable business investments by the major insurance companies have contained the cost of medical malpractice insurance. Since Wrongful Death actions based on medical malpractice fall within the scope of the Medical Malpractice Act, adequate cost containment is already in place.

medical students because of an overabundance of doctors in our country[19]; (3) the number of physicians in Florida increased 70% from 1990 to 1994[20]; and (4) an increase of insurance cost does not cause Floridians to leave Florida — the population of Florida continues to increase regardless of the fact that since 1992, homeowners' insurance has increased 50% to 100%, or more.[21]

Since the passage of section 768.21(8), the FMA has uttered three additional justifications: (1) tort law is not the right way to solve a medical malpractice problem; (2) pain and suffering is too nebulous; and (3) consumer health care rates will increase. The first two justifications are similar to the two justifications which the *McBride* court found illegitimate: "to alleviate a heavy financial burden on

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[19] *U.S. Agrees to Pay to Reduce Doctor Glut,* THE TAMPA TRIBUNE, Aug. 25, 1997, at 1-2.

[20] U.S. Census, Vital Statistics, Health Care, Social Programs. And, from 1994 to 1996, two thousand (2,000) additional non-federal physicians began practicing in Florida. PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S., Department of Data Survey & Planning, Division of Survey and Data Resources, American Medical Association, 1996 Ed., Table A-18 and 1997-98 Ed., Table A-18. This report indicates that in 1994, there were 35,841 non-federal physicians in Florida; in 1995, 37,964 ; and in 1996, 39,715, which represents a gain of 2,000 in two years.

[21] However, as more seniors become aware of section 768.21(8), will they view Florida as an undesirable, dangerous place to live because of their increasing need for medical care without the right for their adult children, through their estate, to sue if they should die from medical negligence?

industries where individuals are likely to file more claims" and "to recognize that occupational diseases have a gradual onset making it difficult to determine when an aggravating injury actually occurs." *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990). As the court in *McBride* found, this Court should find the first two justifications offered by the FMA illegitimate.

Furthermore, tort law may actually help reduce medical malpractice.[22] For hundreds of years, juries have effectively measured pain and suffering with the ability of an appellate court to review an occasional questionable decision.

Finally, the justification that consumer health care costs will increase without section 768.21(8) is a red-herring and without any basis in fact.[23] At this point in time no medical malpractice crisis exists, as supposedly existed in the mid-1980's, when major reform to Florida's medical malpractice law was enacted. As previously set forth, doctors ten years later are not leaving Florida. In fact, Florida now has more

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[22] TROYEN A. BRENNAN, HOWARD H. HIATT, WILLIAM G. JOHNSON, LUCIAN L. LEAPE, JOSEPH P. NEWHOUSE, PAUL C. WEILER, A MEASURE OF MALPRACTICE, MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (Harvard University Press 1993).

[23] Even if this was true, consumer health care costs should not increase more than the increase in medical malpractice rates which at the high end is 2 to 4.5%. This is an incidental amount compared to a loss of equal protection and due process under the law. Further, consumers should not permit the medical profession to pass onto them the costs of medical negligence.

physicians than ten years ago.[24] Medical malpractice insurance rates are not increasing in any but a moderate fashion. If anything, these rates are increasing below inflation.[25] In fact, insurance profits stemming from medical malpractice policies are higher than from most other insurances,[26] which certainly belies any argument that insurers have cause to leave Florida or substantially raise rates.[27] Medical malpractice claims in Florida hospitals have dramatically dropped.[28] While some debate exists as to the cause of the drop, the fact remains, the "crisis" is long since over.

Having established this fact, it is incumbent upon this Court to determine that

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[24] *See supra* note 20.

[25] *See* App. Exh. 4, which is the Florida Department of Insurance's compilation of medical malpractice policy cost for various companies from 1989-1996 in Dade and Broward counties (D/B) and the rest of the state (ROS). The rate of inflation needs to be factored into this compilation. The following are the percentage changes in the Consumer Price Index for all items from 1989 - 1996: 1989, 4.8%; 1990, 5.4%; 1991, 4,2%; 1992, 3.0%; 1993, 3.0%; 1994, 2.6%; 1995, 2.8%; and 1996, 3.0%.

[26] National Underwriter Property & Casualty-Risk & Benefits Management, p.3, National Underwriter Co., Feb. 3, 1997. ("Medical malpractice . . . [was] the most profitable line[] in the nation in 1995 . . . According to the [Nat'l Ass'n of Ins. Comm'rs], medical malpractice coverage made insurers a 25.5 percent profit as a percentage of net premiums earned," in 1995). *See* App. Exh. 5.

[27] Regulation of insurance industry charges require, by law, a demonstrated need in order for rates to be increased.

[28] Malpractice claims against Florida hospitals from 1987 to 1994 fell from 1,756 to 507 according to a study conducted by the University of South Florida. *Malpractice Claims Down in Florida*, TAMPA TRIBUNE, June 11, 1996, at 1.

no legitimate legislative objective is being served by this otherwise clearly arbitrary, discriminatory exception/exemption for the medical profession in Florida's Wrongful Death Act. *See, e.g.*, *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983).

The *Boucher* court was faced with a similar equal protection challenge to a medical malpractice statute and determined that although a medical malpractice crisis existed at an earlier time, such was not the case in 1983. Although the *Boucher* court did not step-up to the Sensitive Rational Scrutiny test, that court did look beyond the statute to take notice of "changing times," and found that what once existed was no longer the case. *Id*. at 93. Having taken notice of the "changing times," the *Boucher* court was unable to sustain a discriminatory statutory scheme as being rationally related to a previous, now nonexistent, public-health crisis. *Id*.

Amicus submits that this Court is faced with the identical situation today, in 1998. What, according to the Legislature, existed in the mid- to late 1980's in Florida as to a medical malpractice "crisis" simply no longer exists.

> [T]his Court, in making its determination of constitutionality, is not bound by whatever preamble the legislature decides to attach to justify a statute . . . This Court's inquiry must be to determine whether such a crisis is extant, because even though the statute in question may have been valid when enacted, changes in conditions to which it applies may make a statute invalid. *See Georgia Southern & Florida Railway v. Seven-Up Bottling Co.*, 175 So. 2d 39, 40 (Fla. 1965). When the factual basis of a statute is undermined by changing circumstances, the statute may not be considered automatically valid even though once valid. *See Conner v. Cone,* 235 So. 2d 492, 498 (Fla. 1970). Our duty to the

citizens of this state is to scrutinize, not accommodate.

Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365, 369 (Fla. 1981) (Sundberg, C.J., *dissenting*). *See, e.g.*, *Leary v. United States*, 395 U.S. 6, 38 n.68, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969) ("A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist."); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415, 55 S. Ct. 486, 79 L. Ed. 2d 949 (1935) ("A statute valid as to one set of facts may become invalid by change in the conditions to which it is applied.").

Based on the foregoing, no legitimate legislative objective exists for section 768.21(8). And, even if a legitimate objective is "conceived," no justification exists. This is especially true in light of the facts that section 768.21(8) renders the life of each Class member meaningless and may place the member at a higher risk to die at the hand of a medical professional than a non-Class member if a medical mistake occurs to the member. Such an arbitrary, discriminatory law has no rational relationship to any "alleged" legislative objective and is contrary to the explicit legislative intent of the Florida Wrongful Death Act. As such, section 768.21(8) violates the Federal Equal Protection clause and thus the court below committed reversible error.

III. SECTION 768.21(8) OF THE FLORIDA STATUTES EFFECTIVELY BARS THE BURDENED CLASS FROM ACCESS TO THE COURT IN VIOLATION OF THE FEDERAL PROCEDURAL DUE PROCESS CLAUSE AND SECTION 21 OF ARTICLE 1 OF THE FLORIDA CONSTITUTION.

Section 768.21(8) further impinges upon the rights of the burdened Class by effectively denying them Access to the Court for a Wrongful Death action based on medical malpractice, in violation of both the Federal Due Process clause and Section 21 of Article 1 of the Florida Constitution. ARM often hears that "the Legislature can giveth and taketh." However, this is true only if no common law right existed prior to 1968, the revision date of the Florida Constitution. ARM also often hears that no common law right to wrongful death exists in Florida to sue the person or entity who has negligently or willfully caused one's death. ARM takes exception to this, and respectfully requests this Court to reconsider its prior cases holding that no common law right to wrongful death exists in Florida.

A. A Common Law Right for "Wrongful Death" Does Exist.

ARM is well aware that Florida has followed the path of accepting Lord Ellenborough's off-hand remarks in the case of *Baker v. Bolton*, 1 Campb 439, 170 Eng Reprint 1033 (1808) where, in dictum, he stated that "in a civil court, the death

of a human being could not be complained of as an injury." This comment became the basis for the so-called American common law rule that there could be no recovery for Wrongful Death in the absence of a statute, which Florida adopted. *Nolan v. Moore*, 81 Fla. 594, 88 So. 601, *on reh'g*, 81 Fla. 600, 88 So. 604 (1920).

One suggested root of Lord Ellenborough's dictum is the concept that while one may complain of the injury to a freeman by another's wrongful act, one may not complain of the death of a freeman because this would reduce the freeman to slave status. *In Mattyasovsky v. West Towns Bus Co.*, 21 Ill. App. 3d 46, 313 N.E.2d 496 (Ill. App. Ct. 1974), *aff'd*, 61 Ill. 2d 31, 330 N.E.2d 509 (1974). This approach apparently took hold in England in *Baker* but was later criticized as having no place in its common law. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 LAW QUARTERLY REVIEW 431 (1916).

It has also been suggested that Lord Ellenborough's opinion was the result of confusion about the rule of law in what has come to be called the "merger doctrine." *Id*. This doctrine deemed that a tort merged into a felony and there was no private action remaining because the felon forfeited his goods to the crown. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1056-57 (1965). This outcome is said to have then become confused with the adage: "acio personalis mortur cum persona." (A personal action dies with the person.) Holdsworth, *supra* p. 37;

SPEISER, RECOVERY FOR WRONGFUL DEATH, § 1:2 (1966).

Whatever the basis for Lord Ellenborough's pronouncement, American courts swallowed this illogic. SPEISER, at § 1:3. To be sure, earlier contrary rulings existed. *Goheen v. General Motors Corp*., 263 Or. 145, 502 P.2d 233 (1972). Massachusetts, Connecticut (where a case stemmed from medical malpractice), and New York all have recorded cases which allow non-statutory Wrongful Death claims. SPEISER, at § 1:3. Georgia refused to adopt *Baker* although it did enact a Wrongful Death Act. *Id*. Hawaii also rejected *Baker*. *Id.*

The most telling case, however, is *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed.2d 339 (1970) (*Moragne I*), a case which began in the state courts of Florida. Before *Moragne I* reached the U.S. Supreme Court, Florida's Supreme Court, in response to a U.S. Fifth Circuit's certified question, had determined that there was no claim under Florida's Wrongful Death Act based on unseaworthiness. *Moragne v. State Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968) (*Moragne II*). The claimant's husband, according to *Moragne II* had been a steve-dore, longshoreman who died while aboard a vessel. Normally, had the victim been injured rather than killed, he would have been able to make such an unseaworthiness claim against the defendant-shipowner. *Moragne II*, 211 So. 2d at 163.

Of greater note is the fact that the Florida Supreme Court stated that "[n]either

the maritime law nor the common law recognized a cause of action for wrongful death," *id.*, and thus, arguably equated the two conclusions of law.

Eventually, *Moragne II* was certified by the U.S. Supreme Court which unanimously in *Moragne I*, made compelling criticisms of the common law rule which denied Wrongful Death actions. In ruling that a general maritime cause of action for unseaworthiness did exist, the U.S. Supreme Court overruled the case of *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886), which case traced its roots back to *Insurance Co. v. Brame*, 95 U.S. 754, 24 L. Ed. 580 (1878), which, in turn, was decided at a time when the Federal courts, under *Swift v. Tyson*, 16 Pet. 1 (1842), expounded a general common law.

Moragne I acknowledged the merger doctrine as being the sole substantive basis for the common law rule of the non-existence of a Wrongful Death claim. The U.S. Supreme Court noted that Lord Ellenborough's opinion cited no authority, gave no supporting reasoning, and did not refer to the felony-merger doctrine in announcing that "in a civil Court, the death of a human being could not be complained of as an injury." *Moragne I*, 398 U.S. at 383, 90 S. Ct. at 1778. The Court went on to state:

> The historical justification marshaled for the rule in England never existed in this country. In limited instances American law did adopt a vestige of the felony-merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony punishment did not include forfeiture of property; there-

fore, there was nothing, even in those limited instances, to bar civil suit. *Moragne I*, 398 U.S. at 384, 90 S. Ct. at 1779.

Amicus could find no court which has ever offered a satisfactory justification for adopting the *Baker v. Bolton* rule.[29] In fact, not lost as to the irony of applying this common law of "no claim for Wrongful Death" to the instant case is William Prosser's comment who referred to Lord Ellenborough as a judge "whose forte was never common sense." Prosser observes that as a result of adopting *Baker*,

> **it is more profitable for the defendant to kill the plaintiff than to scratch him**.

PROSSER, TORTS § 121 (1971 4th ed.).

Given the complete lack of satisfactory explanation and foundation for adopting the common law rule that there is no right to Wrongful Death, and given the reasoning and finding of *Moragne I*, *Amicus* urges this Court to re-examine the blind adherence to this rule. If that re-examination reveals that indeed Lord Ellenborough's pronouncement was without legal justification, then the only conclusion is the oppo-

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[29] In 1933, this Court seemed to have such misgivings when implying that it might not have decided that no common law cause of action existed had it not been for the accretion of over a hundred years. *Florida E. C. Ry. v. McRoberts*, 111 Fla. 278, 285, 149 So. 631, 633 (1933). The inanity of this *Baker* rule has been expressed as adding shame to horror — "the shamefulness, as Justice Holmes once said, of any ruling based on nothing more than 'it was once so decided.'" Leo Alpert, *The Florida Death Acts*, 10 U. FLA. L. R. 153 (Summer 1957).

site: a common law remedy did exist at the time of the re-ratification of Florida's Constitution resulting in a finding that the medical malpractice exception/exemption under Section 768.21(8) denies adult children of a single parent and parents of a single adult child who are victims of Wrongful Death their Access to the Court with no reasonable alternative remedy, in violation of the Federal and Florida Constitutions.

B. The Burdened Class is Denied Access to the Courts Under the Federal Due Process Clause.

The Federal Due Process clause provides a Right of Access to the Court. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (finding state may not foreclose party's access to court for divorce, a statutorily-created right, by imposing court fee indigent cannot afford); *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) (upholding filing fee in bankruptcy, a statutorily-created right, which indigent could not afford since other alternatives exist to restructure debts).

A key to understanding the fact that section 768.21(8) bars the burdened Class from Access to the Court under the Federal Due Process clause is that even the burdened Class has Access to the Court for some damages, small though they may

be.[30] Having given this access, it is then as if the Florida Legislature, by creating the unlawful exception/exemption for the medical profession in Wrongful Death actions, has imposed an arbitrary penalty upon persons standing in the shoes of the burdened Class and not any one else. Under *Kras*, such a penalty may be upheld if it is rational.[31] Here, as already explained, the exception/exemption is wholly irrational, in violation of the Federal Equal Protection, *see supra* pp. 21-36, and as such is irrational under the Federal Due Process clause.

Section 768.21(8) is not only an unlawful discrimination, it is also a sham. It is designed only to protect the economic interests of the insurance and medical industries, arbitrarily penalizing the Class members. This is evident on its face. The penalty prohibits a Class member from recovering nonpecuniary damages which effectively and completely forecloses the Class member's Access to the Court because of the unusually high cost of litigating a medical malpractice case,[32] in

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[30] Estate's P.R. may recover net accumulated estate and funeral expenses which, in most cases, amount to less than out-of-pocket expenses for a medical malpractice action. §768.21(6), FLA. STAT.

[31] Under *Boddie*, the court determined obtaining a divorce was connected to constitutional right to family association. *See supra* note 4.

[32] A cost-benefit analysis always dictates against litigating a Wrongful Death claim based on medical malpractice when non-pecuniary damages are barred because of the extremely high cost of medical malpractice litigation. *See*

(continued...)

violation of the Federal Due Process clause.

Section 768.21(8) renders the potential value of these cases nil to the legal community which normally takes such cases on contingency. Few attorneys will engage in the costly presuit notice filing. No attorney[33] will sign onto civil litigation. This is an exact parallel to *Boddie* -- a statutory right exists but due to the exception/ exemption for the medical profession for nonpecuniary damages in Wrongful Death actions, the Class members cannot achieve access to their statutory right.[34] And, as required by *Kras*, no alternative remedy is available to the Class members in any

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[32](...continued)
Senate Banking & Ins. Comm'n, 04/15/97, Comments by Sen. Brown-Waite. *See also supra* notes 28, 30 ,33.

[33] This is always true unless an attorney is willing to spend at least $50,000 to $100,000 and expend hundreds to a thousand or more litigation hours, *see Good Samaritan Hosp. Ass'n v. Saylor*, 495 So. 2d 782 (Fla. 4th DCA 1986) (affirming as reasonable attorney's fee award of $1.1 million for expending 1,500 to 2,000 hours in one medical malpractice case), without an expectation of any return on the expended cash and time regardless of the merits of the case. A possible exception is counsel who wants to challenge a statute, such as counsel herein did in *Walker*, *supra* at note 2. Furthermore, if a Class member is wealthy enough to afford a significant negative financial return, then that wealthy member could fund the litigation and thus would have Access to the Court. So, in essence, only the poor and middle-class are denied Access.

[34] "*Boddie*. . . safely rests on only one crucial foundation -- that the civil courts . . . belong to the people . . . no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney." *Huffman v. Boersen*, 406 U.S. 337, 92 S. Ct. 1598, 32 L. Ed. 2d 107 (1972) (Douglas, J., concurring).

other forum.[35] To give a right without a remedy is against the foundation of our democratic society. This Court can, and should, correct this egregious wrong, by declaring section 768.21(8) unconstitutional under the Federal Due Process clause.

IV. SECTION 768.21(8) OF THE FLORIDA STATUTES VIOLATES THE SUBSTANTIVE DUE PROCESS CLAUSE IN BOTH THE FEDERAL AND FLORIDA CONSTITUTIONS.

Substantive Due Process guarantees that laws will be reasonable and not arbitrary. The substance of the law is reviewed rather than the procedures employed. This Court must determine if section 768.21(8) of the Florida Statutes bears a "reasonable relation to a permissible legislative objective." *Psychiatric Ass'n v. Siegel*, 610 So. 2d 419, 425 (Fla. 1992). The applicable legal standard is Sensitive Rational Scrutiny as applied under the Equal Protection clause.

And as previously shown, section 768.21(8) violates both prongs of the Federal and Florida Due Process clauses. First, its "stated purpose of making medical malpractice insurance somewhat less expensive," is an impermissible purpose. *Garber*, 712 So. 2d at 481 (Schwartz, *concurring*); *see supra* pp. 21-36. Second, even if such a purpose would be permissible, the absolute bar to nonpecuniary damages to an arbi-

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[35] House attempted to create a private right within professional disciplinary process to no avail. Besides, proposed approaches did not permit recovery for pain and suffering, nor funding for expenses. House Committee, 03/11/97.

trary class of persons based on their condition at the time of their death being more than 24 years of age and unmarried or without minor child and their death being at the hands of a medical professional bears no reasonable relation to the stated purpose. *Id*. (analogizing this discrimination based on age to discrimination based on blue eyes or less than a certain height)*; see supra* p. 9. Simply put, section 768.21(8) is "unreasonable, arbitrary, capricious, and discriminatory [and] oppressive," and thus unconstitutional. *Garber*, 712 So. 2d at 481 (Schwartz, C.J., *concurring*).

CONCLUSION

For the foregoing reasons and for any additional reasons which may be presented at oral argument, *Amicus Curiae*, ASSOCIATION FOR RESPONSIBLE MEDICINE, respectfully requests that this Court find that the Third District Court of Appeal committed reversible error in holding section 768.21(8) of the Florida Statutes constitutional, and further requests that this Court declare section 768.21(8) unconstitutional in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae, Association for Responsible Medicine, Brief on the Merits in Support of Petitioner in *Mizrahi v. North Miami Medical Center* and accompanying Appendix was served by U.S. Mail on this 23rd day of September, 1993, to: JANIS BRUSTARES KEYSER, Esq., of Gay, Ramsey & Warren, Appellate Counsel for Respondents Sussman, Fein, Sussman Staller & Fien, M.D., P.A., Parmet, Howard Parmet, M.D., P.A., Mordujovich, Rutecki Presser Frankfurt & Murdujovich, P.A., and EMSA Limited Partnership, at 1601 Forum Place, Suite 701, West Palm Beach, FL 33402; HINDA KLEIN, Esq., of Conroy, Simberg & Ganon, P.A., Appellate Counsel for Respondent North Miami Medical Center, at Venture Corporate Center I — Second Floor, 3440 Hollywood Blvd., Hollywood, FL 33021; ARNOLD R. GINSBERG, Esq., of Arnold R. Ginsberg, P.A., Appellate Counsel for Petitioners, at 410 Concord Building, 66 W. Flagler St., Miami, FL 33130; and ROBERT BUTTERWORTH, Attorney General of the State of Florida, PL-01 The Capitol, Tallahassee, FL 32399-1050.

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