**IN THE SUPREME COURT OF FLORIDA**
Case No. SC04-779

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

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# ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: PHYSICIAN SHALL CHARGE THE SAME FEE FOR THE SAME HEALTH CARE SERVICE TO EVERY PATIENT

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# INITIAL BRIEF OF SPONSOR FLORIDIANS FOR PATIENT PROTECTION

IN SUPPORT OF THE INITIATIVE

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## THE PROPOSED INITIATIVE

**Ballot Title:**

Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient

**Ballot Summary:**

Current law allows a physician to charge different prices for the same health care provided to different patients. This amendment would require a physician to charge the same fee for the same health care service, procedure or treatment. Requires lowest fee which physician has agreed to accept. Doesn't limit physician's ability to provide free services. A patient may review the physician's fee and similar information before, during or after the health care is provided.

**Full Text:**

BE IT ENACTED BY THE PEOPLE OF FLORIDA:

1) Statement and Purpose:

Many physicians in Florida agree to accept fees for health care covered by health insurance plans or other governmental or private third-party payor programs which limit payments for particular medical treatments, services or procedures. Yet many Floridians, including those in Health Maintenance Organizations or other "managed-care" programs and those without any coverage at all, pay substantially-higher fees for the same medical services. The purpose of this amendment is to insure that all Floridians are able to obtain the lowest prices for medical services which doctors will accept. Doctors will remain free to set their own fees, or to agree to any charges or fee schedules from third-party payors, subject to general law, but they can no longer charge some Floridians more for the same services just because the patients are not in the lowest-cost health insurance plan. In order to help consumers protect themselves against over-charges, patients and their representatives are to be given access, upon request, to the fee data necessary to determine whether they are receiving the lowest agreed-upon fee or whether this amendment is otherwise being violated.

2) Amendment of Florida Constitution:

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

"Section 22. Physicians' Health Care Charges.

"a) A physician shall charge all purchasers the lowest fee for health care which the physician has agreed to accept as full payment for the same health care when the same health care is being paid for in whole or in part through any agreement between the physician and any other purchaser. Nothing in this section shall be deemed to limit the physician's right to provide any health care for free.

"b) To assist patients to determine a physician's fee and compliance with this Section, a patient shall have access to any fee schedules agreed to by the physician, and any other records of the physician related to the patient's health care which might contain information indicating whether the physician is in compliance with this Section. This right of access, whether or not exercised, may not be waived, and may be exercised prior to, during or after the health care is provided. This right of access is not intended to conflict with, supercede or alter any rights or obligations under general law related to the privacy of patient records.

"c) Definitions. As used in this section, the following terms shall have the following meanings:

"i) 'Health Care' means services, procedures, treatment, accommodations or products provided by a physician described by this section.

"ii) 'Physician' means one licensed pursuant to Chapter 458, Florida Statutes, or any similar successor statute, and any corporation, professional association or similar organization established and operated for the purpose of providing health care by such licensees.

"iii) 'Purchaser' means patients, third-party payors or others paying for a patient's health care, and does not include a patient receiving care without charge.

"iv) 'Charge' means require, charge, bill, accept or be entitled to receive as payment for health care.

"v) 'Patient' means an individual who has sought, is seeking, is receiving, or has received health care from the physician.

"vi) 'Have access to' means, in addition to any other procedure for producing such records provided by general law, making the records available for review, 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 made available 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, and shall apply to any health care payment agreement entered into or renewed after the effective date. 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 Amendment to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 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.

This is an amendment to prevent a particular type of "cost shifting" in the provision of health care. "Cost shifting," in this context, makes the uninsured and the under-insured pay higher costs for health care than those with the most favored form of health insurance.[3] "A New York gynecologist says he gets $25 for a

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> 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.

[3]In the past most studies used a different definition of cost shifting: whether insured patients paid more than those using government programs such as Medicare. *See, e.g.*, Rice, *et al*., "Do Physicians Cost Shift?" *Health Affairs*, Fall 1996, 215 ("Our data provide no evidence that physicians respond to Medicare

routine exam for a woman insured by Group Health Insurance and charges $175 for the same exam for a woman without insurance." Gina Kolata, "Medical Fees Are Often More for Uninsured," *The New York Times* (April 3, 2001), at A1, *available online at*: http://query.nytimes.com/gst/abstract.html?res=F30810FC3A5B0C718CDDAD0894D9404482.

About 40 million people lack health insurance at any one time. *See* U.S. Congressional Budget Office, *How Many People Lack Health Insurance and For How Long?* "Summary" (May 2003), *available online at*: http://www.cbo.gov/showdoc.cfm?index=4210&sequence=1. Others are "under-insured," meaning that they have health insurance which may not cover a particular treatment, provider, or the full costs of treatment. *See* Office of Inspector General,

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payment reductions by shifting costs to their privately insured patients."). As noted in recent governmental reviews described *infra*, the debate over cost shifting has dramatically changed, in part because of the *New York Times* article noted *infra*. "On April 2, 2001, the *New York Times* published an article titled "Medical Fees Are Often More for Uninsured" by Gina Kolata that sets on its head the notion that cost shift in health care necessarily means that the insured pay more." State of Vermont, Governor's Bipartisan Commission on Health Care Availability and Affordability, "Synopsis, Article on Cost Shift" (Dec. 4, 2001), *available online at*: http://www.state.vt.us/health/commission/issues/costshift/kolata.htm. This proposed amendment refers to cost shifting in the newer context: costs related to discounts to governmental and private insurer third-party payments being shifted to those who are uninsured or under-insured.

U.S. Dept. Of Health & Human Svcs., "Questions on Charges for the Uninsured" (Feb. 17, 2004), at ¶¶ A1, A2, *available online at*: http://www.cms.hhs.gov/FAQ_Uninsured.pdf.

Sometimes persons in "managed care" programs, such as "Health Maintenance Organizations," may also pay more for their health care than others whose insurer or program has negotiated lower prices. "Because managed care contracts vary by hospital and by insurer, [Hollywood-based hospital collections contractor Ray] Berry could not provide specific comparisons to the full price charged to Garcia." Glenn Singer, "Billed $6,518 after a fall, patient sues hospital; Uninsured often are charged the full price," *Florida Sun-Sentinel* (Sept. 14, 2003), at 1F (emphasis added).[4] These persons may also be considered "under-insured"

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[4] *See also*, "Hospitals Encouraged to Cut Costs for Uninsured," *USAToday* (Feb. 19, 2004), *available online at*: http://www.usatoday.com/news/washington/2004-02-19-hospitals-uninsured_x.htm ("The government on Thursday urged hospitals to cut charges for uninsured patients, rejecting hospitals' argument that they are constrained by federal rules. Uninsured patients often are charged the full retail price for medical procedures, unlike members of private and government health plans that negotiate steep discounts for hospital care. Health and Human Services Secretary Tommy Thompson said there are no legal impediments to offering similar relief to the uninsured, regardless of their income."). *See* Sara B. Miller, "Probing Disparity in Healthcare Bills; Private Payers, Including the Uninsured, Can Face Higher Bills Than Insurers For Procedures," *The Christian Science Monitor* (May 19, 2003), *available online at*: http://www.csmonitor.com/2003/0519/p16s01-wmcn.html. ("Hospitals are required to put official 'list prices' on all services provided. But only uninsured individuals end up paying the full bill, since big insurers routinely

since they do not receive the same financial support as those in more-favored insurance plans.

The uninsured and under-insured pay higher medical fees than do the insured for the same treatments:

> With an estimated 41 million Americans uninsured, many people like Garcia face the burden of paying 'full price' rather than the heavily-discounted amounts negotiated by managed care companies or the lower fees paid by Medicare and Medicaid. The issue has sparked newspaper articles, warnings from the American Hospital Association to members to change their billing and collection processes, and now a Congressional investigation.
>
> What the hospitals are doing, in effect, is **cost shifting**. Although by law, they must charge all patients the same amount for identical services, they are then allowed to introduce a discount for managed care, and they must accept the low payments that Medicare and Medicaid deem proper reimbursement. Those left holding the bag are the uninsured, who are billed the full, original price.

Singer, *supra* (emphasis added).

"Cost shifting" is a reversal of the traditional economics of health care:

> 'It's horribly ironic,' said Paul Menzel, a professor of philosophy at Pacific Lutheran University in Tacoma, Washington. The care of the poor once was supported by the wealthy and the insured, but now the opposite is happening, he said. 'It is the people who are most provided for, not the people who are least provided for, who get the benefit of cost-shifting,' Professor Menzel said.

Kolata, *supra*.

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bargain their prices down.").

According to one article, "big institutions [health insurers] spend between a third and a half of what private-pay patients pay for a service." Miller, *supra*. Some health-care providers have offered sliding-scale payment plans: "A few have even announced plans to charge the uninsured the same rate as managed-care patients. But such a move is not expected to become widespread." *Id*.

Basic data on appropriate costs for particular medical services is already provided to federal and state agencies. Physicians are required to report or make available for inspection their pricing and related information. *See* § 408.061(1)(a), (b), (d), Fla. Stat. (2003). In particular, though particular "specific provider contract reimbursement information" need not be filed with the State, physicians must make information about their fee schedules available for inspection. *Id*., (b).

Ordinarily, such information filed with or similarly made available to the State would be considered public information. 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. Section 24(c) provides a mechanism for the Legislature to exempt certain records from this right to inspect or copy, provided that such

exemptions, however, are no broader than necessary. Article I, Section 23, also expressly provides that the constitutional right to privacy does not limit public access to public records.

Yet, because of a statutory exemption from public disclosure, information about physicians' fee schedules is not available to the public. §§ 408.061(1)(d), 408.061(8), Fla. Stat. The exemption from disclosure is partly responsible for cost shifting, since patients do not know what other patients are paying.

Some health-care providers have claimed that they could not offer to match discounts because discounts for payers other than insurers were prohibited by federal law. Recently, the federal government rejected those assertions. "It has been suggested that two laws enforced by the OIG may prevent hospitals from offering discounted prices to uninsured patients. We disagree." Office of Inspector General, U.S. Dept. Of Health & Human Svcs., "Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills," Feb. 19, 2004, available online at: http://oig.hhs.gov/fraud/docs/alertsandbulletins/2004/FA021904hospitaldiscounts.pdf.[5]

[5] As the citations *supra* indicate, recent federal efforts have been focused on hospitals, since it was the American Hospital Association which sought clarification of federal policy. *See* U.S. Dept. of Heath & Human Svcs., "Letter

The only restriction on discounting health care prices is that the discount cannot be "linked in any manner to the generation of business payable by a Federal health care program – a highly unlikely circumstance." *Id*., ¶ A1. The same is true for patients with large medical bills. *Id*., ¶ A2. Hospitals do not need prior approval from the federal government before offering discounts. *Id*, ¶ A3.

The guiding federal principle is that health-care providers can offer the same discounts to all purchasers or payers. "The Medicare program sees no complications where a provider offers discounts or allowances to uninsured or underinsured patients versus allowing discounts or allowances to third-party payers." *Id*., ¶ A5. Cost shifting is not required by federal law.

Cost shifting imposes societal costs as well as individual burdens. "According to one study, almost half of personal bankruptcies are the result of a

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from Tommy G. Thompson, Sec'y of Health & Human Svcs., to Richard J. Davidson, Pres., American Hospital Ass'n" (Feb. 19, 2004), *available online at*: http://www.hhs.gov/news/press/2004pres/20040219.html.

The same problems of cost-shifting, however, exist at the physician level. "A New York gynecologist says he gets $25 for a routine exam for a woman insured by Group Health Insurance and charges $175 for the same exam for a woman without insurance." Kolata, *supra*. At least one organization suggests that uninsured or under-insured patients negotiate with their physicians to get prices lowered. Consumer Health Action Network, "Save Money On Medical Bills If You Don't Have Insurance," *Tips from the Consumer Health Action Network* (January 2004), *available online at*: www.cthealthpolicy.org/action/docs/uninsured_tips_200401.doc ("Negotiate prices with your doctor, dentist or hospital.").

medical problem." Miller, *supra*.

The expressed purpose of this amendment is to protect the uninsured and the medically under-insured, as well as all Floridians who do not wish to bear the burden of cost shifting. "The purpose of this amendment is to insure that all Floridians are able to obtain the lowest prices for medical services which doctors will accept." Proposed Amendment, § 1, Statement and Purpose. The mechanism chosen to avoid cost shifting is two-fold: provide that all patients may receive the same discount offered by a physician, and eliminate the exemption from public access which shields cost shifting from public scrutiny.

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 Atty. Gen'l re Tax Limitation*, 873 So. 2d 864, 867 (Fla. 1996)).

## SUMMARY OF ARGUMENT

The proposed initiative (hereinafter "Same Fee amendment") places a single, unified question before Florida voters: whether to require physicians to charge the same fee to all patients for the same procedure or treatment, prohibiting the current practice of charging different amounts depending on whether the patient has insurance or other form of third-party payment. The proposed amendment has a logical oneness of purpose, in that both substantive parts (the requirement for equivalent fees and the disclosure of the physician's lowest agreed-upon fee) and the implementing details are directly related to the purpose of the proposal. The proposal complies with the single subject requirement of Article XI, Section 3, Florida Constitution.

Nor does the proposal usurp the functions of multiple branches of government. The instant proposal is a limited policy change which seeks to prevent cost shifting whereby physicians charge lower fees to those with insurance while charging higher fees to the uninsured and under-insured. The policy change says that a physician shall charge all payers the lowest amount the physician has agreed to accept as full payment. As such, the proposal will perform only a legislative function. There are no substantial effects on other branches or levels of state government.

The proposed amendment will have minimal interaction with other provisions of the Florida Constitution. It is prospective only, so it will have no effect on existing contracts between doctors and patients. Because health care pricing data is already available to the Department of Health, this information is a public record and privacy concerns are minimized. The amendment will make these public records accessible, while protecting the legitimate privacy interests of individual patients.

The ballot title and summary carefully and accurately explain to voters the current law and how the proposal will change that law, thus satisfying the requirements of Section 101.161, Florida Statutes. They explain that physicians now charge different amounts for the same treatment, that the purpose of the amendment is to require the same fee for the same treatment, and that the fee shall be the lowest the physician is willing to accept. The summary also explains a patient's right to determine the lowest fee the physician will accept and the privacy protections afforded individual patients. The title and summary do not mislead voters or use rhetorical or emotional language. Differences in terms used between the summary and text are due to the word constraints of the statute and to a need to avoid legal terminology not immediately understandable to the voters.

The proposed Same Fee amendment presents voters with the single choice

to end the practice of cost shifting by physicians. The proposal has a logical oneness of purpose. The ballot title and summary accurately explain the meaning and effect of the amendment in compliance with Section 101.161, Florida Statutes. Because this proposal complies with the constitutional and statutory requirements for initiative amendments, this Court should uphold the proposed Same Fee amendment, and allow Florida voters to consider this question on the November ballot.

## ARGUMENT

### I. THE PROPOSED SAME FEE AMENDMENT HAS ONLY ONE SUBJECT: TO END "COST SHIFTING" OF HEALTH CARE COSTS.

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

Another reason for the single subject limitation is to prevent "logrolling," which is the combining of different issues into one initiative so that voters have to accept something they don't want in order to gain something they do want. *See Advisory Opinion to the Atty. Gen'l re Fla. Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So.2d 367, 369 (Fla. 2000).

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

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

The proposed amendment meets all three of these tests.

### A. The Proposed Same Fee Amendment Has A "Logical Oneness of Purpose."

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

The proposed amendment has a simple purpose: to eliminate cost shifting – the provision of discounts to some payers of health care without public disclosure.

As noted above, cost shifting is both widespread and difficult to detect, even though information about it is already required to be disclosed or made available to public agencies.

Again, as discussed above, many physicians already provide substantial discounts to third-party payers. These discounts are not required or prohibited by state or federal law, but they must be disclosed to the state. The discounts are given by physicians voluntarily and in amounts agreed upon by the physicians. The proposed amendment would not change either the freedom to offer or amounts of those discounts. The single purpose of this amendment is to prohibit "cost shifting," the problem described above and already identified by federal authorities and others as causing both societal and individual burdens. The amendment also ends the exemption from public disclosure which permits cost shifting to continue.

The proposed Same Fee amendment has two mutually dependent parts: an operative declaration that physicians shall charge the lowest fee, together with an elimination of the statutorily-created exemption from the constitutional public disclosure requirement. The remaining material is implementing details and enactment language which is "matter directly connected" with the proposed amendment. The two parts (and implementing details) are part of a coherent whole, however, which is intended to eliminate the identified problem.

As a practical matter, this test for oneness of purpose looks to whether there are multiple proposals which can stand separately. *See Advisory Opinion to the Attorney General re: Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 495 (Fla. 2002). If there are potentially free-standing proposals combined into one initiative, the question is whether there is one dominant purpose for which the other proposals are merely components or implementing details. *See Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984).

It is possible to enact either of these parts separately, but separately, the two parts do not satisfy the purpose of the proposed amendment. The purpose is to prohibit cost shifting. The requirement for equal discounts – the first operative part of the initiative – would be an empty letter if patients could not find out what discounts had been negotiated. "Most patients paying the full fare have no idea that their bill may be many times that of the people next to them in the doctor's waiting room. And, in interviews, many doctors said they did not offer patients information on pricing disparities, however much they might agonize over the inequities of the system." Kolata, *supra*.

Similarly, simple enactment of a right of access to fee schedules alone would not provide significant relief to the uninsured or under-insured. While it might be valuable to patients to know what the fee schedule for a particular health care

procedure or treatment might be, the knowledge alone would not get them discounts below the prices they are already charged. "But the uninsured also are outside the system, and have no one to negotiate for them." *Id*.

In order to fulfill its stated purpose, the proposed amendment must include both the provision to prohibit cost shifting – the first portion – and a right to know if these costs are indeed being shifted – the second portion. Thus, the proposal has a single, unified structure. Because the Same Fee amendment has "a single dominant plan" – to prohibit cost-shifting, there is no danger of log-rolling with this initiative. The proposed amendment has a "logical oneness of purpose."

### B. The Same Fee Amendment Performs Only Legislative Functions at the State Level.

This test asks whether the proposed amendment performs, alters, or substantially affects multiple, distinct functions and levels of government. *See Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 496; *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 1351, 1353-54 (Fla. 1998)); *see also 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).

This amendment prohibits health care cost shifting, a form of pricing discrimination with perceived pernicious effects. This change would set policy, a function of the Legislative branch of state government, but that is the only branch of government at any level whose function is affected by the change.

*1) The Effect on the Legislative Branch Is Only to Supplement Current Law by Requiring the Same Discounts be Made Available to All Payers for a Particular Health Care Procedure or Treatment and Ending A Legislative Exemption From Public Disclosure.*

The proposed amendment performs the legislative act of setting policy in two areas: requiring that all health care payers receive the same discounts; and removing the exemption from public disclosure which permits cost shifting to

occur.

a) Prohibiting Cost Shifting Is A Legislative Act.

Under current law, as noted above, physicians who wish to receive third-party health care payments from insurers or other health care payers enter into comprehensive pricing agreements with those payers. These agreements often provide substantial discounts over the prices physicians charge other patients who receive the same care. This practice is known as cost shifting. The proposed amendment will prohibit cost shifting by requiring any discount to be made available to all.

The proposed amendment will not affect traditional forms of contract or payment, except, perhaps, by market forces adjusting prices up or down to meet physicians' expectations and needs. The only change in law would be a requirement that, if a provider gives one third-party payer a discount, the same discount must be made available to all other payers. Physicians would still be free to provide services at full price, or at no charge.

This is a policy decision, an essentially legislative act. There is, however, no other effect on the legislative branch. The Legislature remains free to alter the Medicaid program, adjust other health care programs to further protect the uninsured or under-insured, or otherwise regulate the health insurance industry.

The retention of discretion by the Legislature has been viewed as a positive factor by this Court in considering single subject limitations. *See, e.g., Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d at 493 (defining terms both in text and by reference to statutes); *Advisory Opinion to the Attorney General re Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1128 (Fla. 1996) (defining of amendment coverage by reference to statutes).

b) Removing the Exemption from Public Disclosure.

In addition to requiring the same discount be made available to all payers, the amendment also ends the exemption from public disclosure of fee schedules and similar pricing information which had kept patients ignorant of discounts which physicians freely entered into. The creation of exemptions from public disclosure is a legislative act, permitted by Article I, Section 24(c), Florida Constitution. The elimination of those exemptions is also a legislative act – the setting of policy (or in this case, the reversal of a contrary legislative policy in favor of the broader constitutional policy).

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

*2) The Proposed Amendment Has No Effects on the Judicial Branch.*

The proposed Same Fee amendment does not make any changes in judicial functions or structure, nor does the amendment undertake to perform a judicial function. The amendment sets policy only in substantive law, and does not affect procedural law.[6] It makes no adjudication of guilt or responsibility, as was the case of the *Save Our Everglades* initiative. 636 So. 2d at 1340. Thus, the proposed 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 Same Fee amendment does not require any executive branch agency to do anything in addition to or different from current law. Although the State negotiates its own prices for Medicaid services with physicians, the proposed amendment provides only a right to obtain the same discount for the State as any other payer would have. If the State can obtain a greater discount than other payers

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[6] 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 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)).

can negotiate from a particular provider, then other payers may also receive the same discount; if another payer can negotiate a greater discount than the State has negotiated, then the State will benefit.

There may be one minor effect on this type of negotiation by the State: the exemption from public disclosure of pricing information (which the proposed amendment would end) also included a statutory restriction on the use of disclosed information by the State for its own negotiations. *See* § 408.061(1)(d), Fla. Stat. In other words, the State had a right to obtain the information, but could not use it to obtain the same discount as other health care payers. When the exemption from public disclosure is terminated, the State, like all payers, will be entitled to get the best discount which the physician will accept.

Aside from promoting the lowest discount for the State as it does with all payers, the proposed amendment does not affect the actual process of State negotiation, and only comes into play *vis-à-vis* the executive branch if another payer gets a better deal. This cannot be understood as performing or substantially altering a function of the executive branch. Thus, the proposed Same Fee amendment does not perform or substantially alter the function of the executive branch at any level of government.

### C. The Proposed Same Fee Amendment Will Not

**Substantially Affect Other Sections of the Constitution.**

In its single subject analysis, this Court also looks at whether the 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 Attorney General re Term Limits Pledge*, 718 So. 2d 798, 802 (Fla. 1998). The test is whether there are multiple parts of the Constitution which are substantially affected by the proposed initiative amendment, in order both to inform the public of the proposed changes and to avoid ambiguity as to the effects. *Tax Limitation I*, 644 So. 2d at 490; *Fine*, 448 So. 2d at 989.

As shown by the discussion above, the net effect of the proposed Same Fee amendment is simply to provide a right to the same discount as negotiated by other payers. One possible issue raised by the proposed amendment is the interaction of the patient's right to review similar discount data with the right to privacy in Article I, Section 23, Florida Constitution. The constitutional right to privacy says 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, physicians may argue that their pricing history 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. Physicians' pricing data is already provided or available to government agencies as part of an effort to protect public health. § 408.061, Fla. Stat. (2003). Thus, this information is not protected by physicians' 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, however, explicitly respects patients' privacy under both federal and state law. Subsection (b) provides that privacy rules under general law shall apply to patients' information. General law already provides that sort of protection. *See* § 408.061(7), Fla. Stat. (2003). The proposed Same Fee amendment does not affect that privacy

protection, and thus does not implicate the constitutional right of privacy.

The proposed amendment also does not affect the right to contract, even though it requires the lowest discounts to be made available. The right to contract, protected under Article I, Section 10, Florida Constitution, generally applies only to protect **existing** contracts. *See, e.g.*, *Manning v. Travelers Ins. Co.*, 250 So.2d 872, 874 (Fla. 1971). Because the amendment applies only to fee agreements entered into following the effective date (*see* Proposed Amendment, at § 3), the proposed amendment does not impair the right to contract. Rather, the amendment performs the classic role of policy-making: it defines conditions for future contracts.

Similarly, the Court has held that laws which impair contracts are possible under a balancing test that weighs the degree of impairment against the importance of the public benefit. *See, e.g., Pomponio v. Claridge of Pompano Condominium*, 378 So. 2d 774, 780 (Fla. 1979). Here, where the effects of cost shifting are both widespread and detrimental, and where the impairment is only to require the use of similar discounts if – and only if – a physician has agreed to provide discounts to a particular payer, the State is entitled to eliminate cost shifting.

The proposed amendment does not affect multiple sections of the

Constitution. Thus, the proposed Same Fee amendment contains only a single subject, affecting only a single branch of state government, and this Court should allow it to appear on the ballot.

## II. THE BALLOT TITLE AND SUMMARY FOR THE PROPOSED SAME FEE AMENDMENT ARE ACCURATE, COMPLETE AND NOT MISLEADING.

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

This Court requires that the summary and ballot title of a proposed initiative amendment be "accurate and informative." *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992). The Court, however, recognizing the statutory word limits, does not require the ballot summary and title to detail every possible aspect of the proposed initiative. *See 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); *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla.

1982). The Court also recognizes that the voters "must be presumed to have a certain amount of common sense and knowledge" when reading the petition. *Advisory Opinion to the Atty. Gen'l re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996) ("*Tax Limitation II*") (voters, by learning and experience, would understand the general rule that a simple majority prevails).

The true meaning and ramifications of the proposed Same Fee 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 limited in length by Section 101.161, need not recite every purpose and every effect, but must describe enough so that voters are informed about the significant changes in law which would result from the adoption of the initiative. *See Protect People From the Hazards of Second-Hand Smoke*, 814 So. 2d at 419; *Grose*, 422 So. 2d at 305; *Advisory Opinion to the Atty. Gen'l English - The Official Language of Florida*, 520 So. 2d 11, 13 (Fla. 1988).

As noted above, the purpose of the proposed amendment is to prohibit cost shifting. The title succinctly states the major purpose of the amendment: that a physician shall charge the same fee for the same health care to every patient. The purpose of the proposed amendment is to end cost shifting; cost shifting is the practice by which physicians give fee discounts to some payers and not to others for the same procedure. "A New York gynecologist says he gets $25 for a routine exam for a woman insured by Group Health Insurance and charges $175 for the same exam for a woman without insurance." Kolata, *supra*. The title accurately states that a Florida practitioner, unlike the one described in the *New York Times* article, would have to charge the same fee to the woman without insurance.

The summary then explains that purpose in more detail and in the context of the proposal's effect on current law. The summary first states: "Current law allows a physician to charge different prices for the same health care provided to different patients." As noted above, this is an accurate assessment of current law. As with the *New York Times* gynecologist, physicians can and do charge "full price" to some patients, and offer discounts to other patients for the same health care.

The summary then describes what would change from current law: "This amendment would require a physician to charge the same fee for the same health care service, procedure or treatment." As noted above in the discussion of the

ballot title, this is an accurate statement of the major purpose and "legal effect" of the proposed amendment. *Evans*, 457 So. 2d at 1355.

The summary then clarifies what "the same fee" means: "Requires lowest fee which physician has agreed to accept." These two sentences together accurately summarize the operative sentence: "A physician shall charge all purchasers the lowest fee for health care which the physician has agreed to accept as full payment for the same health care when the same health care is being paid for in whole or in part through any agreement between the physician and any other purchaser." Proposed Amendment at § 22(a). Thus, the voter will know that the amount the *New York Times* gynecologist would charge would be $25, the lowest of the two prices noted.[7]

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[7] As a practical matter, it is likely that neither amount in the *New York Times* article would be the ultimate price for the exam under the proposed amendment. One of the prices is artificially low, subsidized by cost shifting to the uninsured woman; the other is artificially high, as the physician tries to make up for the unwarranted discount. "'It's a take it or leave situation for doctors,' Dr. [Stephen] Brenner said. . . . But he knew that the insured paid much less than their share. For the insured, he said, 'it's almost like getting a BMW or Mercedes at half price.'" Kolata, *supra*. If cost shifting were eliminated, physicians would be required to price accurately, rather than counting on the uninsured to make up the discounts offered to the fully-insured. That, however, is a market decision, made by individual physicians, and not one established by the proposed amendment. If physicians still want to set their prices artificially low, they can do so under the proposed amendment, but their prices must be low for all similar payers and they may not discriminate among purchasers.

The summary then clarifies what "lowest fee" means in the prior sentence of the summary. "Doesn't limit physician's ability to provide free services." This is an accurate summary of the final sentence of the proposed operative text: "Nothing in this section shall be deemed to limit the physician's right to provide any health care for free." Proposed Amendment at § 22(a).

Finally, the summary briefly describes subsection (b) of the proposed amendment: "A patient may review the physician's fee and similar information before, during or after the health care is provided." This is an accurate summary of the end of the exemption from public disclosure. The actual text of subsection (b) is substantially longer, containing details of what information shall be made available, that the right is non-waivable, and when the right may be exercised. In addition, the actual text limits the right of access to clarify the purpose as only assisting in determining compliance with the new rule. Finally, the actual text includes privacy protections.

In light of the 75-word limitation on ballot summaries, the proposed ballot summary cannot contain all of the definitions in the text, nor even all of the finer points of the major purpose and effect. *Cf. Prohibiting Public Funding*, 693 So. 2d at 975 (citing *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986) ("the title and summary need not explain every detail or ramification of the proposed

amendment"). Yet even the brief summary accurately and clearly describes the chief purpose of the change in law. *Term Limits Pledge*, 718 So. 2d at 803. The test is whether the voter is informed accurately by the material to understand the chief purpose. *See Advisory Opinion to the Atty. Gen'l - Limited Political Terms in Certain Elected Offices*, 592 So. 2d 225, 228 (Fla. 1991).

Similarly, the summary does not mention the substantial definitions section. Yet these definitions are either relatively unambiguous and commonly-understood (*e.g.*, "patient" or "charge") or defined by reference to general law (*e.g.*, "physician" meaning one licensed pursuant to Chapter 458, Florida Statutes). The definition which is somewhat technical – "have access to" – is explained in a manner to give some guidance to the voter: "A patient may review the physician's fee and similar information before, during or after the health care is provided." Changes in the law have been accurately described to voters, and the summary clearly describes this new right to review fee records to determine if cost shifting is occurring. Thus, the ballot title and summary correctly and completely describe the major purpose, the "true meaning and ramifications" of the proposed amendment. *Askew*, 421 So. 2d at 156.

### B. The Proposed Same Fee Amendment Has No Other Effect or Purpose Beyond that 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 *Limited Political Terms*, 592 So. 2d at 228). 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 cost shifting. There are no other legal effects. This ballot title and summary accurately reflect the purpose and major effect of the proposed amendment.

### C. The Title and Summary Do 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).

The instant proposal uses terms that are clear and specific. Where there is a technical phrase in the ballot title and summary – "have access to" – the phrase is explained by simple and clear explanations. The test is whether "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 a review of fee information.[8]

Thus voters, even without any special understanding of legal terms of art, will understand the major purpose and effect of the proposed amendment.

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[8] By way of 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 legal terms of art, not understandable to the average voter and required definition. 699 So. 2d at 1309.

### D. Any Minor Differences in Wording Between the Summary and Text Are Insignificant Will Not Mislead Voters.

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 any minor differences between the amendment text and the ballot title and summary here.

The obvious difference between the text of the proposed Same Fee amendment and the ballot summary is that the amendment itself is much longer. Yet the summary accurately incorporates the overall purpose of requiring the same fee to be charged for the same health care, 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.[9] The statute does not require that the operative text appear in the ballot title and summary; it requires only that "the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the **chief purpose of the measure**." § 101.161(1), Fla Stat. (2003) (emphasis added). In the context of this Court's requirements for clarity to voters, it can be surmised that explanations of the chief purpose may be more informative to voters than simple recitations of the specific text.

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[9] "It is true . . . that certain of the details of the [text] as well as some of its ramifications were either omitted from the ballot question or could have been better explained therein. That, however, is not the test. There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting." *Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So.2d at 498 (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978)).

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

The ballot title and summary of the Same Fee initiative proposal comply fully

with the requirements of Section 101.161, Florida Statutes. The proposed Same Fee amendment should thus be permitted on the ballot.

## CONCLUSION

Because the proposed Same Fee amendment presents a single, unified subject in compliance with Article XI, Section 3, and because its ballot title and summary are clear and accurate, this Court should uphold the proposal and allow it 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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