IN THE SUPREME COURT OF FLORIDA
Case No. SC04-777

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

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: PATIENTS' RIGHT TO KNOW
ABOUT ADVERSE MEDICAL INCIDENTS

INITIAL BRIEF OF SPONSOR FLORIDIANS FOR PATIENT PROTECTION

IN SUPPORT OF THE INITIATIVE

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THE PROPOSED INITIATIVE

Ballot Title:

Patients' Right to Know About Adverse Medical Incidents

Ballot Summary:

Current Florida law restricts information available to patients related to investigations of adverse medical incidents, such as medical malpractice. This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death. Provides that patients' identities should not be disclosed.

Full Text:

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

1) Statement and Purpose:

The Legislature has enacted provisions relating to a patients' bill of rights and responsibilities, including provisions relating to information about practitioners' qualifications, treatment and financial aspects of patient care. The Legislature has, however, restricted public access to information concerning a particular health care provider's or facility's investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients. This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

2) Amendment of Florida Constitution:

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

"Section 22. Patients' Right to Know About Adverse Medical Incidents.

"(a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.

"(b) In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

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

"(1) The phrases 'health care facility' and 'health care provider' have the meaning given in general law related to a patient's rights and responsibilities.

"(2) The term 'patient' means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

"(3) The phrase 'adverse medical incident' means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

"(4) The phrase 'have access to any records' means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, *provided that* current records which have been made publicly available by publication or on the Internet may be 'provided' by reference to the location at which the records are publicly available."

3) Effective Date and Severability:

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

STATEMENT OF THE CASE

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

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

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[1] Article XI, Section 3, Florida Constitution provides:

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

Emphasis added.

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

> 101.161 **Referenda; ballots.--** (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, *the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot* after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be

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

Most medical malpractice is committed by a tiny minority of doctors. "According to a study by Public Citizen, only 6.2 percent of Florida doctors had two or more malpractice payouts between 1990 and 2002. Those doctors were responsible for more than half the settlements and jury awards." Editorial: "Proposal Would Harm Patients," *Sarasota Herald-Tribune* (Sept. 14, 2003), *available online at*:

> embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. Except for amendments and ballot language proposed by joint resolution, *the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure*. In addition, the ballot shall include a separate fiscal impact statement concerning the measure prepared by the Revenue Estimating Conference in accordance with s. 100.371(6) or s. 100.381. *The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.*

Emphasis added.

http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20030914/NEWS/309140728/1030. A recent study showed that some health care providers practicing in Florida had as many as eighteen incidents of medical malpractice. *See* Public Citizen, *Florida's Real Malpractice Problem: Bad Doctors and Insurance Companies Not the Legal System* (Sept. 2002), at 7, *available online at*: http://www.citizen.org/documents/FLAreport.pdf.

Public disclosure of which physicians have significant histories of adverse medical incidents might help patients avoid what they would consider to be unacceptable levels of risk. In fact, Florida has such a system of disclosure,[3] but the current system does not include all adverse medical incidents and similar claims. In other words, the current public disclosure system can provide potential patients with a false sense of confidence because, although it appears complete, it does not include all available and relevant information.

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[3] Public disclosure of official records is governed by Art. I, § 24, Fla. Const., which provides that "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer or employee of the state, or persons acting on their behalf," except as specifically exempted. Section 24(c) provides a mechanism for the Legislature to exempt certain records from this right to inspect or copy. Art. I, § 24(c), Fla. Const. Such exemptions, however, are to be no broader than necessary. *Id*. The constitutional right to privacy, for example, under Art. I, § 23, Fla. Const., does not limit the public right of access to public records under Art. I, § 24.

A physician must report to the Department of Insurance Regulation any claim or action for "personal injury alleged to have been caused by error, omission, or negligence" in the practice of medicine. § 456.049, Fla. Stat. (2003). These claims are searchable on-line, at: http://www.fldfs.com/data/liability/byname.asp. This database is explicitly limited in its scope and coverage and does not include all adverse medical incidents. *See* http://www.fldfs.com/data/liability/disclaimer.htm (disclaimer).

Similarly, § 456.041(1), Fla. Stat. (2003), requires the Florida Department of Health to compile a "practitioner profile" of healthcare practitioners, including physicians. The practitioner profile is available on the Internet. § 456.041(3), (7), Fla. Stat., *available online at*: http://www.doh.state.fl.us/MQA/profiling/index.html. The practitioner profile must include "information that directly relates to the practitioner's ability to competently practice his profession." § 456.041(3), Fla. Stat. The practitioner profile must include "every final disciplinary action taken against the practitioner." *Id.*; § 456.041(5), Fla. Stat. The statute provides that a practitioner's profile must include comparisons of claims against the practitioner to those of other practitioners, §

456.041(4), Fla. Stat., but in practice this is not done.[4]

The practitioner profile was amended in 2003, *inter alia*, to increase the threshold for disclosure to $100,000 per claim. *See* Ch. 97-237, § 4, Laws of Fla.; Ch. 2003-416, § 14, Laws of Fla. Thus, the practitioner profile system now provides less information to patients and potential patients than under prior law.

Under other current laws, certain adverse medical incidents (statutorily defined as including incidents which might involve death, serious injury or transfer to another medical facility) and disciplinary actions taken against a doctor must be reported to the state Department of Health. §§ 458.337(1), (2) & 458.351, Fla. Stat. (2003). Information about adverse medical incidents, even when reported to the Department, is statutorily exempt from disclosure, precluding regular access to public records. § 458.337(3), Fla. Stat. ("[T]hose records shall be used solely for the purpose of the department and the board in disciplinary proceedings. The

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[4]The practitioner profile system often does not provide complete information to patients. For example, Public Citizen reports one physician as having at least 15 medical malpractice suits or settlements in both Indiana and Florida, without ever having been disciplined by either state. *See* Public Citizen, *Florida's Real Malpractice Problem: Bad Doctors and Insurance Companies Not the Legal System* (Sept. 2002), at 7, *available online at*: http://www.citizen.org/documents/FLAreport.pdf. A patient searching the practitioner profile system would not learn this information, as a search for a Florida practitioner profile for that practitioner number lists only one settlement.

records shall otherwise be confidential and exempt from § 119.07(1).").

In fact, that information is not only exempt from regular disclosure under public "right to know" rules, it is not available for use even in legal proceedings. *Id*. ("These records shall not be subject to discovery or introduction into evidence in any administrative or civil action."). In other words, although the State is notified about some adverse medical incidents, those reports may not be uncovered by diligent inquiry or even by legal action.

Current Florida law also provides for a "Florida Patient's Bill of Rights and Responsibilities." *See* § 381.026, Fla. Stat. (2003). The expressed purpose of the Patient's Bill of Rights includes "to promote the interests and well-being of the patients of health care providers and health care facilities and to promote better communication between the patient and the health care provider." § 381.026(3), Fla. Stat.

The Patient's Bill of Rights also declares that "A patient has the right to know the name, function, and qualifications of each health care provider who is providing medical services to the patient. A patient may request such information from his or her responsible health care provider or the health care facility in which he or she is receiving medical services." § 381.026(4)(b)(1), Fla. Stat. In addition, "A patient has the right to be given by his or her health care provider information

concerning diagnosis, planned course of treatment, alternatives [and] risks. . . ." § 381.026(4)(b)(3). Yet, as described above, the Patient's Bill of Rights does not provide access to the information statutorily hidden from patients.

Thus, some of the information which might be most desired by patients wishing to avoid doctors with a high incidence of adverse medical incidents is, by statute, not available to the public. In addition, the seemingly-open access to important records about practitioner competence and malpractice claims, combined with the statutory exemption from disclosure, may create a false sense of security. Patients who view a physician's "practitioner profile" or insurance claim records may believe that they are seeing reports of all available information, when they are not.

The expressed purpose of this amendment is to expand a patient's right to know about information currently kept confidential by statute. "This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility's or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death."

The standard of review in this proceeding is *de novo*, but with deference to

the sovereign right of the People to amend the Constitution. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("the court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people."). Thus, the Court must approve an initiative unless it is "'clearly and conclusively defective.'" *Advisory Opinion to the Atty. Gen'l re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (quoting *Advisory Opinion to the Atty. Gen'l re Tax Limitation*, 873 So. 2d 864, 867 (Fla. 1996)) ["*Tax Limitation II*"].

SUMMARY OF ARGUMENT

The proposed "Patients' Right to Know about Adverse Medical Incidents" initiative (hereinafter "Right to Know amendment") presents a single, limited change to the Florida Constitution, in compliance with Article XI, Section 3, Florida Constitution. The single subject of the amendment is to allow Florida citizens access to information about adverse medical incidents which may currently be unavailable to them. Each part of the proposed amendment is directly related to that purpose. The simple effect is to allow public access to public records that are already being collected, and that contains information important to the safety and personal health of individual citizens.

Information about most adverse medical incidents is currently collected by the Department of Health, and to some degree the Department of Insurance Regulation, but some of this information is currently exempt from public disclosure, even in discovery or legal actions. The proposed amendment will remove that exemption. This is a single, legislative function. The amendment does not substantially affect the executive or judicial branches.

Interaction by the proposed amendment with other provisions of the Florida Constitution is limited. The right to privacy is not substantially affected because the privacy provision explicitly gives way to public records access, and the

Legislature has already required collection of data related to these incidents. The amendment also explicitly provides that information released should protect privacy interests of individual patients. A decision by the people to amend their organic law to allow access to these public records would not involve substantial effects on privacy or any other provision of the Constitution.

The ballot title and summary accurately and clearly state the purpose and chief effect of the amendment in terms that will be understood by voters. The summary explains both the current state of Florida law and how the proposal seeks to change it, while also explaining that individual patient information will not be disclosed. There are no hidden meanings or effects of the amendment, and the descriptions should be easily understood by the voters. The ballot title and summary meet the standards of Section 101.161.

This Court should approve the proposed Right to Know amendment because it presents a single and unified question to the voters, and because its ballot title and summary are clear and accurate.

ARGUMENT

I. THE PROPOSED AMENDMENT PRESENTS A SINGLE SUBJECT, WHICH SUPPLEMENTS CURRENT LAW WITH A NEW RIGHT FOR THE PUBLIC TO RECEIVE INFORMATION ALREADY REQUIRED TO BE REPORTED TO STATE AGENCIES.

Article XI, Section 3 allows the people of Florida to amend their Constitution by initiative, "provided that any such revision or amendment . . . *shall embrace but one subject and matter directly connected therewith*." (Emphasis added) This single subject requirement in Article XI, Section 3, is intended to avoid multiple "precipitous" and "cataclysmic" changes in the Constitution. *See Advisory Opinion to the Atty. Gen'l re Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities*, 813 So. 2d 98, 100 (Fla. 2002); *Advisory Opinion to the Atty. Gen'l - Save Our Everglades*, 636 So.2d 1336, 1139 (Fla. 1994). The rule was instituted because popular initiatives do not afford the same opportunity for public hearing and debate that accompanies the proposal and drafting processes in the Legislature or revision commissions. *See Advisory Opinion to the Atty. Gen'l re Fish & Wildlife Comm'n*, 705 So. 2d 1351, 1353 (Fla. 1998) (citing *Fine v. Firestone*, 448 So.2d 984, 988 (Fla 1984)).

Another reason for the single subject limitation is to prevent "logrolling," which is the combining of different issues into one initiative so that voters have to

accept something they don't want in order to gain something they do want. *See Advisory Opinion to the Atty. Gen'l re Fla. Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So.2d 367, 369 (Fla. 2000).

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

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

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

A. The Right to Know Amendment Affects Only Legislative Branch Functions at the State Level.

This test asks whether the proposed amendment performs, alters, or substantially affects multiple, distinct functions and levels of government. *Advisory Opinion to the Attorney General re: Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 496 (Fla. 2002); *Save Our Everglades*, 636 So. 2d at 1340; *Advisory Opinion to the Atty. Gen'l - Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994); *Evans v.*

Firestone, 457 So. 2d 1351, 1354 (Fla. 1984) (when an amendment "changes more than one government function, it is clearly multi-subject"); *Fine*, 448 So. 2d at 990.

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

As noted above, most data concerning adverse medical incidents is already required to be reported to executive branch agencies, under statutory authority. *See, e.g.*, § 458.351, Fla. Stat. (2003) (reporting to Department of Health). Not all information which is reported to the executive branch, however, is available to patients. *See* § 458.337(3), Fla. Stat. The single purpose of this amendment is to allow the patient to have access to the information now kept secret.

This change involve policy-making, a function of the legislative branch of state government, but that is the only branch of government at any level whose

functions are affected by the change.

1) *The Effect on the Legislative Branch Is Only to Supplement Current Law by Expanding Existing Disclosure Requirements to Include Certain Information Now Protected From Disclosure by Statute.*

Under current law, as noted above, physicians must already disclose adverse medical incidents (including disciplinary actions and investigations) to the Department of Health. These disclosures would ordinarily be available to the public under the constitutional right to access public information, Art. I, § 24, Fla. Const., and the general public access to records statute. *See* § 119.07, Fla. Stat. (2003). Only a statutory exemption from disclosure keeps that information from the public. *See* § 458.337(3), Fla. Stat. (2003).

The major effect of this proposed amendment would be to remove the statutory exemption from disclosure and to make this information available, not just to the Department of Health, but to any patient who requests the information. In other words, this amendment rescinds a disclosure exemption enacted by the Legislature. This reverses prior legislative policy, thus performing a legislative function. *Cf. Evans v. Firestone*, 457 So. 2d at 1354.

There is, however, no other effect on the legislative branch. The Legislature remains free to alter the meanings of "health care facility" and "health care

provider," to change reporting requirements, or to provide public access to records in other ways. This Court, in its single subject jurisprudence, has looked favorably on initiatives that provide for a retention of discretion by the Legislature. *See, e.g.*, *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 493 (defining terms both in text and by reference to statutes); *Advisory Opinion to the Atty. Gen'l re Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1128 (Fla. 1996) (defining of amendment coverage by reference to statutes).

Thus, the proposed amendment has an effect on the Legislative Branch at the state level. Its effect is limited to the performance of a single legislative policy-making function in one specific area already addressed by general law and subject to adjustment by legislative action in the future.

2) *The Proposed Right to Know Amendment Would Not Affect the Judicial Branch*.

The proposed amendment makes no changes in the judicial branch, nor does the amendment perform a judicial function. The amendment sets policy only in substantive law, and does not affect procedural law.[5]

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[5] This Court, in *Allen v. Butterworth*, quoted Justice Adkins in defining the difference between substantive and procedural law: "As to the term 'procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term 'rules of practice and procedure' includes all rules governing the parties, their counsel and the Court

Nor does the proposed amendment change the standards which courts use to determine whether medical malpractice or another adverse medical incident has occurred. The proposed amendment simply tracks and refers to general law related to adverse medical incidents and the public's constitutional and statutory right to know. Thus, the proposed Right to Know amendment neither performs nor substantially alters any judicial function.

3) *The Proposed Amendment Does Not Substantially Affect the Executive Branch at Any Level of Government*.

The proposed amendment does not command or permit an Executive Branch agency to do anything in addition to or different from current law. Although the Department of Health currently receives reports on adverse medical incidents, the proposed amendment provides only for a right of access for patients, and not a requirement that the Department collect or disclose new information. The requirement for disclosure is contained in the Constitution or existing public access to records statutes and the Department's obligation is not affected by the proposed amendment here. *See* Art. I, § 24, Fla. Const.; § 119.07, Fla. Stat. (2003).

Thus, the proposed amendment does not perform or substantially alter the

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throughout the progress of the case from the time of its initiation until final judgement and its execution." *Id*. at 60 (quoting *In re Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

function of the Executive Branch at any level of government.

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

This Court also looks at whether a proposed amendment causes substantial impact on multiple sections of the Constitution. *See Advisory Opinion to the Atty. Gen'l re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994) ["*Tax Limitation I*"]; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019; *Fine*, 448 So. 2d at 989-90. An initiative will not be removed just because there is some "possibility that an amendment might interact with other parts of the Florida Constitution." *Advisory Opinion to the Atty. Gen'l re Term Limits Pledge*, 718 So. 2d 798, 802 (Fla. 1998). The test is whether there are multiple parts of the Constitution which are substantially affected by the proposed initiative amendment, in order both to inform the public of the proposed changes and to avoid ambiguity as to the effects. *Tax Limitation I*, 644 So. 2d at 490; *Fine*, 448 So. 2d at 989.

As shown by the discussion above, the net effect of the proposed Right to Know amendment is simply to remove a statutory exemption from public disclosure. Public disclosure of official records is governed by Article I, Section 24, Florida Constitution. Article I, Section 24 provides that "Every person has the right to inspect or copy any public record made or received in connection with the

official business of any public body, officer or employee of the state, or persons acting on their behalf," except as specifically exempted. Article I, Section 24(c) provides a mechanism for the Legislature to exempt certain records from this right to inspect or copy. Such exemptions, however, are to be no broader than necessary. *Id*.

One possible issue raised by the proposed Right to Know amendment is the interaction with the right to privacy in Article I, Section 23, which provides that "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Thus, practitioners may argue that their history of adverse medical incidents should be considered private and protected by the right of privacy.

That argument, however, has been foreclosed by both the Constitution and statutes. Section 23 itself provides an exception: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Thus, disclosure of information received by public agencies, as described in Article I, Section 24 or implemented in general law, cannot be blocked by assertions of privacy alone. The proposed amendment removes an exemption from disclosure of information already reported to the Department of Health, and not otherwise protected by the right to privacy.

If there is some concern about the right to privacy from the proposed amendment, it is the privacy of patients whose information might otherwise be disclosed. Subsection (b) of the proposed amendment explicitly respects patients' privacy. In addition, if there is a federal privacy law issue involved, the proposed amendment explicitly defers to those rights, thus avoiding any issue of possible confrontation with federal laws. *Cf. Term Limits Pledge*, 718 So. 2d at 804-05 (Harding, J., concurring) (raising concerns about the interaction of a proposed initiative with federal law); *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022 (Kogan, J., concurring).

The proposed Right to Know amendment thus does not affect multiple sections of the Constitution.

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

An initiative proposal must also have "a natural relation and connection as component parts of a single dominant plan or scheme. Unity of object and plan is the universal test ..." *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 339 (Fla. 1978) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)). This test is sometimes described as whether the proposed amendment has a "logical and natural oneness of purpose." *Advisory Opinion to*

the Atty. Gen'l re Local Trustees & Statewide Governing Board to Manage Florida's Univ. Sys., 819 So. 2d at 729 (quoting *Fine*, 448 So. 2d at 990).

As a practical matter, this test looks to whether there are multiple proposals which can stand separately. *See Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 495. This proposed amendment cannot be so divided. It has a simple two-element operative text (one a positive declaration of policy, the other a protection for privacy concerns), plus necessary definitions. *See id.* The operative text cannot be further split, since it describes a specific policy change and a privacy protection which is intimately connected with the policy change.

It is possible that the policy change could be enacted without the privacy provision, but not without raising questions about the effect on state and federal privacy protections; thus the privacy protections are not declaratory of laws, but clarifications of the scope of the policy change. The definitions themselves are similarly explanatory, as described above, indicating implementing details which are essential to understanding the dimensions of the operative text. *Cf. Advisory Opinion to the Atty. Gen'l Re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597, 599 (Fla. 2002) (definitions section part of a "functionally and facially unified" amendment proposal); *Advisory Opinion to the*

Atty. Gen'l Re Protect People from the Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking, 814 So. 2d 415, 419 (Fla. 2002) (definitions section provided to make clear the scope and effect of the proposal).

Since the initiative proposal at issue here has "a single dominant plan" – i.e. to remove the statutory exemption from public disclosure of adverse medical incidents – there is no danger of log-rolling with this initiative. The proposed amendment has the requisite "logical oneness of purpose." Thus, the proposed Right to Know amendment contains only a single subject, affecting only a single branch of state government.

II. THE BALLOT TITLE AND SUMMARY FOR THE PROPOSED RIGHT TO KNOW AMENDMENT ARE ACCURATE, COMPLETE AND NOT MISLEADING.

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

The Court requires that the summary and ballot title of a proposed initiative

amendment be "accurate and informative." *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992). The Court, however, recognizing the statutory word limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982). The Court also recognizes that the voters "must be presumed to have a certain amount of common sense and knowledge" when reading the petition. *Tax Limitation II*, 673 So. 2d at 868 (voters, by learning and experience, would understand the general rule that a simple majority prevails).

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

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

The first test for a ballot title and summary is that it accurately convey the major purpose of the initiative. *See Smith*, 606 So. 2d at 621. The title and summary, which are statutorily limited in length, need not recite every purpose and every effect, but must describe enough so that voters are informed about the

significant changes in law which would result from the adoption of the initiative. *Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002); *Grose*, 422 So. 2d at 305; *Advisory Opinion to the Atty. Gen'l: English - The Official Language of Florida*, 520 So. 2d 11, 13 (Fla. 1988).

As noted *supra*, the purpose of the proposed Right to Know amendment is to close an exception to the regular constitutional and statutory rules about disclosure of information. The ballot title and summary accurately convey that purpose.

The ballot title says: "Patients' Right to Know About Adverse Medical Incidents." Currently patients have no right to know about certain adverse medical incidents, even in discovery or other legal process. *See* § 458.337(d), Fla. Stat. (2003). The title accurately states that the purpose of the amendment is to provide a patient with a right to know about those previously secret incidents.

The ballot summary first describes current law as restricting "information available to patients related to investigations of adverse medical incidents, such as medical malpractice." This, in fact, is an accurate statement both of the constitutional and statutory exemption from disclosure described above, and of the actual ability of patients to obtain this information, for example, as noted above, from a practitioner's "profile. In fact, patients who look at a physician's

"practitioner profile" may falsely believe that they are privy to all the physician's "adverse medical incidents," when they are not. Patients who wish to obtain complete information about adverse medical incidents cannot obtain this information, even by discovery. *See* § 458.337(3), Fla. Stat. (2003).

The ballot summary then describes the major effect of the proposed amendment: "This amendment would give patients the right to review, upon request, records of health care facilities' or providers' adverse medical incidents, including those which could cause injury or death." Again, this is an accurate summary of the major purpose of the initiative.

In light of the 75-word limitation on ballot summaries, the proposed ballot summary does not contain all of the definitions in the text. *See Treating People Differently Based on Race*, 778 So. 2d at 899 ("an exhaustive explanation of the interpretation and future possible effects of the amendment are not required."). Yet these definitions are either relatively unambiguous and commonly-understood (*e.g.*, "patient") or defined by reference to general law (*e.g.*, "health care provider" or "adverse medical incident").

The definition which is somewhat technical – "adverse medical incident" – is explained in a manner to give some guidance to the voter: "such as medical malpractice" and "including those which could cause injury or death." This

definition follows general law, § 458.351(4), Fla. Stat. (2003), and the examples are accurate. This test looks primarily to see if changes in the law have been accurately described to voters, and the proposed amendment does not disturb the definitions of these factors in general law. Thus, the ballot title and summary correctly and completely describe the major purpose of the proposed amendment.

B. The Proposed Right to Know Amendment Has No other Effects Beyond those Disclosed in the Title and Summary.

A ballot summary is defective "if it omits material facts necessary to make the summary not misleading." *Term Limits Pledge*, 718 So. 2d at 803 (quoting *Advisory Opinion to the Atty. Gen'l - Limited Political Terms*, 592 So. 2d 225, 228 (Fla. 1991)). This Court has stated: "We are most concerned with relationships and impact on other areas of law when we consider whether the ballot summary and title mislead the voter with regard to effects and impact on other constitutional provisions." *Protect People from the Hazards of Second-Hand Smoke*, 814 So. 2d at 419 (citing *Treating People Differently Based on Race*, 778 So. 2d at 899-900).

As noted above, there are no significant impacts on other areas of the law from the proposed amendment. Its effect will be to end an exemption from the regular constitutional and statutory disclosure rules. There are no other legal

effects. This ballot title and summary accurately reflect the purpose and major effect of the proposed amendment.

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

Although voters are presumed to have normal intelligence and common sense, they are not presumed to have special knowledge or legal expertise. *Cf. Tax Limitation II*, 673 So. 2d at 868. Voters should not be misled by ballot title or summary language which has a peculiar or ambiguous meaning and effect. *Treating People Differently Based on Race*, 778 So. 2d at 899 (term "bona fide qualifications based on sex" not defined and subject to broad and differing interpretations by voters); *People's Property Rights Amendments*, 699 So. 2d at 1309 ("common law nuisance" and "increases in tax rates" undefined).

Here the terms used are clear and specific. Where there is a technical phrase in the ballot title and summary – "adverse medical incident" – the phrase is explained by simple and clear examples. The test is whether the "voters are not informed of its legal significance," as the Court said with regard to the initiative in *Treating People Differently Based on Race*, 778 So. 2d at 899 (discussing the phrase "bona fide qualifications based on sex"). The legal significance of the phrase is apparent from the face of the summary, and from voters' common sense

understanding of what constitutes an adverse medical occurrence.[6]

Similarly, the phrase "Provides that patients' identities should not be disclosed" is an accurate summary of the major purpose of subsection (b) of the proposed amendment. Subsection (b) says that "In providing such access [to records regarding adverse medical incidents], the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained."

The preamble to the proposed amendment explains subsection (b): "This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients." The summary accurately describes the major purpose of subsection (b) to protect patients' identities. In conjunction with existing federal privacy laws, proposed subsection (b) should have the described effect of protecting patients' identities.

Thus voters, even without any special understanding of legal terms of art, will

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

understand the major purpose and effect of the proposed amendment.

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

Significant divergent terminology between the text of a proposed amendment and its ballot summary has been a ground for invalidation of a ballot summary. Thus, in *Treating People Differently Based on Race*, the Court invalidated a summary which used the term "people," while the text of the amendment referred to "persons," terms which the Court found legally distinct. 778 So. 2d at 896-97. Similarly, in *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, the Court invalidated a summary which used the term "citizens" in the summary, when the amendment used the term "natural persons." 705 So. 2d 563, 566 (Fla. 1998) (uncertain as to whether the terms and coverage were intended to be synonymous). There is no such uncertainty about the minor differences between the amendment text and the ballot title and summary here.

The most significant difference between the text of the proposed Right to Know amendment and its ballot summary is that the amendment itself says "patients have a right to have access to any records", where the ballot summary speaks of giving "patients the right to review, upon request, records." Under

current law (including both the constitutional right of public access and the new "practitioner profile" procedure of Section 456.041), the public already has a right to review some relevant records, but not all records. The text is much longer, explaining, for example, that the request could be either "formal or informal," and could be made either by the patient or a representative of the patient. Yet the summary accurately incorporates the overall purpose of providing a right to review records on request, even if the actual textual conditions and scope are not included *verbatim.* In other words, the ballot summary describes the major purpose and effect of the proposed amendment, while the text itself is the specific policy change and declaration.

This difference between description of purpose and verbatim recitation of command reflects the statutory requirements for a ballot title and summary. Although this difference may be more significant for longer and more complex proposed amendments, there is no current requirement that short amendments should simply be included verbatim in the ballot summary.[7] The statute does not

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[7] "There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting." *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So.2d at 498 (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978)).

require that the operative text appear in the ballot title and summary; it requires only that "the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the **chief purpose of the measure**." § 101.161(1), Fla Stat. (2003) (emphasis added). In the context of this Court's requirements for clarity to voters, it can be surmised that explanations of the chief purpose may be more informative to voters than simple recitations of the specific text.

Indeed, this test can be seen as another means to insure that hidden or unexpected meanings are not slipped by the voters. Thus, a difference in terms which widen or narrow the expected scope of the measure might be objectionable, as in *People's Property Rights Amendments*. In that case, the Court noted that the summary referred to "owners" of real property, but did not define the term; the Court was concerned that the accompanying use of the term "people" in the title might cause confusion as to whether the amendment would apply to corporately owned property. 699 So. 2d at 1308-09. Similarly, in *In re Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, the summary used the term "hotel," while the text of the proposed amendment used the term "transient lodging establishment," which the Court found much broader in scope than a simple hotel. 656 So. 2d 466, 468-69 (Fla. 1995).

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

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF TYPEFACE COMPLIANCE

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

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