IN THE SUPREME COURT
OF FLORIDA

NO. 93, 649

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

Petitioners,

vs.

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.; MORGE URDOJOVICH, M.D.; AND DRS. RUTECKI, PRESSER, FRANKFURT AND MURDUJOVICH, P.A.,

Respondents.

IN THE SUPREME COURT
OF FLORIDA

NO. 93, 650

LYNN GARBER, as PERSONAL REPRESENTATIVE
OF THE ESTATE OF FRANCES GOLUB, deceased,
and LYNN GARBER, surviving daughter,

Petitioners,

vs.

LAWRENCE SNETMAN, M.D., MALCOLM COHEN, M.D., STEVE POLIAKOFF, M.D., FLORIAN YANDEL, JR., M.D., FRANK MOYA, M.D., AND ASSOCIATES, P.A., and MOUNT SINAI MEDICAL CENTER OF GREATER MIAMI, INC.,

Respondents.

AMICI CURIAE,
FLORIDA LEAGUE OF HEALTHSYSTEMS, FLORIDA HOSPITAL ASSOCIATION, FLORIDA MEDICAL ASSOCIATION, AND THE ASSOCIATION OF COMMUNITY HOSPITALS AND HEALTH SYSTEMS OF FLORIDA
BRIEF ON THE MERITS
IN SUPPORT OF RESPONDENTS

(Certified Question from Third District Court of Appeal)

Appellate Counsel for *AMICI CURIAE*,
Florida League of Health Systems,
Florida Hospital Association, Florida Medical Association and The Association of Community Hospitals and Health Systems of Florida

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FLORIDA HOSPITAL ASSOCIATION, FLORIDA MEDICAL
ASSOCIATION AND ASSOCIATION OF COMMUNITY HOSPITALS
AND HEALTH SYSTEMS OF FLORIDA
IN SUPPORT OF RESPONDENTS

The Florida League of Health Systems, Florida Hospital Association, Florida Medical Association and Association of Community Hospitals and Health Systems of Florida (collectively referred to herein as "*Amici*") respectfully submit this Brief as Amici Curiae in support of Respondents.[1] Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, *Amici* file this Brief simultaneously with their Motion for Leave to Appear as Amici Curiae and to File an Amici Curiae Brief.

STATEMENT OF INTEREST

Florida League of Health Systems

The Florida League of Health Systems (FLHS) is a Florida non-profit organization, whose address is 301 South Bronough Street, Suite 210 Tallahassee, Florida 32301. FLHS is organized and maintained for the benefit of the ninety (90) investor-owned hospitals which comprise its membership. One of the primary purposes of the Florida League of Health Systems is to act on

1 Amici Curiae appear in this case, and request that this Court also consider this brief in the case of Lynn Garber v. Lawrence Snetman, Case No. 93,650, which is also pending before this Court. In an effort to save the Court from receiving, and having to read more briefs than is necessary, Amici file only this brief, yet in support of Respondents in both cases. See CIBA-GEIGY Ltd., BASF v. The Fish Peddler, Inc., 683 So. 2d 522 (Fla. 4th DCA 1996).

behalf of its members by representing their common interests before various governmental entities of the state. All members of the FLHS are Florida hospitals, which are licensed by the Agency for Health Care Administration pursuant to Part I, Chapter 395, Florida Statutes. As such, each of the hospitals which is a member of the FLHS, as well as the Florida League of Health Systems itself as their duly designated representative, is substantially affected by state statutes, rules, regulations and policies applicable to medical negligence claims.

Florida Hospital Association

The Florida Hospital Association (FHA) is the primary organization of hospitals in the State of Florida, with its membership including approximately 250 hospitals, varying in size and forms of ownership. The principal objective of the FHA is to promote its members' ability to provide comprehensive, efficient and high-quality health care to the people of Florida. As such, its members are substantially affected by state or national statutes, rules, regulations and policies applicable to medical negligence actions.

Florida Medical Association

The Florida Medical Association (FMA) is a not-for-profit corporation, which is organized and maintained for the benefit of the approximately sixteen thousand (16,000) licensed Florida physicians who comprise its membership. The FMA was created and

exists for the purpose of securing and maintaining the highest standards of practice in medicine and to further the interests of its members. One of the primary purposes of the FMA is to act on behalf of its members by representing their common interests before the courts of the State of Florida. Members of the FMA are also substantially affected by state or national statutes, rules, regulations and policies applicable to medical negligence actions.

The Association of Community Hospitals and Health Systems of Florida, Inc.

The Association of Community Hospitals and Health Systems of Florida, Inc. (CHHS) is a not-for-profit association composed of more than 90 public hospitals and private, not-for-profit hospitals in Florida. All of the members of CHHS are qualified as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. The members of CHHS are located in every area of the state and provide more than 85% of all of the indigent and charity care in this state. The outcome of this appeal has the potential to affect the interests of every member of CHHS.

Each of the organizations participating as amici curiae in these cases also benefits the interests of both citizens and visitors to the State of Florida. Participating amici attempt to assure that Florida's hospitals and other health care providers furnish comprehensive, efficient, high-quality and affordable health care. Any legislation or judicial decision impacting the delivery of high-quality health care is of substantial interest to

participating amici.

ARGUMENTI. A RATIONAL BASIS EXISTS FOR THE STATUTE IN QUESTION

The key issue before this Court centers on the basis for the passage of Fla. Stat. §768.21(8) (1990) by the Florida legislature, as well as of Fla. Stat. §766.201 (1988). This latter statute codified the legislative findings of fact used by the legislature in passing Section 768.21(8).

In deciding Mizrahi v. North Miami Medical Center, Ltd., 712 So. 2d 826 (Fla. 3d DCA 1998), the Third District Court of Appeal on clarification certified the following question to this Court:

> 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?

Later that same day, "the same question of great public importance certified in Mizrahi" was certified in Garber v. Snetman, 712 So. 2d 481 (Fla. 3d DCA 1998).

Consequently the legislature's findings of fact which formed the basis for the legislation in question are at issue in this constitutional attack. In Stewart v. Price, 718 So. 2d 205 (Fla. 1 DCA 1998), the First District Court of Appeal upheld the constitutionality of Section 768.21(8). In authoring the opinion,

Judge Van Nortwick based his findings on Florida Statute §766.201 (1990) which states that:

> (1) The Legislature makes the following findings:
>
> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in an increased cost for most patients and functional availability of malpractice insurance for some physicians.
>
> (b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.
>
> ***
>
> (d) The high cost of medical malpractice claims in the state can be substantially alleviated . . . by imposing reasonable limitations on damages. . . .

Id. at 210 (fn. 4).

The Florida legislature recognized as fact the existence of a "medical malpractice crisis" in this state in 1988. *See* Fla. Stat. §766.201 (1988). This fact was found to exist by the legislature based upon study and findings of the Academic Task Force for Review of Tort and Insurance Systems, which body was created by the 1986 legislature when it enacted the Tort Reform and Insurance Act of 1986. With sweeping legislation in 1986 and 1988, the legislature sought to control the cost of medical negligence claims in an effort to assure the continuity of quality medical services throughout the state. Chapter 766, Fla. Stat. (1988). These facts remain undisturbed to date, and are bolstered by the only significant study conducted since this legislation went in to

effect.[2] Petitioners and their amicus attempt to dispel these legislative findings of fact without any empirical data or support.[3] This must be rejected by this Court.

As recently as 1995, the United States Senate recognized that the costs associated with medical malpractice continue to have an "adverse impact on the availability of, and access to health care services and the cost of health care in this country.". U.S. S.Rep. 104-83, 1995 WL 311930 (1995). According to facts submitted to the United States Senate Committee, experts estimate that "defensive medicine" costs as much as $25 billion annually. S.Rep. 104-83 (1995), 1995 WL 311930 (1995) at p. 7.

Despite tort reform in many states (including Florida), nationally "both the amount of total indemnity (verdicts and settlements) and the average indemnity more than doubled between 1985 and 1993." S.Rep. 104-83, 1995 WL 311930 (*citing* data from Physician Insurers' Association of America Data Sharing Project).

This national trend is echoed in the only study published [App. A], which establishes several critical facts for this Court

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2 See James Studnicki, Sc.D., *Malpractice Claims Closed Against Hospital Defendants in Florida: 1986-1993*, Journal of Healthcare Risk Management, Vol. 16, No. 3, at 7-16, (Summer 1996). A copy of this article may be found at Appendix "A".

3 Amicus "Association for Responsible Medicine" (ARM) in particular fails to cite any data to suggest the legislative findings of 1986 and 1988 are in any way invalid. Instead, ARM appends affidavits not found in the record below which are rife with hearsay, and which should be stricken and/or ignored by this Court. [ARM Amicus App. Exhibits 1, 2, 3].

to consider.[4] In the years after the tort reform in question, hospital malpractice claims-closed went down between 1986 and 1993, from 1756 to 507, respectively. [App. A at 7]. Claims receiving payment increased from 35 percent to 67 percent during the same years. The average payment on hospital malpractice claims increased from $94,000.00 to $212,000.00 (71 percent after adjustment for inflation). Id. The highest incident of claims made remains in the acute critical care and obstetrics area, the same areas recognized to be "in crisis" by the legislature in 1986-88. Id. at 8. What is abundantly clear from this study is that tort reform measures like Chapter 766 and Section 768.21(8) are working to weed out the frivolous claims, while still assuring fair compensation for claimants affected by medical negligence. Id. at 10, 14 (". . . This analysis indicates that hospital malpractice claims in Florida are decreasing in frequency, and that the no-cost and expense-only (frivolous) claims are being wrung from the

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4 This Court need not challenge the legislative findings of Florida Statutes Chap. 766, and Section 768.21(8). These statutes have passed constitutional muster several times. See, for example, Stewart v. Price, 718 So. 2d 205 (Fla. 1st DCA 1998); Bassett v. Merlin, Inc., 335 So. 2d 273 (Fla. 1976); Capiello v. Goodnight, 357 So. 2d 225 (Fla. 2d DCA 1978); White v. Clayton, 323 So. 2d 573 (Fla. 1975); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So. 2d 365 (Fla. 1981); and Univ. of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993). However, if this court chooses to exercise "judicial scrutiny" as urged by former Chief Justice Sundberg, dissenting in Pinillos, 403 So. 2d at 369, [See Amicus ARM brief at 35-36], it is clear that the same facts and circumstances exist today, not only in Florida, but nationally, and justify this legislation.

system".). It is this goal that the Florida legislature desired to achieve when it enacted the legislation in question. Clearly, a rational basis existed, and remains to this date, for the legislation before this Court. The goals of reduction of the number of medical malpractice claims, increasing claims predictability and insurance availability, while assuring adequate, available and affordable health care, are clearly being met by statutes such as Section 768.21(8). *See* Pinillos v. Cedars of Lebanon Hospital Corp., 403 So. 2d 365 (Fla. 1981).

II. THE LEGISLATURE IS IN THE PROPER POSITION TO DETERMINE WHETHER A MEDICAL MALPRACTICE CRISIS STILL EXISTS

It is axiomatic that both the Florida and Federal Constitutions established each respective government to contain three branches: judicial, legislative and executive, each with its own realm of power. Art. II, §3, Fla. Const.; U.S. Const. Art. III, §2. "No branch of state government can arrogate to itself powers that properly inhere in a separate branch." State v. Ashley, 701 So. 2d 338, 342 (Fla. 1997). Consequently, this Court should not invade the province of the legislature by determining whether sufficient external facts exist to justify the repeal of Fla. Stat. §768.21. This Court must not sit as a "super legislature". State v. Wershow, 343 So. 2d 605, 607 (Fla. 1977).

In the recent past, several bills calling for the repeal of Fla. Stat. §768.21(8) have been presented to the Florida

Legislature. *See* ARM Amicus brief, at 19-20; Amicus App. Exs. 1, 2, 3; Fla. S.B. 40 (1997); Fla. H.B. 25 (1997). The Legislature has, thus far, refused to repeal it. What is more preposterous than the evident fact that the legislature continues to recognize the need for this legislation is Amicus ARM's bald statement that the statute creates a "politically powerless" class. *See* ARM Amicus brief at 19. Getting a bill sponsored in both houses of the Legislature, in several sessions, is hardly "politically powerless". Instead, this demonstrates that the petitioners have no basis to factually attack the legislative findings of prior legislatures. This Court cannot substitute its judgment for that of the Legislature as to the appropriateness of Fla. Stat. §768.21(8). "[U]nless legislation duly passed be clearly contrary to some expressed or implied prohibition contained [in the State Constitution], the courts have no authority to pronounce [the Legislation] invalid." City of Miami Beach v. Crandon, 35 So. 2d 285, 287 (Fla. 1948).

The boundary between adjudicating and legislating can be blurred when dealing with policy issues determined to be of great public importance. However, as this Court stated in the case of Holley v. Adams, 238 So. 2d 401 (Fla. 1970), the "basic principles of constitutional construction" which must be followed are that:

> First, it is the function of the Court to interpret the law, not to legislate.
>
> Second, courts are not concerned with the mere

> wisdom of the policy of the legislation, so long as such legislation squares with the constitution.
>
> Third, the courts have no power to strike down an act of the Legislature unless the provisions of the act, or some of them, clearly violate some express or implied inhibition of the Constitution.
>
> Fourth, every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act.
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> Fifth, to the extent that such an act violates expressly or clearly implied mandates of the Constitution, the act must fail, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary.

citing Amos v. Mathews, 99 Fla. 1, 126 So. 308 (Fla. 1910).

The Florida Legislature utilized data compiled by the Academic Task Force for Review of Tort and Insurance Systems in finding that a medical malpractice crisis existed in Florida when it enacted Florida Statutes Chapter 766. 1998 Fla. Sess. Law Serv. 88-1. The Legislature's factual findings in turn were relied upon for the enactment of Section 768.21(8).

Arguably, Florida Statute §768.21(8) is an enactment of social legislation. In Adams v. Miami Beach Hotel Ass'n, 77 So. 2d 465 (Fla. 1955), this Court found that a "legislative finding that . . . a requirement is in the public interest concludes the matter." The legislation at issue in the cause *sub judice* falls within the ambit of social legislation, since its goal is control the costs of defending medical malpractice actions in the interest of the

recognized need for uninterrupted quality medical services. Fla. Stat. §766.201(1)(c). Therefore, the Legislature's findings regarding the need for the implementation of tort reform justify the implementation of Section 768.21(8), and end this Court's inquiry into the propriety of the enactment. Adams, 77 So. 2d at 468.

The Legislature, and not the judiciary, is in the best position to determine both the appropriate legislative action needed to facilitate the provision of efficient and affordable health care within the state, and whether the previously recognized medical malpractice crisis has abated. The Legislature determined that tort reform was necessary to curb the costs associated with medical malpractice so as to ensure affordable healthcare to all. Fla. Stat. §766.201(1)(1990).

III. FLORIDA STATUTE §768.21(8), IS VALID AND CONSTITUTIONAL

The precedent upon which this Court is to rely in determining the constitutionality of a statute unequivocally establishes that Section 768.21(8) continues to be a valid and constitutional means for limiting the cost of providing healthcare. When faced with a challenge to the constitutionality of a statute, as here, there are certain "cardinal principals" which must be utilized in determining the constitutionality of a statute. These include the following:

1. The burden is upon him who assails the constitutional validity of a statute,

2. It is presumed that the Legislature intended a

valid constitutional enactment, and

> 3. When the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one which it would be unconstitutional and the other it would be valid, it is the duty of the Court to adopt that construction which will save the statute from constitutional infirmity.

Boynton v. State, 64 So. 2d 536, 546 (Fla. 1953). Therefore, in delving into a determination of the validity of a legislative enactment, this Court has stated on countless occasions that, "there is a presumption of constitutionality inherent in any statutory analysis." Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984), *citing* Scullock v. State, 377 So. 2d 682, 683-4 (Fla. 1979); *see also* Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983); Rich v. Ryals, 212 So. 2d 641 (Fla. 1968). Consequently, "this statute [Fla. Stat. §768.21(8)] comes before [the] Court clothed with a presumption of constitutionality." Sanford-Orlando Kennel Club, 434 So. 2d at 881, *citing* In re: Estate of Caldwell, 247 So. 2d 1 (Fla. 1971).

To overcome this presumption of validity, Petitioners must demonstrate that Section 768.21(8) conflicts with the Equal Protection clauses of the Florida and/or Federal Constitutions **beyond a reasonable doubt**. Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981). This Petitioners cannot do.

The first two requirements from Boynton, in effect, work together to place the burden upon those challenging the

constitutionality of a statute.[5] Behind these presumptions of validity and constitutionality is the underlying theory that the Legislature would not knowingly enact an unconstitutional measure. Wright v. Board of Public Instruction of Sumter County, 48 So. 2d 912, 914 (Fla. 1950). To this end, Section 768.21(8) should be afforded the presumptions of validity and constitutionality.

Constitutional challenges to Florida Statute §768.21(8) are not novel. The most recent, and again unsuccessful, challenge was presented to the First District Court of Appeal in Stewart v. Price, 718 So. 2d 205 (Fla. 1st DCA 1998). There, the constitutionality of Section 768.21(8) was challenged by the same Equal Protection arguments at issue in the instant cause. The Price court upheld the validity of Section 768.21(8), unpersuaded by arguments to the contrary. Id. The First District noted that under the common law, an adult who has not been dependent on a parent was not entitled to recover damages for the wrongful death of a parent. Id., *citing* U.S. v. Durrance, 101 F.2d 109 (5th Cir. 1939); Louisville & N.R. Co. v. Jones, 45 Fla. 407, 34 So. 246 (Fla. 1903).

In upholding the constitutionality of Section 768.21(8), the Price court observed that the implementation of Chapter 90-14, Laws of Florida which afforded minor children the opportunity to recover

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5 Boynton v. State, 64 So. 2d at 546 (requiring that burden rest with the assailant of constitutionality and containing presumptions of validity and constitutionality).

for nonpecuniary damages resulting from the death of a parent in Section 768.21(3), created a new right rather than eliminated any extant remedy. This is important from a constitutional perspective.

> We do not find that an equal protection violation is presented by this separate treatment. Had the legislature eliminated an existing remedy, we would be required to employ a different constitutional analysis. *See* Kluger v. White, 281 So. 2d 1 (Fla. 1973). Because **no statutory or common law right existed for the adult children of persons who wrongfully died as a result of medical malpractice**, however, section 768.21(8) may be declared an unconstitutional denial of equal protection only if it bears no rational relationship to a legitimate state objective. *See* State v. Leicht, 402 So. 2d 1153 (Fla. 1981). Florida's wrongful death act was found constitutional even though it provided no general right of recovery to adult non-dependent children of persons subject to wrongful death of any cause. Henderson v. Insurance Co. of North America, 347 So. 2d 690 (Fla. 4th DCA 1977); *and* Capiello v. Goodnight, 357 So. 2d 225 (Fla. 2d DCA 1978). We find no constitutional barrier to the legislature's subsequent limited grant of the right to recover damages for pain and suffering to adult, non-dependent children. **The legislature's choice to exclude from such right adult children of persons who wrongfully died as a result of medical malpractice bears a rational relationship to a legitimate state interest of limiting increases in medical insurance costs**. *See* §766.201(1), Fla. Stat. (1995). (Footnote omitted) [Emphasis added].
>
> **Chapter 90-14 closed no courthouse doors. Rather it opened, albeit only for some, those doors by creating a limited right of recovery where no recovery has previously existed at all. We find Section 768.21(8) constitutes therefore neither a denial of due process nor a denial of access to courts. In short, appellants have failed to overcome the presumption of constitutionality of this statute**. *See* Florida Dept. of Educ. v. Glasser, 622 So. 2d 944 (Fla. 1993). [emphasis added].

Stewart v. Price, 718 So. 2d at 210. Accord, Mizrahi, supra; Graber, supra.

The rational basis supporting the constitutionality of Fla. Stat. §768.21(8) has been recognized as valid by this Court already. *See* Univ. of Miami v. Echarte, 618 So. 2d 189, 191 (Fla. 1993). This Court recognized the findings of the Academic Task Force for Review of the Insurance and Tort Systems; in particular, this Court recognized the fact of a "financial crisis in the medical liability insurance industry" and the resultant need to deal with this "medical malpractice crisis". Echarte, 618 So. 2d at 191-192 (fn. 12), 197. No evidence or compelling fact, beyond and to the exclusion of any reasonable doubt, has been demonstrated by Petitioners to override the facts which have been recognized as valid by the legislature and by this Court in Echarte. Belk-James, Inc. v. Nazum, 358 So. 2d 174 (Fla. 1978). The constitutional attack of Petitioners must fail.

CONCLUSION

Florida Statute §768.21(8) clearly passes constitutional muster. As a primary concern, this Court must give great deference to legislative enactments, because they are presumptively constitutional and valid. This is especially true in light of the theory that the Legislature would not knowingly enact an unconstitutional measure. Likewise, Section 768.21(8) must be considered valid and constitutional unless and until the Petitioners demonstrate "beyond a reasonable doubt" that the subject statute violates some provision of the Florida or Federal

Constitutions. Bridges, 402 So. 2d 411.

This Court should again defer to the Legislature's reasons for the enactment of Section 768.21(8), codified in Fla. Stat. §766.201(1), since the Court is to resolve doubts in favor of constitutionality. There is ample factual support demonstrating the rational basis for this statute. Absent compelling factors demonstrating otherwise beyond a reasonable doubt, the lower court decision must be affirmed by this Court.

STATEMENT OF CERTIFICATION

I, Douglas M. McIntosh, Counsel for Amici Curiae, in accord with Rule 9.210(a)(2), hereby certify that the size and style of type used in the attached Brief On The Merits In Support of Respondents (Courier 10cpi) is proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amici Curiae, FLORIDA LEAGUE OF HEALTH SYSTEMS, FLORIDA HOSPITAL ASSOCIATION, FLORIDA MEDICAL ASSOCIATION and THE ASSOCIATION OF COMMUNITY HOSPITALS AND HEALTH SYSTEMS OF FLORIDA, in Support of Respondents was served by U.S. Mail on this _____ day of November, 1998 to all attorneys on the attached counsel of record list.

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