IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC06-688

FLORIDA HOSPITAL WATERMAN, INC., d/b/a FLORIDA HOSPITAL WATERMAN,

Appellant,

-vs-

TERESA M. BUSTER, as Personal Representative of the Estate of LARRY BUSTER, deceased; JEFFREY B. KEELER, M.D., and KELLER & GOODMAN, M.D., P.A.,

Appellees.
_____/

BRIEF OF AMICUS CURIAE FLORIDIANS FOR PATIENT PROTECTION, INC. ON BEHALF OF APPELLEE, BUSTER

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INTRODUCTION

Floridians for Patient Protection, Inc. is a proactive organization of medical malpractice and negligence victims and their families striving for justice and change in Florida=s medical care system. Floridians for Patient Protection also seeks to educate the public and increase awareness regarding medical errors and the urgent need for reforms in the quality of care for all citizens.

Floridians for Patient Protection, Inc. is specifically interested in the outcome of this case because it was the sponsor of Amendment 7 (Athe Patients= Right to Know Amendment@) and has previously appeared in court to support its adoption, see In re Advisory Opinion to the Atty. Gen. re Patients= Right To Know About Adverse Medical Incidents, 880 So.2d 617, 620 n.1 (Fla. 2004).[1] Floridians for Patient Protection has also appeared as amicus in other court proceedings to defend Amendment 7 against attacks since its adoption.

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[1]/Floridians for Patient Protection, Inc. also filed an Amicus Curiae Brief, which is identical to this one, in Notami Hospital of Florida v. Bowen, Case No. SC06-912, which is currently pending in this Court based on conflict with the Fifth District's decision in the case sub judice. The amicus brief filed in that case is essentially identical in content to this brief.

SUMMARY OF ARGUMENT

Floridians for Patient Protection is limiting the argument in this Amicus Brief to the last question certified by the Fifth District. The third certified question should be rephrased and answered in the affirmative, since Amendment 7 can be constitutionally applied to documents and records which existed prior to its enactment. As case law applying the Public Records Act has determined, the critical date for application of a provision authorizing access to documents is the date of enactment, not the date the documents were generated. Even if such application is not retroactive.

Even assuming arguendo that the application of Amendment 7 to all existing records is retroactive, it does not interfere with any constitutionally recognized vested right on the part of the healthcare providers. The limitation on disclosure of particular records in particular contexts does not rise to the level of a vested right, especially since it was subject to repeal or modification by the legislature at any time. Moreover, the underlying interest of the healthcare providers is not a constitutionally recognized liberty or property interest. For these reasons, the third certified question should be answered in the affirmative.

ARGUMENT

POINT ON APPEAL

AMENDMENT 7 CAN BE CONSTITUTIONALLY APPLIED TO DOCUMENTS AND RECORDS WHICH EXISTED PRIOR TO ITS ENACTMENT.

Historical Perspective

In 2004, the Floridians for Patient Protection proposed a constitutional amendment, entitled Patients' Right to Know About Adverse Medical Incidents, for inclusion on the ballot for the election of November 2, 2004. The purpose of the proposed Amendment was described in the ballot summary as follows:

> 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.
>
> The essence of Amendment 7 was contained in its subsection (a), which provides:
>
> 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.

The Amendment also provided in subsection (b) that the identity of patients involved in the adverse medical incidents should not be disclosed and that any privacy restrictions imposed by federal law shall be maintained. The remainder of the Amendment contains definitions, a severability provision, and an effective date, designated as the date it is approved by the voters.

The legislation referred to in the ballot summary was enacted in the 1970s and 1980s, see '395.0191, Fla. Stat., '395.0193, Fla. Stat., '395.0197, Fla. Stat., '766.101, Fla. Stat., and as recently as 2003, see '766.1016, Fla. Stat. The confidentiality provisions created by those statues did not exist at common law, in which testimonial privileges were few and narrowly construed, as noted by the United States Supreme Court in United States v. Bryan, 339 U.S. 323, 331 (1950):

> For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man=s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

[Quoting Wigmore, Evidence (3d Ed.) '2192.] Miami Herald Publishing Co. v. Morejon, 561 So.2d 577, 581 (Fla. 1990), see also, State v. Davis, 720 So.2d 220, 225 (Fla. 1998).

After the requisite signatures were obtained and other procedural requirements satisfied, the Attorney General requested this Court to review Amendment 7, as well as its ballot title and summary in anticipation of its placement on the ballot, see Advisory Opinion to the Attorney General Re Patients Right to Know about Adverse Medical Incidents, 880 So.2d 617 (Fla. 2004). This Court=s review was limited to whether the proposed amendment satisfied the single subject requirement of Article XI, '3 of the Florida Constitution, and whether the ballot title and summary contained clear and unambiguous language (880 So.2d at 619). The Florida Dental Association challenged the proposed amendment on both grounds.

This Court rejected both challenges brought by The Florida Dental Association. This Court found that the ballot title and summary accurately stated that Acurrent Florida law restricts information available to patients related to investigations of adverse medical incidents,@ and that the Amendment created a Abroader right to know about adverse medical incidents than currently exist.@ Id. This Court concluded, in a unanimous opinion, that the initiative petition and proposed ballot title and summary met the legal requirements of Article XI, '3 of the Florida Constitution, as well as '101.161(1), Fla. Stat. (2003).

The proposed Amendment was then placed on the ballot and on November 2, 2004, the voters passed it by a margin of 81.2% to 18.8%, the highest

margin of any proposed amendment on the ballot. Amendment 7 was thereafter designated Article X, '25 of the Florida Constitution, and is commonly known as the APatient=s Right to Know Amendment.@

After its enactment, Amendment 7 spawned what the Fifth District described as Aa frenzy of litigation,@ Florida Hospital Waterman, Inc. v. Buster, 2006 WL 566084 p.1 (Fla. 5th DCA March 10, 2006). That court characterized the effect of Amendment 7 as follows (2006 WL 566084 at p.8):

> We believe that Amendment 7 heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information that will allow patients to better determine from whom they should seek health care, evaluate the quality and fitness of health care providers currently rendering service to them, and allow them access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers.

The court in Buster determined that Amendment 7 preempted statutory privileges afforded to healthcare providers for their self-policing procedures, that the Amendment was self-executing, and that the legislature=s attempt to Aimplement@ the constitutional provision through the enactment of '381.028, Fla. Stat., was invalid. However, the Fifth District ruled that Amendment 7 did not require the disclosure of documents generated prior to its enactment, which it characterized as a retroactive application of the Amendment. The Fifth District then certified three questions to this Court regarding whether Amendment 7 preempted the statutory privileges; it was self-executing; and whether it could be applied retroactively(2006 WL 566084 p.9).

Soon thereafter, the First District issued its decision in Notami Hospital of Florida, Inc. v. Bowen, 927 So.2d 139 (Fla. 1st DCA 2006). The First District agreed with the Fifth District that Amendment 7 was self-executing and that the legislature=s attempt to Aimplement@ the constitutional provision through the enactment of '381.028, Fla. Stat., was invalid. However, the majority in Notami Hospital disagreed with the Fifth District on the retroactivity issue, and ruled that the Amendment could constitutionally be applied to extant records. The First District certified conflict with Buster on that issue. Floridians for Patient Protection is limiting this brief to that issue, which is raised by the third certified question.

The Application of Amendment 7 to Extant Records Is Not Retroactive

A holding that Amendment 7 requires that patients have access to preexisting records and documents is not a retroactive application of that constitutional provision. Florida decisions addressing the Public Records Law, Chapter 199, Fla. Stat., and cases from other jurisdictions support that conclusion.

In News-Press Publishing, Inc. v. Kaune, 511 So.2d 1023 (Fla. 2d DCA 1987), a publishing company relied on the Public Records Law, Chapter 119, Fla. Stat., in seeking access to medical and physical examination reports of a city=s firefighters. The documents at issue were generated on June 1986; and on July 2, 1986, the publishing company filed a request for access to them under '119.07, Fla. Stat. However, on July 1, 1986, the legislature amended '112.08, Fla. Stat., to include subsection (7) and (8), which specifically exempted the documents requested from the Public Records Act. The

publishing company contended that the statutory amendment could not be retroactively applied to documents generated prior to its enactment. The Second District rejected that contention, noting that the critical date for determining if a document is accessible is the date the request for examination is made, not the date the document was generated. The court stated (511 So.2d 1026):

> Under the facts of this case, we conclude that the date of request is the critical date and, therefore, even though we believe section 112.08(7) is remedial and thereby retroactive, we do not have to so determine. The request was made on July 2, 1986, and the law became effective July 1, 1986. It would be illogical to base a chapter 119 exemption of a class of public documents on the question of whether the document came into existence prior to or subsequent to the date of exemption for those requests for disclosure made thereafter. It seems to us indisputable that if the legislature determines that Aall documents pertaining to subject AA@ in personal files shall be exempt,@ it intends, unless it specifies otherwise, that on the effective date of the law creating the exemption *all* such documents are exempt from any request for disclosure made thereafter regardless of when they came into existence or first found their way into the public records. [Emphasis supplied.]

See also, Baker County Press v. Baker County Medical Services, Inc., 870 So.2d 191, 192-93 (Fla. 1st DCA 2004) (the law in effect on the date of the public records request was applicable, not the date the documents were generated, citing Kaune, supra).

Similarly, in State Ex Rel Beacon Journal Publishing Co. v. University of Akron, 415 N.E.2d 310 (Ohio 1980), the Ohio Supreme Court rejected an agency=s contention that records generated prior to the effective date of an amendment to the public records disclosure statute were immune from application of that law. The court stated (415 N.E.2d at 313):

> [W]e initially note that [the statute] speaks in terms of Aall public records@ and makes no distinction for those records compiled prior to its effective date. More importantly, however, is the simple fact that Beacon Journal is not seeking to apply the statute in a retrospective manner, but is instead seeking present access to the records. Concededly, the creation of the records took place prior to the legislative amendment at issue, but this is not the conduct regulated by the statute. [The statute] deals with the availability of public records, not the recordation function of government units. The date the records were made is not relevant under the statute. Since the statute merely deals with record disclosure, not record keeping, only a prospective duty is imposed upon those maintaining public records.

Similarly, in State of Hawaii Organization of Police Officers v. Society of Professional Journalists, 97 P.2d 386, 398 (Haw. 1996), the court rejected a municipality=s argument that application of a disclosure statute enacted in 1993 to records generated in 1988 was retroactive, citing, inter alia, Kaune, supra.

Here, the critical date for application of Amendment 7 is the date the document request is made, not the date the documents were generated. The Amendment creates a right of access to information, and limiting that information to only what has been generated after its effective date would frustrate its primary purpose, which is to enable the public to make informed decisions regarding their selection of healthcare providers. Based on the cases discussed above, the application of Amendment 7 to existing records is not retroactive, and was clearly the intent of the electorate.

The Application of Amendment 7 to Extant Records Is Not Unconstitutional

Even assuming arguendo this Court concludes that the application of Amendment 7 to extant documents constitutes retroactive application, it is not prohibited by the appropriate constitutional analysis. Retroactive application of a constitutional amendment

is only prohibited if it abrogates or impairs a vested right, Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). This Court has defined the term Avested right@ in City of Sanford v. McClelland, 163 So. 513, 514-15 (1935), as follows:

> [a] vested right has been defined as Aan immediate, fixed right of present or future enjoyment@ and also as Aan immediate right of present enjoyment, or a present, fixed right of future enjoyment.@ Id. at 514-15 (citing Pearsall v. Great N. Ry. Co., 161 U.S. 646, 16 S.Ct. 705, 40 L.Ed. 838 (1896)).

In Division of Workers= Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982), the First District stated:

> [T]o be vested a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand,....

In Campus Communications, Inc. v. Earnhardt, 821 So.2d 388 (Fla. 5th DCA 2002), the Fifth District authorized retroactive application of a statutory amendment exempting photographs, video, or audio recordings of autopsies from disclosure under the Public Records Act, Chapter 119, Fla. Stat. In that case, Dale Earnhardt, a race car driver, died on February 18, 2001, and on February 23, 2001, certain media filed requests for autopsy materials from the Volusia County Medical Examiner. However, on March 29, 2001, the Governor signed into law '406.135, Fla. Stat., which expressly exempted photographs, video, or audio recordings of autopsies from disclosure under the Public Records Act.

The issue in Campus Communications was whether '406.135, Fla. Stat., could be applied retroactively to preclude the media=s access to documents generated prior to its

amendment based on a document request made prior to its amendment. The trial court denied the media access to the autopsy materials, and the Fifth District affirmed. After noting the definitions of a Avested right@ discussed above, the Fifth District concluded that the media did not have a vested right to the autopsy materials for two reasons. First, the right to inspect and copy public records was a right subject to divestment by enactment of statutory exemptions, as declared in the Florida Constitution and the Public Records Act (821 So.2d at 398-99). Additionally, the Fifth District determined that the rights provided under the Public Records Act were public rights, which are not deemed to become vested in the constitutional sense, as private vested rights are, see Hodges v. Snyder, 261 U.S. 600 (1923).

Here, an evaluation of the relevant statutory provisions upon which the healthcare providers rely demonstrate that they did not have a vested right to confidentiality of the documents now made available to patients under Amendment 7. At best, healthcare providers had only a subjective expectation that the limitations on access to those documents would continue to be the law in Florida. That is insufficient to preclude retroactive application of a constitutional provision, especially considering the limited nature of the exemptions from disclosure created by the relevant statutes.

There are five statutes upon which health care providers primarily base their claim of a vested right:

1) Section 395.0191, Fla. Stat., relating to staff membership and clinical privileges of healthcare providers;

2) Section 395.0193, Fla. Stat., which requires each licensed hospital to provide for peer review of physicians;

3) Section 395.0197, Fla. Stat., which requires each licensed hospital facility to establish an internal risk management program;

4) Section 766.101, Fla. Stat., which addresses medical review committees of hospitals or ambulatory surgical centers; and

5) Section 766.1016, Fla. Stat., which addresses patient safety organizations.

As discussed below, none of those statutes provide an absolute privilege against disclosure of the investigation, proceedings or records of the respective committees or organizations; the statutes simply limit the disclosure of certain materials in certain contexts, and are riddled with exceptions.

The statutes addressing staff membership, peer review, medical review committees, and patient safety organizations do not create any privilege, nor even provide that their investigations, proceedings or records are deemed confidential. Each of those statutes provide only that the investigation, proceedings, and records of the respective committee or organization are not subject to discovery or introduction into evidence in any civil or administrative action against a healthcare provider arising out of the incidents or matters which are the subject of the committee or organization, '395.0191(8), Fla. Stat.; '395.0193(8), Fla. Stat.; '766.101(5), Fla. Stat.; '766.1016(12), Fla. Stat. Those statutes also provide that no one in attendance at the proceeding or committee meeting shall be permitted or required to testify regarding them in any such civil or administrative action (Id). However, the statutes also make it clear that if information, documents, or

records utilized or presented are otherwise available from original sources, they are not to be construed as immune from discovery or use in any such civil or administrative action (Id). Furthermore, any witness who has testified before such committee or organization may not be prevented from testifying as to matters within his or her knowledge, albeit not about opinions they formed as a result of the investigations or proceedings (Id).

Conspicuously absent from any of the four statutes discussed above is a statement that the materials at issue are either confidential or privileged. In fact, the restrictions or disclosure are limited solely to discovery or introduction into evidence in particular civil or administrative actions; the prohibition does not even apply to all civil or administrative actions. Those statutory provisions do not bar the use of such evidence in civil proceedings against a healthcare provider based on a federal cause of action, see Feminist Women=s Health Center, Inc. v. Mohammad, 586 F.2d 530, 545 n.9 (5th Cir. 1978) (Florida=s peer review privilege Acannot, of course, operate to bar the use of such evidence in the trial of a federal cause of action@), cert. den., 100 S.Ct. 262 (1979). Numerous courts have allowed discovery of peer review materials in federal proceedings, rejecting the applicability of state law privileges. See e.g., Atteberry v. Longmont United Hosp., 221 F.R.D. 644 (D. Colo. 2004) (EMTALA action); Accreditation Ass=n for Ambulatory Health Care, Inc. v. United States, 2004 WL 783106 (N.D. Ill. 2004) (federal health care fraud criminal investigation); Nilavar v. Mercy Health Sys. - Western Ohio, 210 F.R.D. 597 (S.D. Ohio 2002) (federal antitrust claim); Marshall v. Spectrum Medical Group, 198 F.R.D. 1 (D. Me. 2000) (Americans with Disabilities Act claim);

United States v. OHG of Indiana, Inc., 1998 WL 1756728 (N.D. Ind. 1998) (False Claims Act qui tam action); Johnson v. Nyack Hosp., 169 F.R.D. 550 (S.D.N.Y. 1996) (racial discrimination claim).

Additionally, any disciplinary action against a physician by a medical association or hospital must be reported to the Department of Health, and notice of any such action which is severe enough for expulsion or resignation must then be transmitted by that Department to every hospital and health maintenance organization in the state, '458.337(1)(a) and (b), Fla. Stat. The physician has no right or ability to prevent that disclosure.

The statutes addressing staff membership, peer review, medical review committees, and patient safety organizations do not expressly preclude access to the relevant documents by prospective patients of a healthcare provider outside the context of litigation, which is one of the primary purposes of Amendment 7. In fact, the legislature never addressed that subject until after Amendment 7 was passed, and then only in the invalid implementation statute, '381.028, Fla. Stat. As a result, healthcare providers cannot claim that they have had any right, let alone a vested right, to prevent such disclosure.

With respect to the internal risk management program mandated for licensed hospital facilities pursuant to '395.0197, Fla. Stat., the statute provides in (6)(c) that incident reports generated by such a program are part of the work papers of the attorney defending the licensed facility in litigation. Case law construing that statute holds that it

incorporates the work product doctrine, with the result that upon a sufficient showing of need and hardship, an opposing party may obtain those materials in litigation arising out of the incident investigated,[2] see Dade County Public Health Trust v. Zaidman, 447 So.2d 282 (Fla. 3d DCA 1983); Health Trust, Inc. v. Saunders, 651 So.2d 188 (Fla. 4th DCA 1985). Thus, hospitals had no valid expectation that those reports would always remain confidential.

As an examination of these statutes demonstrates, healthcare providers had no vested right in an absolute privilege which could preclude patients from having access to extant documents pursuant to a validly enacted constitutional amendment. All of those committees and organizations are creatures of statutes, and the provisions restricting access to their records, documents, and investigations are extremely limited in nature and obviously subject to legislative reevaluation. In fact, anyone paying passing attention to healthcare litigation knows that those statutes have been the subject of constant revision in the last twenty years.[3] Clearly, all the healthcare providers ever had was an

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[2]/Section 395.0197, Fla. Stat., provides that the meetings of the risk management committee are not open to the public under Chapter 286, Fla. Stat., and those records and the annual reports are confidential and not available to the public under the Public Records Act, '395.0197(14), Fla. Stat. However, the Agency for Health Care Administration (AMCA) shall have access to all of those records to carry out its review function, '395.0197(13), Fla. Stat.

[3]/Section 395.0191, Fla. Stat., has evolved from eighteen different legislative enactments, beginning in 1982; '395.0193, Fla. Stat., has evolved from fourteen legislative enactments since 1982; '395.0197, Fla. Stat., has evolved from 26 legislative

expectation, based on their anticipation of the continuance of existing statutory law, that the restrictions on access to documents and records relating to adverse incidents would continue in force. That is not enough to preclude retroactive application of a constitutional amendment.

In Doe v. Sundquist, 2 S.W.3d 919 (Tenn. 1999), the Tennessee Supreme Court held that a statute allowing disclosure of sealed adoption records could be applied to pre-existing records, despite birth parents= claim that it retroactively violated their vested rights. While the Tennessee Court of Appeals had decided the birth parents had a reasonable expectation of confidentiality based on the law as it existed when they surrendered their children for adoption, however, the Tennessee Supreme Court ruled unanimously to the contrary. The court examined the prior adoption statutes and noted there had never been an absolute guarantee, nor even a reasonable expectation by the birth parents that adoption records would be permanently sealed, since disclosure was permitted in various circumstances, some conditional upon a judicial finding and in other situations without even judicial consideration. The Tennessee Supreme Court determined that the birth parents did not have a vested right in the confidentiality of the adoption records, since there had always been a possibility of disclosure. Based on that reasoning,

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enactments since 1975; '766.101, Fla. Stat., has evolved from 31 legislative enactments since 1972; and '766.1016, Fla. Stat., was just enacted in 2003, see West, Florida Statutes Annotated.

the court held that the new statute authorizing disclosure of all existing records was constitutional.

Similarly here, healthcare providers did not have an absolute guarantee of confidentiality, since the materials at issue were capable of being disclosed under various circumstances and to various third parties. Moreover, the relevant statutes have constantly been in a state of revision, since their enactment, see fn. 2, supra. Since there were no such privileges nor protections at the common law, the healthcare providers had to rely solely on the continued existence of the relevant statutes and that, in itself, is insufficient to create a vested right.

The Fifth District found a vested right on the part of healthcare providers Ain the confidentiality of the information generated through the self-evaluative process,@ 2006 WL 566084 at p.6. However, it is not the underlying information which is protected by the relevant statutes, since the testimony of witnesses regarding the information can theoretically be obtained, and original source material can be accessed and utilized. Instead, only certain documents or records containing that information, i.e., the investigation materials, records of proceedings, and documents generated by the committees or organizations are protected. Moreover, the statutory limitations on disclosure apply only in litigation involving the healthcare providers and, in some of the statutes, only to the precise incident which was the subject of the organization or committee=s investigation. Furthermore, that limitation has no binding effect on federal

claims in federal court and, thus, the Aprotected@ materials would become public record in those cases.

Finally, it is also significant that the statutory limitations on disclosure were not designed to protect the privacy of the individual doctor or hospital whose conduct is at issue, but rather to promote the flow of accurate and complete information in the particular investigation or committee proceedings, see Holly v. Auld, 450 So.2d 217 (Fla. 1984). Moreover, a healthcare provider does not have a protected liberty or property interest in disclosure of such information sufficient to justify constitutional protection.

In Randall v. United States, 30 F.3d 518 (4th Cir. 1994), cert. den., 514 U.S. 1107 (1995), an army doctor contended that an adverse action report entered into the National Practitioner=s Data Bank denied him the right to practice his profession free from an imposed stigma. The Fourth Circuit rejected that contention, relying on Siegert v. Gilley, 500 U.S. 226 (1991), and Paul v. Davis, 424 U.S. 693 (1976), for the proposition that an action adversely affecting the reputation of a person which might create hardship in obtaining employment is not harm sufficient to rise to the level of a constitutional deprivation, see also, Simkins v. Shalala, 999 F.Supp. 106 (D.D.C. 1998) (physician challenging inclusion of information in National Practitioner=s Data Bank did not demonstrate a protected liberty or property interest in the case).

Indeed, there is simply no constitutional basis for objection for the healthcare industry=s persistent claims that there must be something unconstitutional about Amendment 7 removing protections once afforded to past records. As previously

demonstrated, courts have found no constitutional infirmity to states changing their public policy on the identities of birth parents long after an adoption has occurred and, as discussed above, courts have held there is no interest protected by the due process clause that prevents reporting of adverse incidents involving physicians to a data bank. Such decisions are consistent with judicial reluctance to find constitutional violations in the mandatory disclosure of truthful, relevant information in the public interest, the public as decided was necessary by adopting Amendment 7 with an 81% of the vote, see e.g., Smith v. Doe, 538 U.S. 84, 98, 123 S.Ct. 1140, 1150, 155 L.Ed.2d 164 (2003) (rejecting Ex Post Facto Clause challenge to sex offender reporting and disclosure statute noting A[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment@); State v. Robinson, 873 So.2d 1205, 1213 (Fla. 2004) (A[t]he interest in one=s reputation alone . . . is not a liberty interest and thus >the frequently drastic effect of the Astigma@ which may result from defamation by the government in a variety of contexts= does not by itself constitute a harm sufficient to be afforded the protections of due process. Such a stigma must be coupled with >more tangible interests such as employment= or altered legal status to establish entitlement to these protections@) (citing Paul v. Davis, 424 U.S. 693, 701, 708-09, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) (upholding ARight to Know@ aspect of Florida=s Sunshine Amendment requiring elected officials to make financial disclosures), cert. den., 99 S.Ct. 1047 (1979); Medical Soc. of New Jersey v. Mottola, 320 F.Supp.2d 254, 272 (D. N.J. 2004) (upholding state law requiring public

disclosure of confidential medical malpractice settlements and rejecting constitutional right of privacy and impairment of contracts challenges, stating Athis Court must respect the New Jersey Legislature=s policy-making authority with regards to the necessity and the reasonableness behind disclosure of statutorily mandated medical malpractice information@).

In summary, the statutory provisions upon which the healthcare providers rely do not create a vested right sufficient to preclude application of Amendment 7 to all existing documents. Those statutory provisions only limit access to certain documents for particular purposes, and the healthcare providers had no valid expectation that those limitations would continue to remain the law indefinitely. Moreover, there is no underlying, constitutionally recognized, liberty or property interest which could justify the conclusion that a vested right is being violated by application of Amendment 7.

CONCLUSION

All three certified questions should be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to all counsel on the attached counsel service list, by mail, on September 5, 2006.

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CERTIFICATE OF TYPE SIZE & STYLE

Amicus Curiae, Floridians for Patient Protection, Inc., hereby certifies that the type size and style of the Amicus Curiae Brief is Times New Roman 14pt.

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