IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-912

Lower Tribunal Case No. 1D05-4149

NOTAMI HOSPITAL OF FLORIDA, INC., d/b/a
LAKE CITY MEDICAL CENTER,

Appellant,

vs.

EVELYN BOWEN, ET AL.,

Appellees.

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

Appellees' citations herein will be to the record on appeal ("R") ("Vol. ____, R-____"); and to Appellant's Amended Initial Brief (Initial Brief _____).

The Appellant, Notami Hospital of Florida, Inc., d/b/a Lake City Medical Center will be referred to as "Appellant" or "LCMC" throughout. Emphasis herein is supplied by Appellee unless otherwise noted.

STATEMENT OF THE CASE AND OF THE FACTS

Appellees accept the Statement of the Case and of the Facts set forth in Appellant's Initial Brief, with the following supplementation and clarification:

In the circuit court, this case concerned four separate complaints against Dr. Pendrak, his professional association, and the Appellant hospital, LCMC. In addition to the claims against Dr. Pendrak and his professional association for his negligent surgeries, Plaintiffs alleged that LCMC was negligent in its investigation and recruiting of Dr. Pendrak, and in granting Dr. Pendrak medical staff privileges and surgical privileges beyond his competence. (Vol. IV, R-536-37, 541-42, 558-59, 581-82, and 586-87).

Garry Karsner, the CEO of LCMC, gave his deposition on November 4, 2004. At Mr. Karsner's deposition, Plaintiffs' counsel asked questions concerning adverse incidents involving Dr. Pendrak that led to injury to or death of patients at

LCMC. Mr. Karsner testified that in addition to the three patients involved in these cases – Bowen, Nicely, and Williams – he had received more than 10 reports concerning significant injury or death of Dr. Pendrak's patients treated at LCMC. Mr. Karsner was instructed not to answer any questions about the details of those incidents. (Vol. II, R-230).

Appellant contends that the order upheld by the First District granting Plaintiffs' motion to compel was an order requiring "1) LCMC to produce privileged and confidential peer review, credentialing, quality assurance, and risk management records of any adverse medical incident 'involving' Dr. Pendrak, and 2) compelling Garry Karsner, the CEO of LCMC, to testify on deposition about privileged and confidential investigations, proceedings and records relating to Dr. Pendrak." (Initial Brief at 5).

The Order actually required the following:

1. Defendant, LAKE CITY MEDICAL CENTER, shall *produce any records made or received in the course of business relating to any adverse medical incident* involving Dr. Pendrak's care and treatment of patients at LAKE CITY MEDICAL CENTER, *as that term is defined in Article X, Section 22(c)(3) of the Florida Constitution*. *Patient identifying information shall be redacted, except*

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1 This section, originally designated section 22 by Amendment No. 7, 2004, proposed by Initiative Petition filed with the Secretary of State April 1, 2003, adopted 2004, was redesignated section 25 by the editors in order to avoid confusion with section 22, relating to parental notice of termination of a minor's pregnancy, as contained in Amendment No. 1, 2004, added by H.J.R. 1, 2004, adopted 2004. For clarity, further references to the amendment will substitute Article X, section 25 for any reference to Article X, section 22, or will be referred to as Amendment 7.

for patients whom Plaintiffs' counsel represents or for whom HIPAA authorization has been provided. The Court reserves ruling on whether it is necessary to require the Defendant to produce a key that can be used to determine the actual identity of each patient but not disclosed to Plaintiffs or anyone outside the hospital or its counsel.

2. Mr. Karsner is instructed to answer the questions propounded to him at deposition *which, prior to the passage of Amendment 7, sought privileged information*.

(Vol. I, R-66).

Without arguing error, LCMC implies such by drawing a distinction between the compelling of testimony and production of documents. The information solicited at deposition that was included in Plaintiff's motion to compel concerned the same adverse medical incident information that was not disclosed based on the confidentiality privilege repealed by Amendment 7. No issue of any such distinction was addressed in the First District's opinion, nor does Appellant argue it as error in its brief.

The First District's grounds for denial of certiorari and certification of conflict is more completely summarized in the court's Conclusion:

> Because section 381.028 restricts express constitutional rights, it must fall. The trial court did not depart from the essential requirements of law by concluding the statute is unconstitutional. Similarly, because Amendment 7 provides a sufficient rule by which patients can access records of adverse medical incidents, without the need for legislative enactment, the trial court did not depart from the essential requirements of law by concluding the amendment is self executing, and by giving it retrospective application. Because our conclusion

> that the amendment has retrospective application to records created prior to its effective date directly conflicts with the holding in *Fla. Hosp. Waterman, Inc., v. Buster*, 31 Fla. L. Weekly D763, – So.2d – , 2006 WE 566084 (Fla. 5th DCA March 10, 2006), we certify conflict.

Notami Hospital of Florida v. Bowen, 927 So.2d 139, 145 (Fla. 1st DCA 2006). Of the three principal questions on appeal identified in Appellant's Statement of the Case and of the Facts, the only question in conflict between the First District and Fifth District is Amendment 7's application to records created prior to its effective date.

STANDARD OF REVIEW

Appellees accept the Standard of Review set forth in the Initial Brief, that review is *de novo,* with the following supplementation:

> [W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have the right to change, abrogate or modify it in any manner they see fit so long as they [k]eep within the confines of the Federal Constitution. . . . [O]ur first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.

Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956).

SUMMARY OF ARGUMENT

On November 2, 2004, the people of Florida passed Amendment 7 by a margin of 81.2% in favor to 18.8% opposed. The constitution now provides a fundamental right for patients "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." Amendment 7, section 1.

The amendment effectively repealed statutes that kept doctors' and hospitals' records of medical negligence secret. Having lost at the ballot box, these special interest groups sought to preserve the repealed statutory privileges through legislation and litigation.

I. Retrospective Application

The trial and appellate courts below correctly determined that in saying "patients have a right to have access to *any records . . . relating to any adverse medical incident*" Floridians clearly demanded for themselves access to all such records, past, present and future.

Statutory privileges, like the ones at issue here, are not substantive, vested rights. These privileges were created by statute and can be repealed by either

statute or constitutional mandate. Well-established rules of construction hold that testimonial privileges are to be read narrowly, while fundamental rights established through general referendum are to be accorded great deference. Both the plain language of the amendment and statutory construction principles direct that Amendment 7 applies to any records regardless of when they were created.

II. Contract Clause

Appellant's allegation that applying the amendment to existing records violates the Contract Clause of the United States Constitution lacks merit. To establish constitutionality the Court must analyze: 1) whether the law has operated as a substantial impairment of a contractual relationship; 2) whether any such impairment is justified by a significant and legitimate public purpose; and 3) whether the adjustment of rights and responsibilities is appropriate to the public purpose justifying the law. The contract "rights" LCMC alleges are impaired are, in fact, merely terms that LCMC imposes on its staff as a condition of obtaining hospital privileges. Amendment 7 does not operate to substantially impair a contractual relationship. The public purposes justifying any modification to LCMC's employment contracts clearly are legitimate and significant. LCMC cannot contract to perpetuate secrecy and privilege in matters of important public interest and thereby avoid the reach of the State into such matters.

III. Self-Execution

The court below found Amendment 7 does not require implementing legislation, and recognized Section 381.028, Florida Statutes, as an attempt not to implement Amendment 7, but rather to overturn it. The amendment meets this Court's self-execution test in that "it lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." [1] Specific definition of primary phrases are included in the amendment, giving the average citizen information sufficient to determine to whom the amendment applies, and the nature of the information that must be disclosed.[2] No new system for production or redaction of records is necessary. Moreover, the amendment stated it would be "effective on the date it is approved by the electorate." Any interpretation that the amendment is not self-executing is directly contrary to that directive.

IV. Unconstitutionality of Section 381.028

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2 *Gray v. Bryant*, 125 So.2d 846, 851 (Fla. 1960).

3 "[T]here is no word in the amendment incapable of understanding. . . . 'ambiguity' simply will not serve as a sound underpinning of an argument offered to delay implementation of Article X, § [25]." *Sardes v. South Broward Hospital District*, Case No. 03-5290-CACE (17th Judicial Circuit, Broward County, 2006)

The First District Court of Appeal also correctly determined that,"[b]ecause section 381.028, restricts express constitutional rights, it must fail." *Notami Hospital*, 927 So. 2d at 145. The amendment was intended to obtain for the people access to records previously privileged by statute. The First District compared the provisions of Amendment 7 with the provisions of Section 381.028 and found: 1) Article X, section 25 allows access to "*any* records made or received in the course of business by a healthcare facility or provider relating to *any* adverse medical incident;" Section 381.028(3)(j) attempts to limit disclosure to only a "final report"; 2) Article X, section 25 allows access to *any* records of *any* adverse medical incident; Section 381.082 attempts to limit disclosure to a final report relating to the same or substantially similar condition, treatment or diagnosis with that of the patient requesting the records; 3) Amendment X, section 25 contains no limitation on the time frame within which discoverable records were generated; Section 381.082(5) limits production to records created after November 2, 2004; 4) Article X, section 25 states its purpose as changing current law; Section 381.082 states that Article X, section 25 does not affect existing privileges.

Having found in the implementing statute clear restrictions on established constitutional rights, the court below properly struck down the law.

(Vol. IV, R-610-11).

V. Federal Preemption

Appellant claims the federal government has preempted the issue of confidentiality of records of peer review proceedings under the Health Care Quality Information Act, 42 U.S.C. § 11101, *et seq.*, ("HCQIA"). Federal courts consistently have held that there is no federal peer review privilege, however, and that HCQIA protects only the information reported under the Act. Indeed, "Congress spoke loudly with its silence in not including a privilege against discovery of peer review materials in the HCQIA."[3] The Act itself provides that nothing therein is to be "construed as affecting *in any manner* the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment by any physician, health care practitioner, or health care entity, . . ." 42 U.S.C. § 11115 (d).

Appellant is correct that "Congress created immunity from suit as an incentive for hospitals and physicians to engage in peer review . . .." Initial Brief at 42. However, this incentive – immunity from suit for peer review participation in the absence of intentional fraud or the knowing presentation of false information – is still provided to peer review participants. *See* Sections 395.0191(7);

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4 *Teasdale v. Marin General Hospital,* 138 F.R.D. 691, 694 (N.D.Calif. 1991).

395.0193(5); 766.101(3)(a)&(7)(e), Florida Statutes; 42 U.S.C. §11111. Neither Amendment 7, nor the rulings below change that.

ARGUMENT

I. THE FIRST DISTRICT COURT CORRECTLY DETERMINED THAT RECORDS CREATED PRIOR TO NOVEMBER 2, 2004, ARE SUBJECT TO THE PROVISIONS OF AMENDMENT 7.

Appellant accurately observes that "[r]etroactive application of a constitutional amendment is disfavored where vested rights would be destroyed and where its terms do not compel retroactivity."[4] As the trial and appellate courts below found, however, Amendment 7 did not destroy vested rights, and the language approved by the people clearly compels retroactivity:[5]

A. Amendment 7 Does Not Affect Vested Rights.

The district court first analyzed the nature of "vested rights" and found that appellants had only an expectation that the law would not change, not a vested right to statutory privileges in perpetuity:

> "A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right." *Clausell v. Hobart Corp.*, 515 So.2d 1275, 1276 (Fla.1987). However, "[t]o be vested a right must be more than a *mere expectation based on an anticipation of the continuance of an existing law*.... " *Id*. (quoting *Div. of Workers'*

5 Initial Brief at 8, *citing*, *Buster*, 2006 WL 566084 at *6.

6 "It is also appropriate for us to examine the 'explanatory materials available to the people as a predicate for their decision as persuasive of their intent.' " *Dep't of Environmental Protection v. Millender*, 666 So.2d at 886 (Fla. 1996) (quoting *Plante v. Smathers*, 372 So.2d 933, 936 (Fla.1979).

> *Comp. v. Brevda*, 420 So.2d 887, 891 (Fla. 1st DCA 1982)). Here, the Hospital does not have a vested right in maintaining the confidentiality of adverse medical incidents. The Hospital's "right" is no more than an expectation that previously existing statutory law would not change. Because the Hospital's expectation is not a vested, substantive right, applying Amendment 7 to records created prior to its passage is not unconstitutionally retrospective.

Notami, 927 So.2d at 143-144.

Appellant cites *Somer v. Johnson*, 704 F.2d 1473, 1479 (11th Cir. 1983) for the proposition that F.S. §768.40(4) creates a "*substantive privilege.*" Neither *Somer* nor any other opinion cited by Appellant holds the medical confidentiality statutes confer a substantive *right* upon the Appellant, nor that the right would have been "vested" at the time Amendment 7 was adopted.[6] The distinction between a vested right and the type of statutory privilege at issue here was explained by a Georgia court examining that state's public records law:

> It has been held that once a statutory right becomes "vested" no subsequent legislative act can impair it. However, a well established exception exists that a person has no vested right in statutory *privileges* and exemptions. A subsequent legislative act can impair or destroy a statutory privilege.

Evans v. Belth, 388 S.E. 2d. 914, 916 (Ga.Ct.App. 1989)(citations omitted) (emphasis in original).

While no support is found in the common law for Appellant's position, the

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7 A Texas court, however, held plaintiffs had no vested right to discover records created prior to, but sought after, adoption of that state's hospital peer review privilege. *Northeast Community Hospital v. Gregg*, 815 S.W.2d 320, 327

position of the trial court and First District followed a rule enunciated in New York more than 100 years ago. As restated by the Michigan Supreme Court:

> It is a general rule of constitutional law that a citizen has no vested right in statutory privileges and exemptions, *Cooley Const. Lim*. 7th Ed., p. 546, *Brearley School v. Ward*, 201 N.Y. 358 (1901), and a franchise granted by the State with a reservation of a right to repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon the faith of the sovereign grantor.

Stott v. Stott Realty, 284 N.W. 635, 637 (Mich. 1939).

Moreover, the statutory privileges repealed by Amendment 7 were never intended to be absolute. For example, Section 458.337(3), Florida Statutes, gave the State subpoena powers over the records in question.

The Fifth District's *Buster* opinion gave no clear rationale for its conclusion that vested, substantive rights were at issue.[7] Without examining the nature of vested rights, or considering the public's expressed will, the court said only that "[r]etroactive application would not be constitutionally permissible because it vitiates a vested right that health care providers have in the confidentiality of the information generated through the self-evaluative process." *Buster* at *6.

(Tex. Ct. App. 1991).

8 The Fifth District earlier described the laws at issue as conferring a statutory privilege. *See, e.g., Paracelsus Santa Rosa Med. Ctr. v. Smith*, 732 So.2d 49 (Fla. 5th DCA 1999); *Cape Canaveral Hosp., Inc. v. Leal*, 917 So.2d 336 (Fla.

The First District, however, explained that to be "vested" a right must have become a "title, legal or equitable, to the present or future enforcement of a demand." *Notami* at 143; *Div. of Workers' Comp. v. Brevda,* 420 So.2d 887, 891 (Fla. 1st DCA 1982). The Appellant's privileges do not meet that test.

Analogously, courts considering previously confidential adoption records have consistently found statutes later allowing access to those records constitutionally sound. *See*, *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999)(statute did not retroactively impair vested rights of birth parents or violate their state constitutional right to privacy); *Does 1-7 v. State*, 993 P.2d 822 (Or. App. 1999), *review denied*, 6 P.3d 1098 (Or. 2000)(rejecting birth mothers' constitutional challenge that voter-approved initiative impaired obligations of contract or invaded right to privacy). The same result is dictated here; the benefit gained for the patient far outweighs any perceived consequences that disclosure of the records may have for those creating them.

Opponents of the amendment argued before this Court that "while the amendment is designed to provide access to records on adverse medical incidents, it does so by *repealing* several different statutes ...." *Advisory Opinion to the Attorney General Re: Patients' Right to Know About Adverse Medical Incidents*, 880 So.2d 617, 620 (Fla. 2004). If a right, remedy or privilege is created by statute,

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5th DCA 2005).

its repeal has retroactive effect. *See*, *Yaffee v. International Co.*, 80 So.2d 910, 913 (Fla.1955)("[W]hen the statute is repealed, the right or remedy created by the statute falls with it."); *Bureau of Crimes Compensation v. Williams*, 405 So.2d 747, 748 (Fla. 2d DCA 1981)("Repealing statutes apply retrospectively in all situations where a right or remedy has been created wholly by statute.").

Appellant's broader public policy argument also lacks merit. This court has recognized that,

> Despite formulations hinging on categories such as "vested rights" or "remedies," it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.

State Dep't of Transp. v. Knowles, 402 So.2d 1155, 1158 (Fla.1981); *see also*, *Department of Agric. & Consumer Servs. v. Bonanno*, 568 So.2d 24, 30 (Fla.1990).

Florida voters weighed the sanctity of doctors' peer review process against citizens' right to know about medical mistakes and voted *overwhelmingly* for an outright repeal of the special treatment the legislature had carved out for the medical profession. Clearly the people do not share the Appellant's view that the public interests were being served by these secrecy laws. The third part of the *Knowles* test further favors retroactive application of Article X, section 25: The nature of the "right" at issue is to shield evidence of doctors' and hospital's

neglect. The law is well-settled that evidentiary privileges are to be narrowly interpreted:

> Since privileges shielding information from the reach of the court contravene the fundamental principle that the public has a right to every man's evidence, such privileges must be strictly construed.

Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) (*quoting*, *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950).

Finally, Appellants argue that the extremely narrow reading of Article X, section 25 proffered by the Florida Legislature and general counsel of the Florida Department of Health "is entitled to deference," citing a case where the Marine Fisheries Commission was permitted to determine the mesh parameters of mullet nets.[8] This is not an amendment which arose from the legislature, however, but from popular initiative. Further, an opinion of the general counsel of the affected department has no binding effect outside the Department, especially where the opinion has not gone through the formal process for declaratory statements required by Chapter 120, Florida Statutes. In any event, this Court has made clear that in matters of constitutional law it is the express will of the people that demands deference. *Gray,* 89 So.2d at 790.

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9 *Pringle v. Marine Fisheries Commission*, 732 So.2d 395, 397 (Fla. 1st

B. Voters Approved Language Clearly Applying the Amendment to Records Created Prior to Its Adoption.

Four out of five Florida voters approved language saying very directly that the privileges the legislature afforded the medical profession were effectively repealed, and that *all* previously privileged information regarding medical negligence was to be brought into the light.[9] By its plain terms the amendment states that even patients who were treated only *before the effective date of the amendment* – and thus *by definition* can *only* have pre-amendment records to discover – may access any record relating to any incident in their health care provider's "*history*."

The following passages of Amendment 7 make this clear:

> Amendment 7 Sec. (1) "Statement and Purpose" states in part: "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."
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> Amendment 7 Sec. (2)(a) states in part: "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.*"
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> Amendment 7 Sec. 2(c)(2) states in part: "The term 'patient' makes an individual who has sought . . .or has undergone care . . .."

DCA 1999); Initial Brief at 9.

10 The vote was 5,849,125 to 1,358,183, or 81.2% favoring Amendment 7.

> Amendment 7 Sec. 2(c)(3) states in part: "The phrase 'adverse medical incident' means medical negligence, intentional misconduct, any other act, neglect, or default of a health care facility or health care provider *that caused* or could have caused injury to or death of a patient . . .."

The voters could hardly give a clearer indication of the broad application of the new openness they demanded. "Any" does not mean "future" or "to be created" or "only final reports after November 2, 2004."[10] "Any" means "one or some indiscriminately of whatever kind; unmeasured or *unlimited in amount, number, or extent.*" *Webster's New Collegiate Dictionary* (5th ed.1977).[11]

In considering use of the term "any" in a temporal context, the Third District Court of Appeal has stated:

> [The reference in the termination clause to 'any term' clearly refers to the initial three-year term as well as the subsequent three-year terms. *See generally, Black's Law Dictionary* (5th ed. 1979) ("any" is "often synonymous with 'either', 'every', or 'all'"); *American Heritage Dictionary* (rev.ed. 1985) ("any" is defined as "[o]ne or another without restriction or exception"). Thus the termination clause is not ambiguous, and it was error for the trial court to go beyond the face of the contract to consider extrinsic circumstances. The plain meaning of the clause allowed Acceleration to terminate the contract during the initial three-year term. *Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc.*, 541 So. 2d 738, 739 (Fla. 3rd

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11 "[A]n interpretation of a constitutional provision which will lead to an absurd result will not be adopted when the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people." *Plante*, 372 So.2d at 936 (citing *City of Miami v. Romfh*, 66 Fla. 280, 63 So. 440 (1913)).

12 *See, e.g., Burbank Grease Services, LLC v. Sokolowski*, – N.W.2d – , 2006 WL 1911997, 2006 WI 103, (Wis., Jul 13, 2006).

DCA 1989).

This common-sense application of the term “any” was followed by the First District when it stated :

> When determining whether Amendment 7 should be retroactively applied, we must determine whether there is clear evidence the electorate intended it to be applied retroactively. *See Campus Commc'ns, Inc. v. Earnhardt,* 821 So.2d 388, 395 (Fla. 5th DCA 2002). Intent is determined primarily from the language of the amendment, and when the language is clear, unambiguous and conveys a clear and definite meaning, the amendment must be given its plain and obvious meaning. *See id.* (citing *Holly v. Auld*, 450, So.2d 217, 219 (Fla.1984)).
>
> Here, the plain language of the amendment permits patients to access *any* record relating to *any adverse medical incident,* and defines "patient" to include individuals who had *previously undergone treatment.* The use of the word "any" to define the scope of discoverable records relating to adverse medical incidents, and the broad definition of "patient" to include those who "previously" received treatment expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment.

Notami, 927 So.2d at 144-145 (emphasis in original).

Those opposing the amendment’s implementation would have this Court read “any records” regarding a doctor’s “history” with patients he or she treated “previous” to the amendment’s adoption by a very limited light:

> The Hospital respectfully submits that in *Notami*, the First District erred in reading a retroactive intent into Amendment 7’s reference to

> "any" adverse medical incident for patients who had "previously undergone treatment." . . . . those terms can reasonably be read as describing nothing more than the breadth of access ("any") for a particular class of patients (past patients as opposed to individuals evaluating a new physician). Those words, which have *no temporal connotation with respect to pre-Amendment records* legislatively shielded from disclosure, do not overcome the presumption of prospectivity established by the Amendment's express designation of an effective date.[12]

Respectfully, the words such as *history*, and, most importantly, *any* do indeed have a "temporal connotation."

Statutory construction principles also compel a finding that the reading suggested by Appellant is incorrect. The rule of construction *expressio unius est exclusio alterius* applies here. If the people had intended to exclude records and information created prior to the effective date from the right of access afforded by the amendment, presumably such exemptions would have been included in the amendment. Instead of "any" records, the amendment would have said "records created after November, 2004." *See University of Florida Institute of Agr. Services v. Karch*, 393 So.2d 621 (Fla. 1st DCA 1981).

Opponents of the amendment misconstrue *State, Dep't of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353 (Fla. 1977) for the proposition that the inclusion of an effective date effectively rebuts any argument that retroactive

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13 *Buster*, Initial Brief of Appellant, at 35 (citations omitted).

application of the law was intended. That was not the holding of this Court in *Zuckerman-Vernon*, which dealt only with an increase in tax penalties applicable as of a date certain:

> In the instant case, the Department assessed the penalty against the taxpayer in 1973, prior to the effective date of Ch. 77-281. It is a well-established rule of construction that in the absence of clear legislative intent to the contrary, a law is presumed to act prospectively. . . . The 1977 Legislature's inclusion of an effective date of July 1, 1977, in Ch. 77-281 effectively rebuts any argument that retroactive application of the law was intended.

Id. at 358 (citations omitted). The *Zuckerman-Vernon* holding was limited by its facts and the express language of Ch. 77-281, Laws of Florida.

Florida courts also have determined the constitutionality of disclosing previously confidential records turns not upon when the records were created, but when the records request was made in relation to passage of the provision allowing their discovery. In *News-Press Publishing Co. v. Kaune*, 511 So.2d 1023 (Fla. 2d DCA 1987), the legislature created an exemption to the Public Records Act for medical records of municipal employees. A request for records was made the next day. The court determined that the date of the request was the determinative date, saying:

> Under the facts of this case, we conclude that *the date of the request is the critical date* and, therefore, even though we believe section 112.08(7) to be 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 "all documents pertaining to subject A in personnel 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.[13]

News-Press Publishing Co. at 1026; *see also, Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189, 193 (Fla. 1st DCA 2002), *review denied*, 885 So.2d 386 (Fla. 2004)(critical date in determining whether a document is subject to examination is the date the request for examination is made). The same reasoning applies here. By the express terms of Amendment 7, on November 2, 2004, a patient would be entitled to request "any records made or received in the course of business by a health care facility or provider relating to . . . medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient." Article X, section 25(a), (c)(3), Florida Constitution. Reading the entire amendment in context, the court below properly found, "The effective date merely sets forth the date patients obtained the right to receive the

14 "All" as used in *News-Press* and "any" as used in Amendment 7 are synonymous terms. *See Acceleration National Service Corp.* at 739. (Citing Black's Law Dictionary, 5th Ed.)

records requested."

II. APPLICATION OF AMENDMENT 7 DOES NOT SUBSTANTIALLY IMPAIR APPELLANT'S PREEXISTING CONTRACTUAL RELATIONSHIPS AND DOES NOT VIOLATE THE CONTRACT CLAUSE.

Appellant asserts erroneously that Amendment 7 substantially impairs the existing contractual relationship between LCMC and members of its medical staff, and thereby violates the Contract Clause. Under the standard enunciated by the United States Supreme Court in *Energy Reserves Group v. Kansas Power & Light,* 459 U.S. 400 (1983), Amendment 7's requirement for disclosure of information that was previously privileged does not violate the Contract Clause.

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." . . . In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past... The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."
>
> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as remedying of a broad and general social or economic problem.

Energy Reserves Group at 411-12, quoting *Allied Structural Steel Co. v. Spannaus,*

438 U.S. 234, 244 (1978), and *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (citations omitted). The Supreme Court stated further that: "the next inquiry is whether 'the adjustment of the rights and responsibilities of contracting parties' is based 'upon reasonable conditions and' is 'of a character appropriate to the public purpose justifying' the legislation's 'adoption.'" *Id.* at 412. "'[A]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id.* at 412-13, *quoting*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977).

Here the Court first should examine the nature of the contractual relationship that LCMC claims will be impaired. The hospital contracts with its medical staff to require that "staff who participate in credentialing, peer review, Medical Staff Committee, quality assessment, and performance improvement activities maintain the confidentiality of all communications relating to those activities." LCMC Bylaws, Art. III, Section 3 (Initial Brief at 22-23). Thus, the hospital has done the very thing that the Supreme Court made reference to in *Energy Reserves Group, Inc.* – it has sought to remove a right from the people by making a contract about that right, then claiming a Contract Clause violation.

LCMC relies on pre-Amendment 7 pronouncements of state law that hospitals must have in place "a planned, systematic, hospital-wide approach to the

assessment, and improvement of its performance to enhance and improve the quality of heath care provided to the public." *See* Fla. Admin. Code R. 59A-3.271(1). The State's pre-Amendment 7 requirements for quality improvement did not have as their primary objective preventing patients from accessing information of medical neglect brought to light through internal staff processes. Although the health care industry may have convinced the Legislature that peer review cannot work effectively absent complete confidentiality of records, the people of Florida forcefully rejected that argument.

The contract rights that LCMC claims are substantially impacted are not at the essence of the contractual relationship. Confidentiality relating to participation of medical staff in credentialing, peer review, and quality assessment proceedings is only a collateral aspect of the relationship. *See, e.g., Medical Society of New Jersey v. Mattola*, 320 F. Supp. 2d 254, 271-72 (D.N.J. 2004). In return for their participation in such proceedings, the medical staff is immune from suit, except in instances of fraud or knowing presentation of false information. Although it is undoubtedly awkward for many participants in peer review committees to find fault with a colleague when facts indicate such a finding is appropriate, the primary objective is, and must be, quality of patient care. Because the obligations impacted by Amendment 7 are only collateral to the contractual relationship, analysis under the first prong of *Energy Reserves Group, Inc.*, directs that application of

Amendment 7 is constitutional.

Even if this Court were to determine that Amendment 7 works a substantial impairment of contract rights, it is clear the amendment reflects an overriding, legitimate public purpose that would serve to tip the balance required under the second prong of *Energy Reserves Group, Inc.*, to a finding of constitutionality.

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

Advisory Opinion to Attorney General Re: Patients' Right to Know About Adverse Medical Incidents, 880 So. 2d 617, 619 (Fla. 2004), quoting Amendment 7, Proposed Amendment Ballot Summary. "By the opponent's own admission, access to this information is restricted. The amendment creates a broader right to know about adverse medical incidents than currently exists." *Id*. at 623. The people of Florida sealed this public policy with the most direct imprimatur of legitimacy that any law can have, a 4-to-1vote of the electorate .

In an Illinois case, *May v. Wood River Township Hospital*, 257 Ill. App. 3d 969, 629 N.E.2d 170 (Ill. Dist. Ct. 1994), the court considered the same problem Floridians faced. In limiting the application of Illinois' peer review privilege to the deliberations of the peer review panel, and not to the actions taken before or as a

result of peer review, the court stated:

> If the simple act of furnishing a committee with earlier-acquired information were sufficient to cloak that information with the statutory privilege, a hospital could effectively insulate from disclosure virtually all adverse facts known to its medical staff, with the exception of those matters actually contained in a patient's records. As a result, it would be substantially more difficult for patients to hold hospitals responsible for their wrongdoing through medical malpractice litigation. So protected, those institutions would have scant incentive for advancing the goal of improved patient care. The purpose of the act would be completely subverted.

257 Ill. App. 2d at 974-75, 629 N.E.2d at 174. This Court is obliged to consider the expression of public will to protect against the broad societal problem of repeated malpractice fostered by a system of "self policing" under conditions of secrecy and privilege. Even if the Court finds a substantial impairment of a preexisting contractual relationship, the contract must be weighed against the public purpose expressed by the people through Amendment 7.

Under the third part of the *Energy Reserves Group, Inc.*, test, the courts should defer to the judgment of the people, as did both the trial court and the First

District. If Amendment 7 impairs contract rights, the impairment is insubstantial and justified. The First District was imminently correct in holding that "the Hospital does not have a vested right in maintaining the confidentiality of adverse medical incidents." *Notami Hospital of Florida, Inc.*, 927 So. 2d at 143.

III. AMENDMENT 7 IS SELF-EXECUTING

The First District was also correct in determining that Article X, Section 25 is self-executing, and that no implementing legislation is required to achieve its purposes. The trial court stated:

> Amendment 7, now Article X, section [25], does not require implementing legislation. Section 3 of the amendment provided that the "amendment shall be effective on the date it is approved by the electorate." As stated by the Court in *Gray v. Bryant*, 125 So.2d 846, 851 (Fla. 1960): "A basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays does a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment."

In *Gray v. Bryant* the Court held that Fla. Const. Art. V, Section 6(2), which provided for one circuit judge for each 50,000 inhabitants of the circuit, was self-executing. If that type of broadly worded constitutional provision is self-executing, Amendment 7, which is much more specific, is also self-executing. The Court went on to note:

> The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most *sacrosanct* of all expressions of the people.

Gray, 125 So.2d at 851.

Other trial courts reviewing Amendment 7 likewise have found the amendment to be self-executing:

> Judicial examination of a constitutional provision must begin with the explicit language of the provision in question. Amendment 7, from the perspective of the undersigned Judge, can easily be deemed a model of clarity. Various terms utilized in the statute are expressly defined therein. Provision for the protection of the identity of health care recipients is included in the body of the amendment, thereby complying with both state and Federal mandates. Ample identification of those subject to both its strictures and its benefits are set forth in verbiage which should be subject to serious challenge. There is no need for further legislative action for such determination to be made.
>
> Specific definition of primary phrases are included in the amendment, thus affording the average person – lay or professional – with information sufficient to determine what entity – natural or corporate – the amendment applies. Whether one consults a standard college dictionary or Blacks Law Dictionary, there is no word on the amendment incapable of understanding. . . . "ambiguity" simply will not serve as a sound underpinning of an argument offered to delay implementation of Article X, § [25].

Sardes v. South Broward Hospital District, Case No. 03-5290-CACE (17th Judicial Circuit, Broward County 2006) (Vol. IV, R-610-11). *See, also, Michota v.*

Bayfront Medical Center, No. 04-1057-CI-19, 2005 WL 900771 (Fla. Cir. Ct. 2005).

Any interpretation that the amendment is not self-executing also is contrary to the directive in the amendment that it be effective immediately. Preexisting state and federal provisions provide guidelines for production and cost of records and redaction of individually identifiable information. *See*, 45 C.F.R. §164.524(b)(2) & (c)(4); sections 395.3025(1) and 766.204(1), Florida Statutes. Florida law already provides for redaction of information required prior to third-party production of documents. *Amente v. Newman*, 653 So.2d 1030 (Fla. 1995). There is nothing about Amendment 7 that would prevent health care facilities and providers from using existing systems to provide the records in response to a formal or informal request, or to protect other patients' "privacy and dignity" through appropriate redactions.

In claiming the amendment contained "gaps" left to be filled by the Legislature, LCMC relies on this Court's *Advisory Opinion to the Governor – 1996 Amendment 5 (Everglades)*, 706 So.2d 278 (Fla. 1997). That opinion, however, actually points up the difference between the two amendments and the ease with which Amendment 7 may be implemented without legislation. The *Everglades* amendment stated: "Those who in the Everglades Agricultural Area [EAA] who cause water pollution within the Everglades Protection Area [EPA] or the

Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution." *See* Article II, section 7(b), Fla. Const. The Court recognized that too many policy questions remained unanswered for the amendment to be implemented without additional legislation. Questions left open included what constituted water pollution; how one would be judged a polluter; how costs of pollution abatement would be assessed; and who could have asserted such a claim. By contrast, Amendment 7 is simple and direct. It defines all terms necessary for its implementation. The First District correctly recognized Section 381.028, Florida Statutes, as an attempt to abridge the rights created by Amendment 7, not fill the alleged gaps:

> Section 381.028, Florida Statutes, purports to implement Amendment 7. However, a comparison of the plain language of the "implementing" statute and article X, section 25, reveals the statute drastically limits or eliminates discovery of records the amendment expressly states are discoverable, and limits the "patients" qualified to access those records.

Notami Hospital, 927 So. 2d at 143.

IV. THE COURT BELOW CORRECTLY DETERMINED THAT § 381.028, FLA. STAT. (2005) IS UNCONSTITUTIONAL

The First District Court of Appeal stated: "Because § 381.028, restricts express constitutional rights, it must fail. The trial court did not depart from the essential requirements of law by concluding the statute is unconstitutional."

Notami, 927 So. 2d at 145. When reviewing Amendment 7 for placement on the ballot, this Court stated that the amendment:

> has but one purpose – providing access to records on adverse medical incidents. . . . Unquestionably, the amendment would affect sections 395.0193(8) and 766.101(5) of the Florida Statutes (2003), which currently exempt the records of investigations, proceedings, and records of the peer review panel from discovery in a civil or administrative action. Indeed, this is a primary purpose of the amendment.

Advisory Opinion to the Attorney General re Patients' Right to Know About Adverse Medical Incidents, 880 So.2d 617, 620-21 (Fla. 2004). Those statutory provisions that conflict with Amendment 7 simply must give way. *In re Advisory Opinion to Attorney General, Limitation of Non-Economic Damages in Civil Actions*, 520 So.2d 284, 287 (Fla. 1988). This Court, dealing with constitutional tort reform, said:

> The committee correctly observes that statutes and jury instructions which are inconsistent with the constitution, if it is amended, will simply have to give way. Further, as the committee points out, proposed amendments to the constitution are not required to be consistent with statutory law or jury instructions and may require modification in such law or instructions. *Id.*

The First District's conclusion that Section 381.023 serves to impermissibly restrict the effect of Amendment 7 is amply supported in the record. As the trial court said, "The legislature did not attempt to 'implement' Amendment 7 in

enacting Section 381.028, they attempted to abolish it." (Vol. I, R-63). The recourse of the people to amend their constitution would be rendered a mockery if the Legislature is allowed to "implement" the amendment by reinstating the very statutory privileges the amendment repealed.

When we put the implementation statute and amended constitution side-by-side, we find:

1. Article X, section 25 allows access to "any records made or received in the course of business by a healthcare facility or provider relating to any adverse medical incident." Section 381.028(3)(j) limits disclosure to only a "final report."

2. Article X, section 25 allows access to *any* records of adverse medical incidents. Section 381.082 limits disclosure to a final report relating to same or substantially similar condition, treatment or diagnosis with that of the patient requesting the records.

3. Amendment X, section 25 by use of terms such as "any" expressly places no limitation on the time frame within which records were generated. Section 381.082(5) limits production only to records created after November 2, 2004.

4. Finally, Article X, section 25 states its purpose is to change existing laws regarding access to privileged medical records. Section 381.082 states that

Article X, section 25 will have no effect on existing privileges.

Even the staff analysis for the Senate bill that became Section 381.028, pointed out that:

> While the bill defines patient as the constitution does . . . . the bill *significantly narrows* that definition. . . . This limitation is enforced by the requirement that a person seeking records of adverse medical incidents must do so in writing and provide the "patient's" name and address, the last 4 digits of his or her social security number, his or her condition, treatment, or diagnosis, and the name of the health care providers whose records are being sought. *These restrictions would make it impossible for a person seeking treatment to obtain records of adverse medical incidents as is provided in the constitution.*

(Vol. II, R-257-58)

Section 381.028 seeks to restrict or destroy the rights guaranteed by Article X, section 25. Both the trial court and the district court of appeal correctly determined that the statute is unconstitutional.

V. AMENDMENT 7 IS NOT PREEMPTED BY FEDERAL LAW

LCMC's federal preemption argument rests on the erroneous conclusion that the disclosure of previously privileged peer review documents pursuant to Amendment 7 would impermissibly operate as an obstacle to Congressional objectives, in violation of the Supremacy Clause of the federal constitution.

Although LCMC argues that the Health Care Quality Information Act, 42

U.S.C. § 11101 et seq., ("HCQIA") preempts the patients' right of access to peer review documents under Amendment 7 , federal courts have routinely held that there is no federal peer review privilege. HCQIA protects only the information reported under the Act, and does not establish confidentiality for peer review records or protect peer review records and materials from discovery and court subpoena. *Atteberry v. Longmont United Hospital*, 221 F.R.D. 644, 647 (D.Colo. 2004); *Medical Society of Jersey v. Mottola*, 320 F.Supp.2d 254 (D.N.J. 2004); *Johnson v. Nyack Hospital*, 169 F.R.D. 550 (S.D.N.Y. 1996); *Mattice v. Memorial Hospital of South Bend*, 203 F.R.D. 381 (N.D. Ind. 2001)(42 U.S.C. §11137(b) protects what is reported to national clearinghouse, but not what is gathered during the peer review process); *Marshall v. Spectrum Medical Group*, 198 F.R.D. 1 (D. Maine 2000).

Further, Amendment 7 section 2(b) states that patient identities "shall not be disclosed" and "any privacy restrictions imposed by federal law shall be maintained."

As the court stated in *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D.Calif. 1991): "Congress spoke loudly with its silence in not including a privilege against discovery of peer review materials in the HCQIA." Clearly, if Congress had viewed the confidentiality of *all* peer review documents as essential to an effective peer review process or implementation of the Act, it could have

expressly extended the privilege afforded to information reported under the Act to other hospital records.

The people of the State of Florida have rejected, overwhelmingly, the health care industry's claim that confidentiality of all peer review documents and "effective peer review" operate together to adequately protect patients' rights. The people have decided that the importance of having access to this information far outweighs any benefits of the confidentiality previously accorded to the documents. While Article X, Section 25 provides 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 does nothing to halt the peer review process or repeal the requirements that health care providers engage in risk management.

Physicians practiced on the staff of hospitals in this state for decades before peer review confidentiality was provided, and it is doubtful that they will forego the ability to practice medicine in hospitals and clinics and to be providers in HMO's because confidentiality in peer review proceedings is no longer available. As argued by LCMC "Congress created immunity from suit as an incentive for hospitals and physicians to engage in peer review, . . ." Initial Brief at 42. This incentive is still provided for participants in the peer review process. *See*, Sections 395.0191(7); 395.0193(5); 766.101(3)(a)&(7)(e), Florida Statutes; 42 U.S.C.

§11111.

Federal courts have not found frustration of core Congressional objectives in other cases where preemption has been claimed as a shield from disclosure. *See, e.g., Mattice v. Memorial Hospital of South Bend*, 203 F.R.D. 381 (N.D. Ind. 2001). Application of the provisions of Amendment 7 is not proscribed by the Supremacy Clause. Indeed, the federal Act itself provides that nothing therein is to be "construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State to seek redress for any harm or injury suffered as a result of negligent treatment by any physician, health care practitioner, or health care entity, . . ." 42 U.S.C. § 11115 (d).

Finally, LCMC argues that "this Court spoke quite clearly when it said 'meaningful peer review would not be possible *with* a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues.'" Initial Brief at 39-40. The argument misstates – indeed, misquotes – *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). What this Court actually said is:

> In an effort to control the escalating cost of health care in the state, the legislature deemed it wise to encourage a degree of self-regulation by the medical profession through peer review and evaluation. The

> legislature also recognized that meaningful peer review and evaluation would not be possible *without* a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues.

Holly, 450 So. 2d at 219-20. In *Holly*, this Court assumed that the Legislature had balanced the detriment that the privilege would have on the rights of civil litigants against the potential for health care cost containment, and found the latter to be of greater importance. Appellant stretches this Court's acknowledgment of legislative prerogative into a pronouncement that this Court has "indelibly stamped confidentiality as an indispensable component" of effective peer review. Initial Brief at 39. That is simply not true. The deference this Court gave the Legislature in *Holly* now must give way to the greater deference owed to the people in a constitutional democracy. *Gray v. Golden*, 89 So. 2d 790. The decision of the First District should be affirmed.

VI. CONCLUSION

For the reasons expressed above this Court should affirm the First District Court of Appeal's determinations that: 1) Amendment 7 applies to records created prior to the amendment's effective date; 2) Amendment 7 is self-executing; and 3) § 381.028 is an unconstitutional restriction of express constitutional rights.

Likewise, this Court should hold that Amendment 7 does not violate either the Contract Clause or the Supremacy Clause of the United States Constitution in its application.

Respectfully submitted,

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