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.

AMENDED INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This case presents important questions concerning the validity of § 381.028, Fla. Stat. (2005), under Amendment 7; the proper interpretation of Amendment 7; and the validity of Amendment 7 under the Contract Clause (Art. I, § 10, cl. 1) and the Supremacy Clause (Art. VI, cl. 2) of the U.S. Constitution.

The record on appeal ("R") consists of the five volumes forwarded by the Clerk of the First District. The Appendix of Petitioners in that Court consisted of 20 numbered tabs; Appellant will refer to the Appendix below by use of the term "Tab." For the convenience of the Justices of this Court, Appellant has contemporaneously with its Initial Brief submitted a short Appendix, referred to as "FSC App." It contains four tabbed items, A-D, in sequence: the opinion below, Amendment 7, § 381.028, Fla. Stat. (2005), and the opinion of the Fifth District in *Fla. Hosp. Waterman, Inc. v. Buster*, 2006 WL 566084 (Fla. 5th DCA Mar. 10, 2006).

I. STATEMENT OF THE CASE AND OF THE FACTS

A. The Nature of the Case

This is an appeal by Lake City Medical Center ("LCMC") from a decision and opinion of the First District denying LCMC's petition for a writ of common law certiorari to quash a discovery order compelling disclosure of records that were

privileged and confidential when created and declaring § 381.028 Fla. Stat. (2005) unconstitutional. *Notami Hosp. of Fla., Inc. v. Bowen*, 927 So. 2d 139, 145 (Fla. 1st DCA 2006). (FSC App. A) This Court has mandatory appellate jurisdiction under Fla. R. App. P. 9030(a)(1)(A). In the courts below, Appellant LCMC was the Petitioner in the First District and Defendant in the Circuit Court.

B. The Course of Proceedings and Dispositions Below

Appellees, who were Plaintiffs in the Circuit Court and Respondents in the First District, sued for medical malpractice. Each suit was filed before Amendment 7 was passed. Each suit alleged that Dr. Robert Pendrak performed negligent surgery, resulting in injury or death to plaintiffs (or their decedents). LCMC was alleged to be negligent in credentialing, retaining, or supervising Dr. Pendrak. By agreement of the parties, the trial court consolidated the three suits for purposes of discovery, which turned on the interpretation and application of Amendment 7 ("patients' right to know about adverse medical incidents"), Art. X, § 25, Fla. Const. (FSC App. B). The trial judge granted plaintiffs' motion to compel pretrial discovery of information that was acknowledged to be privileged and confidential at the time it was created or communicated.

Summary of The Amendment 7 Discovery Dispute

Plaintiffs served LCMC with a Notice of Taking Videotape Deposition Duces Tecum of Gary [*sic*] Karsner, LCMC's CEO before passage of Amendment

7. It sought production of "all files, papers, and computer records relating to the selection, retention, or termination of Robert B. Pendrak, M.D., at Lake City Medical Center." (Tab 3). LCMC filed a Motion for Protective Order as to the credentialing file and related documents, invoking, *inter alia*, risk management, peer review and other statutory privileges. (Tab 4). LCMC also filed a Privilege Log pursuant to Fla. R. Civ. P. 1.280(b)(5). (Tab 5).

The deposition was held on November 3, 2004, the day after Amendment 7 was passed by the voters. Respondents' counsel propounded questions to which counsel for LCMC invoked statutory privileges. A single example suffices to convey the nature of the discovery dispute at deposition.[1]

Q. During the time that you've been here, have you heard of any other patient that has eviscerated [*sic*] following elective surgery from a wound infection?

MR. SHAD: Now, again, if any information has come to you through any hospital Risk Management or Peer Review Committee or Quality Assurance Committee, I instruct you not to answer; if you got that information from another source, you certainly should answer it.

THE WITNESS: I can't answer it.

(Tab 6, p.180). Tab 10 lists the specific questions that Plaintiffs identified as the subject of their motion to compel.[2]

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[1] Other examples appear in the transcript of deposition. (Tab 6.)

[2] Plaintiffs listed these pages of the deposition transcript as containing questions subject to the motion to compel answers: 66-72, 121-24, 129-30, 133, 143- 45, 149,

Written discovery was also at issue. In a successive motion to compel, Plaintiffs broadened their previous request (Tab 8) from the credentialing file of Dr. Pendrak to "[a]ny records made or received in the course of business by LCMC relating to any adverse medical incident involving Dr. Pendrak." (Tab 10, Exh. A).

Three Motions to Compel were called up for hearing on May 12, 2005. At the hearing, it was stipulated that:

> the three motions … are all predicated … [on] Amendment 7. There's no other ground stated. And so the only thing before the court is Amendment 7.

(Tab 2, p.37). Plaintiffs' counsel conceded that the documents and information sought to be compelled were created and were privileged before passage of Amendment 7. There was no individualized consideration of the unanswered deposition questions. The order did not differentiate between Mr. Karsner's testimony and LCMC's production of documents. Amendment 7 applies by its terms only to "records." Art. X, § 25(a), Fla. Const. The legislature enacted a statute to implement Amendment 7. It, too, refers only to "records." § 381.028(7)(a), Fla. Stat. (2005). (FSC App. C).

On August 5, 2005, the trial court entered 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.

154, 155-56, 161, 176, 180. (Tab 10).

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.[3] (Tab 1). All written and testimonial information that was compelled to be disclosed was created before the November 2, 2004 passage of Amendment 7. The discovery order stayed execution pending appellate review.[4] (Tab 2, p.7, ¶ 3).

Certiorari Review in the First District

LCMC timely filed a petition for writ of common law certiorari to quash the order of the trial court.[5] (R1:1). The First District issued a briefing schedule and oral argument was had. On April 21, the First District issued the opinion that is the subject of this appeal. (R5:712; FSC App. A). It denied the petition and let the discovery order stand without differentiating between the written discovery requests and the oral deposition questions. It affirmed the three legal conclusions reached by the trial court: Amendment 7 is self-executing; Amendment 7 is

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[3] The trial court ordered Mr. Karsner "to [respond to] the questions propounded to him at deposition which, prior to the passage of Amendment 7, sought privileged information." (Tab 1, p.6, ¶ 2).

[4] By agreement of the parties following decision of the First District, a continuation of the stay pending disposition of litigation in this Court was entered by the circuit court.

[5] "[A] petition for writ of certiorari is appropriate to remedy situations in which hospitals have been wrongly ordered to disclose statutorily privileged documents." *Tarpon Springs Gen. Hosp. v. Huidak*, 556 So. 2d 831, 832 (Fla. 2d DCA 1990).

retroactive to records and reports created and incidents occurring before it was passed on November 2, 2004; and § 381.028, Fla. Stat. (2005), implementing Amendment 7, is unconstitutional. *Notami*, 927 So. 2d 139, 145 (Fla. 1st DCA 2006).

The Fifth District earlier reached a partially contrary conclusion, holding that Amendment 7 was not retroactive. *Buster*, 2006 WL 566084 *8. (FSC App. D). The First District certified conflict with *Buster* with respect to its conclusion that Amendment 7 is retroactive. *Notami*, 927 So. 2d at 145. Judge Ervin dissented from the holding that Amendment 7 is retroactive. *Id.*

LCMC timely filed a notice of appeal invoking this court's mandatory appellate jurisdiction under Fla. R. App. P. 9.030(a)(1)(A)(ii). (The notice also invoked this Court's discretionary jurisdiction over the certified conflict under Fla. R. App. P. 9.030(a)(2)(A)(vi).) This Court granted review of three certified questions in *Buster*. Appellant Notami filed a notice of pending related case with this Court and suggested that the two cases, having the same three questions in common, should be briefed and argued contemporaneously. Counsel for Florida Hospital Waterman agreed in a similar filing.

C. Standards of Review

All issues of constitutional validity and statutory interpretation are legal questions subject to *de novo* review. *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004).

SUMMARY OF ARGUMENT

I. NON-RETROACTIVITY

A. Because Amendment 7 Does Not Express A Retroactive Intent, The Law Presumes Against Retroactivity In Order To Protect Settled Expectations. All The Discovery Sought By Plaintiffs Pre-Dates Amendment 7.

Amendment 7 took effect the day it passed, November 2, 2004. The Fifth District considered its statement of effective date as evidence of prospective intent. *Fla. Hosp. Waterman, Inc. v. Buster,* 2006 WL 566084 *6 (Fla. 5th DCA Mar. 10, 2006). Amendment 7 did not explicitly declare itself to be retroactive to pre-existing records of "adverse medical incidents." The presumption is that the amendment receives "prospective effect only." *In re Advisory Opinion to the Governor – Terms of County Court Judges*, 750 So. 2d 610, 614 (Fla. 1999).

Amendment 7 has undeniable retroactive effect because it "attaches new legal consequences to events [confidential peer review, credentialing and related confidential quality assurance investigations] completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265.

B. Retroactive Application Of Amendment 7 Would Destroy Vested Rights.

Retroactive application of Amendment 7 to compel disclosure of documents that were privileged and confidential when they were created will destroy vested rights. *Somer v. Johnson*, 704 F.2d 1473, 1479 (11th Cir. 1983) (holding that Florida statute protecting the confidentiality of the records of hospital committees formed to evaluate and improve quality of health care created a substantive privilege). Retroactive application of a statute is invalid where "vested rights are adversely affected or destroyed . . . ." *McCord v. Smith*, 43 So. 2d 704, 709 (Fla. 1949). Retroactive application of a constitutional amendment is likewise disfavored where vested rights would be destroyed and where its terms do not compel retroactivity. The Fifth District reached the correct conclusion on this issue: "Retroactive 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*, 2006 WL 566084 at *6.

C. The Legislative And Executive Branch Determinations That Amendment 7 Is Prospective Only Are Entitled To Respect.

Section 381.028(5), Fla. Stat. (2005) interprets Amendment 7 as prospective only, *i.e.*, to documents created or incidents occurring after November 2, 2004. Legislators have responsibilities for constitutional interpretation. *State ex rel. Davis*

v. Rose, 122 So. 225, 237 (Fla. 1929). Their judgment should be respected if it is rational.

Before the statute was enacted, the General Counsel for the Department of Health (DOH) had issued a legal opinion that "[u]nder applicable constitutional principles, Amendment 7 is prospective in application" meaning that "both the adverse medical incident must have occurred and the record must have been created after November 2, 2004 in order for Amendment 7 to apply." Its legal determination, even of constitutional law, is entitled to "deference." *Pringle v. Marine Fisheries Comm'n*, 732 So. 2d 395, 397 (Fla. 1st DCA 1999).

II. APPLICATION OF AMENDMENT 7 TO LCMC'S PRE-EXISTING CONTRACT WITH ITS MEDICAL STAFF WOULD NULLIFY THE CONTRACTUAL REQUIREMENT THAT PEER REVIEW REMAIN CONFIDENTIAL, IN VIOLATION OF THE CONTRACT CLAUSE.

The documents and testimony sought by Plaintiffs were made or received under contractual guarantees of confidentiality. As a condition of licensure, LCMC is required by Florida law to "have a planned, systematic, hospital wide approach to the assessment, and improvement of its performance to enhance and improve the quality of health care provided to the public." Agency for Health Care Administration (AHCA), Fla. Admin. Code R. 59A-3.271(1). (Tab 15). The required hospital system for quality improvement "must be defined in writing, approved by the governing board (of the hospital), and shall include a confidentiality policy." Fla. Admin. Code R. 59A-3.271(1)(b)(3). (Tab 15).

The governing board of LCMC approved and adopted the bylaws of the medical staff of the hospital and the rules regulating its medical staff. Such adoption to accomplish peer review and credentialing constitutes a binding, enforceable contracts between it and the physicians comprising its medical staff. *See* *Greenberg v. Mount Sinai Med. Ctr.*, 629 So. 2d 252, 257 (Fla. 3d DCA 1993); *Lawler v. Eugene Wuesthoff Mem'l. Hosp. Ass'n*, 497 So. 2d 1261, 1264 (Fla. 5th DCA 1986). Confidentiality is a material term of those contracts. Application of Amendment 7 to compel disclosure of confidential peer review information would substantially impair those agreements, in violation of the Contract Clause.

III. BECAUSE AMENDMENT 7 DID NOT DEFINE ITS OPERATIVE TERMS AND LEFT OPEN IMPORTANT POLICY QUESTIONS, IT IS NOT SELF-EXECUTING. LEGISLATIVE IMPLEMENTATION WAS REQUIRED.

Amendment 7 left numerous gaps in the law. It did not, for example, define "record"; it did not provide a "look back" period; it did not address retroactivity. These and other holes needed to be filled by legislation. Section 381.028(2), Fla. Stat. (2005), did so. By comparison, Amendment 3, The Medical Liability Claimant's Compensation Amendment, appeared on the same ballot as Amendment 7 and specifically provided that it was self-executing. Amendment 7 did not. It could not. It was far too indefinite.

The test for a newly enacted amendment is "whether or not the provision 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." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). Amendment 7 fails that test. Unlike *Gray*, which involved application of a simple mathematical judge-to-population ratio, the vague language of Amendment 7 left open significant questions of public policy and practical implementation. Implementing legislation was necessary.

IV. SECTION 381.028 IS A CONSTITUTIONALLY VALID IMPLEMENTATION OF THE AMBIGUITIES OF AMENDMENT 7.

The First District concluded that the challenged statute conflicted with Amendment 7 in four respects. But viewed as a whole, it provides a workable system to implement Amendment 7. The "final report" clause is not a limitation on Amendment 7 disclosures. Rather, it defines what constitutes an "adverse" medical incident report by creating a standard that approximates probable cause. Without such a standard, those required to respond to Amendment 7 requests are required to guess at the meaning of an incident that "could have caused" injury or death. The Court of Appeal also disapproved of the "time frame" imposed by the statute; but the statute and the *Buster* court correctly analyzed Amendment 7 as lacking in a clear statement of retroactive intent.

The First district condemned the statute's preservation of existing self-policing privileges, but the language of Amendment 7 does not mention, much less abolish, peer review, risk management, credentialing or quality assurance

privileges at all. Its *Notami* opinion infers an intention by the voters to destroy those privileges. This was one possible reading of Amendment 7 but not the best one. Absent an explicit statement in Amendment 7 abolishing privileges and confidentiality, the Court went too far in divining a *vox populi* to create a "new era" for the medical care system.

The First District also faulted the statute's prohibition on pretrial discovery. Amendment 7 makes no reference at all to litigation or to pretrial discovery. It would have been an easy matter for the Amendment 7 drafters to declare that the patients' "right to know" was a pretrial discovery device. They did not do so. Although pretrial discovery is a possible interpretation of "access" to records of adverse medical incidents, it is not the best one. Pretrial discovery requires sharing of the privileged documents with persons who are not entitled to receive them under Amendment 7, *e.g.*, the co-defendants of the hospital. Amendment 7 does not provide for pretrial discovery, and this Court should strive to uphold the statute.

The statute is correct in viewing Amendment 7 as providing a consumer information model for prospective patients shopping for medical services, not lawsuits. This model also supports the statutory definition of adverse medical incident reports as those that are "the same or substantially similar" to those of the patient making the request. §381.028(7)(a), Fla. Stat. (2005).

V. AMENDMENT 7 IS INVALID UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION IF THE ABOLITION OF PEER REVIEW PRIVILEGES IS UPHELD.

Amendment 7 is preempted by federal law because compelled disclosure of confidential peer review documents will stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress expressed in the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101 et seq. (2000), in which effective peer review is central.

ARGUMENT

I. AMENDMENT 7 DOES NOT APPLY RETROACTIVELY TO COMPEL DISCLOSURE OF RECORDS THAT WERE PRIVILEGED AND CONFIDENTIAL WHEN CREATED.

A. Because Amendment 7 Is Not Explicitly Retroactive, The Law Presumes It To Be Prospective; All Information At Issue Pre-Dates Amendment 7.

All records ordered disclosed by the trial court pre-date the enactment of Amendment 7. All answers to deposition questions compelled by the trial court pertain to pre-Amendment 7 events. Amendment 7 took effect the day it passed, November 2, 2004. The Fifth District construed that as indicating prospective intent. *Fla. Hosp. Waterman, Inc. v. Buster*, 2006 WL 566084 at *6. Amendment 7 did not explicitly create a patient's right of access to records of adverse medical incidents created before that date. The records were, by law and by concession of opposing counsel, exempt from discovery before passage of Amendment 7.

The counter-argument made by Appellees in the court below is that Amendment 7 is not retroactive "merely" because it applies to "conduct antedating" the enactment, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). This is a half truth. Amendment 7 is retroactive not "merely" because it applies to past conduct but because it attaches new, harmful legal consequences to that conduct. Its retroactive effect is undeniable.

Retroactive law is a potent medicine that must be administered sparingly and only when the intention to do so is explicit. For this reason, "[u]nless specifically stated in the text or in the statement placed on the ballot, constitutional amendments are generally given prospective effect only." *In re Advisory Opinion to the Governor – Terms of County Court Judges*, 750 So. 2d 610, 614 (Fla. 1999).

There is no explicit statement of retroactive intent in Amendment 7 or its ballot summary. Amendment 7 is silent as to its effect on pre-existing documents. Silence indicates a lack of retroactive intent. *See Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438, 441 (Fla. 2001) (finding no clear legislative intent supporting retroactive application where statute was "silent concerning the effect . . . on those records in existence at the time the statute was enacted").

Nonetheless, the First District inferred retroactive intent by focusing on words in Amendment 7 that apply only to a sub-set of the total universe of potential "patients" who could make Amendment 7 requests, those who had "*previously*

undergone treatment." *Notami Hosp. of Fla., Inc. v. Bowen*, 927 So. 2d 139, 145 (Fla. 1st DCA 2006) (emphasis in the original). According to the Court, this "expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment." *Id.*

This is a *non sequitur* for two reasons. First, Sec. 25(b)(2) of Amendment 7 also defines a "patient" in the present tense, as one who "is undergoing . . . care or treatment." Present patients by definition have already made their medical consumer choices to begin treatment; they have no logical claim to records of adverse medical incidents created before Amendment 7 was passed. Second, even for past patients, there is no necessary nexus between having previously undergone treatment and seeking disclosure of privileged and confidential records of "adverse medical incidents." Time travel being impossible, such records could not possibly influence a patient's past decision to undergo procedures or treatments.

The most that can be said about Amendment 7's retroactive intent is that it is ambiguous and uncertain. It does not crisply state, as legal drafters could, "This Amendment applies to records of adverse medical incidents in existence on the date of enactment." If it did, there would be no substantial issue of retroactivity. But there is, as evidenced by the split between the First and Fifth Districts and Judge Ervin's dissent in the court below. The question is how should this Court interpret

Amendment 7 in light of its ambiguity? The answer is simple: retroactivity is very strongly disfavored, both by Florida law and by federal law.

Retroactive application of a law inherently poses a threat to fundamental fairness because it upsets settled expectations, breaking pre-existing legal promises.

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Landgraf, 511 U.S. at 265 (1994) (footnote omitted). So strong is the presumption against retroactivity that the U.S. Constitution contains multiple prohibitions against it: the *ex post facto* clause; the ban on bills of attainder; and the due process clause. "These provisions demonstrate that retroactive statutes raise particular concerns." *Id.* at 266.

The Framers were wise in this regard. They understood the uses and abuses of political power. What they said about state legislatures applies equally to a state-wide referendum by the electorate:

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. . . . political pressures pose[ ] a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. The anti-retroactivity principle presents a compelling reason for this Court to choose the prospective interpretation over the retroactive one where the terms of Amendment 7 do not clearly dictate the outcome.[6]

It would be especially unfair to infer a duty of retroactive disclosure when most of the documents in question were created by statutory mandate. Section 395.0197(6)(a), Fla. Stat. (2005), relating to risk management, is an example. "Each licensed facility subject to this section shall submit an annual report to the agency summarizing the incident reports that have been filed in the facility for that year." The *quid pro quo* for such mandatory disclosure is that "the annual report is confidential and is not available to the public pursuant to § 119.07(1), Fla. Stat. (2004), or any other laws providing access to public records." Nor is the annual report "discoverable or admissible." § 395.0197(6)(c), Fla. Stat. (2005). There are parallel guarantees for credentialing and peer review.

In short, doctors and medical review committees have for three decades relied in good faith upon the promises of confidentiality made by the applicable statutes. To now "open the books" on those confidential communications would

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[6] Even a clear expression of retroactive intent would not be dispositive; it is only a starting point for analysis. "[T]he second inquiry is whether retroactive application is constitutionally permissible." *Metro. Dade Co. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999). Thus, even where a statute evinces a purpose to apply retroactively, a court should reject such an application if it "impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. LaForet*, 658 So. 2d 55, 61 (Fla. 1995).

break faith with all those in the medical world who relied upon the confidentiality of their peer review and other self-policing communications, including LCMC.

All LCMC participants in the credentialing, peer review and risk management process operated under statutory assurances of confidentiality. They had the guarantees of law that their comments and critiques would remain private and confidential. Those legal guarantees created long standing settled expectations that should not be discarded by retroactive application of a later law that lacks an explicit command to do so.

B. LCMC's Vested Rights In The Confidentiality Of The Information Sought Requires Judicial Enforcement Of The Presumption Against Retroactivity Where The Amendment Is Ambiguous.

In addition to shattering settled expectations, retroactive application of Amendment 7 will destroy vested rights. A retroactive application is invalid where "vested rights are adversely affected or destroyed . . . ." *McCord v. Smith*, 43 So. 2d 704, 709 (Fla. 1949). Accord, *R.A.M. of S. Fla., Inc. v. WCI Commtys., Inc.*, 869 So. 2d 1210, 1217 (Fla. 2d DCA 2004). Here, the rights that would be destroyed by retroactive disclosures are substantive rights. Thus, *Somer v. Johnson*, 704 F.2d 1473, 1479 (11th Cir. 1983), held that the Florida peer review statute[7] created a substantive privilege in protecting the confidentiality of records of hospital committees that evaluate and improve quality of health care.

[7] § 768.40(4), Fla. Stat. (1983), now codified as § 766.101(5), Fla. Stat. (2005).

Salt Lake City Child and Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1019-20 (Utah 1995) upholds the same rule. There, the defendant in a negligence case sought the therapy records of the plaintiff from a clinic, arguing that a statute abolished the privileged nature of the communications *post facto*. The Utah Supreme Court held that the subsequently enacted statue could not be applied retroactively because of the vested rights of the patient to have her communications with the clinic, conducted under an expectation of confidentiality, kept private.

The information ordered disclosed by the trial court is as privileged and confidential as attorney-client communications. Retroactive disclosure would be as radical a change as suddenly opening the books on confidential attorney-client communications pursuant to a constitutional amendment creating a "client's right to know about adverse legal incidents" where the amendment was not explicit in declaring a retroactive intention. The parallel between the peer review body of privileges and attorney client confidentiality is strong: both require the guarantee that confidences will be maintained in order for the professional relationship to work. This Court explicitly recognized the need for medical peer review confidentiality, in analyzing the peer review privilege: "The discovery privilege of subsection (4) [of § 766.101] was clearly designed to provide that degree of confidentiality necessary for the full, frank medical peer evaluation which the legislature sought to encourage." *Holly v. Auld*, 450 So. 2d 217, 220 (Fla. 1984).

Amendment 7 is ambiguous. It did not advise the voters that adoption of Amendment 7 would break numerous statutory promises made in the past to physicians and other members of medical staffs. It did not declare its intention to open the books on all pre-existing privileged records. This court should not supply the missing intention. Amendment 7 should not be interpreted to apply where its own language does not go. *See Pub. Health Trust of Dade County v. Lopez*, 531 So. 2d 946, 949 (Fla. 1988) (observing that court may not "insert words or phrases in a constitutional provision, or supply an omission that was not in the minds of the people when the law was enacted").

C. The Legislative and Executive Branch Determinations That Amendment 7 Is Prospective Are Entitled To Respect.

Ever since *Marbury v. Madison*, 5 U.S. 137, 177 (1803), it has been axiomatic that "[i]t is emphatically the province and duty of the judicial department to say what the law is." It is also fundamental that the legislative branch has a role to play in constitutional interpretation. Legislators have responsibilities for constitutional interpretation. "Legislators are just as capable" as judges "in ascertaining and applying the meaning" of constitutional amendments. *State ex rel. Davis v. Rose*, 122 So. 225, 237 (Fla. 1929).

The legislative judgment that interprets Amendment 7 as prospective only, *i.e.*, to documents created or incidents occurring after November 2, 2004, is entitled to respect. Indeed, "every reasonable doubt must be indulged in favor of the act. If

it can be rationally interpreted to harmonize with the Constitution, it is the duty of the court to adopt that construction and sustain the act." *Holley v. Adams*, 238 So. 2d 401, 404 (Fla. 1970). *Accord, Stewart v. Green*, 300 So. 2d 889, 893 (Fla. 1974). "When the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other it would be valid, it is the duty of the court to adopt that construction which will save the statute from constitutional infirmity." *Leeman v. State*, 357 So. 2d 703, 704 (Fla. 1978).

Likewise, the General Counsel for the Department of Health (DOH) had issued a legal opinion of non-retroactivity: "under applicable constitutional principles, Amendment 7 is prospective in application" meaning that "both the adverse medical incident must have occurred and the record must have been created after November 2, 2004 in order for Amendment 7 to apply." That departmental determination, even of constitutional law, is entitled to "deference." *Pringle v. Marine Fisheries Comm'n*, 732 So. 2d 395, 396 (Fla. 1st DCA 1999).

II. APPLICATION OF AMENDMENT 7 TO LCMC's PRE-EXISTING CONTRACT WITH ITS MEDICAL STAFF WOULD NULLIFY THE CONTRACTUAL REQUIREMENT THAT PEER REVIEW REMAIN CONFIDENTIAL, IN VIOLATION OF THE CONTRACT CLAUSE.

In addition to being protected by statutory confidentiality, the documents and testimony sought by Plaintiffs were made or received under contractual guarantees

of confidentiality. As a condition of continuing licensure, LCMC is required by Florida law to "have a planned, systematic, hospital wide approach to the assessment, and improvement of its performance to enhance and improve the quality of health care provided to the public." Agency for Health Care Administration (AHCA), Fla. Admin. Code R. 59A-3.271(1). (Tab 15).

The required hospital system for quality improvement "**must be defined in writing**, approved by the governing board (of the hospital), and shall include **a confidentiality policy**." Fla. Admin. Code R. 59A-3.271(1)(b)(3)(emphasis added). (Tab 15). State statutes impose similar requirements, *e.g.*, § 395.0193(2), Fla. Stat. (2005).

Long before passage of Amendment 7, the governing board of LCMC, in compliance with Florida law, approved and adopted the bylaws of the medical staff of the hospital and the rules regulating its medical staff. These pre-Amendment 7 documents "define in writing" the "hospital system for quality improvement" and include the mandated "confidentiality policy." Indeed, the LCMC bylaws emphasize confidentiality.[8]

[8] Art. III, Section 3:

> Acceptance of membership on the Medical Staff shall constitute the staff member's agreement that he will … maintain confidentiality of all communications relating to patient information, credentialing, peer review, Medical Staff Committees information, quality

The bylaws adopted by the medical staff of LCMC to accomplish peer review and credentialing are a binding, enforceable contract between it and the physicians comprising its medical staff. *See Greenberg v. Mount Sinai Med. Ctr.*, 629 So. 2d 252, 257 (Fla. 3d DCA 1993); *Lawler v. Eugene Wuesthoff Mem'l. Hosp. Ass'n*, 497 So. 2d 1261, 1264 (Fla. 5th DCA 1986). This contract requires that the members of the medical staff and all who participate in the peer review process do so in a confidential setting and that all peer review information remain confidential and privileged.

> assessment and performance improvement activities. (Tab 16, p. 10). (Emphasis added).

Art. VIII, Section 6:

> The presiding officer, prior to the commencement of any hearing … shall inform all committee employees, agents, investigators, attorneys, witnesses or other participant members of the committee that … [a]ll communications to the committee are privileged and confidential; [a]ll actions of the committee are privileged and confidential; [and] [t]he unauthorized disclosure of any privileged and confidential matters are expressly prohibited by the Staff Bylaws … . (Tab 16, p. 38). (Emphasis added).

Art. XIV, Section 2:

> The confidentiality … applies to all information or disclosures performed or made in connection with . . . applications for appointment, clinical privileges or specified services, [and] periodic reappraisals for reappointment, clinical privileges or specified privileges. (Tab 16, p. 55). (Emphasis added).

The confidentiality provisions in the contract are essential to accomplishing the goals of peer review. Confidentiality is ***crucial*** to ensuring that peer review and related quality-of-care privileges work to protect the public. The "[f]ocus of the peer review process" is "to reduce morbidity and mortality and to improve patient care." § 395.0193(2)(g), Fla. Stat. (2005). "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients." *Dade County Med. Ass'n v. Hlis*, 372 So. 2d 117, 120 (Fla. 3d DCA 1979). "In order to make meaningful peer review possible, the legislature provided a guarantee of confidentiality for the peer review process." *Cruger v. Love*, 599 So. 2d 111, 113 (Fla. 1992).

In short, confidentiality is a material term of the LCMC contract. The Contract Clause of the U.S. Constitution provides that "[n]o State shall [] pass any [] Law impairing the Obligation of Contracts . . . ." The threshold inquiry under the Contract Clause is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

Because of the express constitutional prohibition against any law "impairing the obligation of contracts," this Court in *Pomponio v. Claridge of Pompano Condo. Inc.*, 378 So. 2d 774, 782 (Fla. 1980), reaffirmed the "well-accepted

principle that virtually no degree of contract impairment is tolerable . . . ." The initial inquiry is whether the enactment operates as a substantial impairment of a contractual relationship. *Id*. at 780. The Court then applies a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes to a degree greater than is necessary to achieve that objective. *Id.*

By abolishing the confidentiality of records in peer review and credentialing activities, Amendment 7 creates a severe impairment in the contractual relationship between the hospital and its medical staff. Through the bylaws of the medical staff, the hospital fulfills its condition of licensure by providing for peer review of the physicians who deliver health care services at the facility. § 395.0193(2), Fla. Stat. (2005). With regard to credentialing and peer review activities, confidentiality is necessary for a full and frank medical peer evaluation. *Holly v. Auld*, 450 So. 2d at 220. Indeed, "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." *Id.*

This Court in *Pomponio*, 378 So. 2d at 780, adopted "an approach to contract clause analysis similar to that of the United States Supreme Court." It cited with approval, *id.* at 776, U.S. Supreme Court decisions in *Home Building & Loan*

Association v. Blaisdell, 290 U.S. 398, 438 (1934) and *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The latter case warns that the "State is not free to impose a drastic impairment when . . . a more moderate course would serve its purposes equally well." *Id.* at 31. Legislation must be addressed to a legitimate end and the measures taken must be reasonable and appropriate to that end.

Is Amendment 7 reasonable and appropriate to achieve its objective? The purposes of permitting consumers (patients) of health care services access to information about health care providers so that they can make informed decisions about which providers to use and what procedures to subject themselves to are legitimate. But Amendment 7 attempts to achieve those objectives by giving unlimited access to virtually every document and record created in order for a hospital to fulfill its primary purpose of rendering quality care. Moreover, as shown by the litigation undertaken since passage of the Amendment, its proponents clearly envision the amendment as a broad pretrial discovery device to be used to troll through hospitals' records.

III. BECAUSE AMENDMENT 7 DID NOT DEFINE ITS OPERATIVE TERMS AND LEFT OPEN IMPORTANT POLICY QUESTIONS, IT IS NOT SELF-EXECUTING. LEGISLATIVE IMPLEMENTATION WAS REQUIRED.

Amendment 7 left numerous *lacunae* in the law. It did not define "record"; it did not provide a "look back" period; it did not address retroactivity. These and other gaps needed to be filled by interstitial legislation. Section 381.028(2), Fla.

Stat. (2005), did so: "It is the purpose of this act to implement s. 25, Art. X of the State Constitution." *See* H. Reps. Staff Analysis on HB 1797 CS (2005). (Tab 17). "The bill defines several terms not defined in Constitutional Amendment 7, including the type of facilities and providers subject to the amendment." *Id*. at 3. "The bill incorporates the definitions of other terms precisely as defined in Constitutional Amendment 7, including 'adverse medical incident' and 'patient'." *Id*. (footnote omitted). It also "supplement[s]" Amendment 7. *Id.* at 2.

Before enactment of § 381.028, Fla. Stat. (2005), the majority of circuit courts to consider the issue sensibly concluded that vaguely worded Amendment 7 was not self-executing but required implementing legislation. (Tab 18). They were correct. Amendment 7, unlike Art., I, § 26, Fla. Const. (Amendment 3), does not state that it is self-executing. Amendment 3, The Medical Liability Claimant's Compensation Amendment, appeared on the same ballot as Amendment 7; it specifically provides that it is self-executing. The drafters of Amendment 7 might have tried to follow that model. They did not. Indeed, the numerous holes in Amendment 7 precluded a declaration that Amendment 7 was self executing. The need for legislative supplementation was apparent:

> The 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 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.

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

The First District applied *Gray* to uphold Amendment 7; but *Gray* involved an amendment with a mathematical ratio of judges to inhabitants. Implementing that amendment was largely a mechanical process. Comparison to the far more complicated and uncertain terms of Amendment 7 is simply inapt.

This Court applied the *Gray* test in *Advisory Opinion to the Governor-1996 Amend. 5 (Everglades)*, 706 So. 2d 278 (Fla. 1997), to an amendment (now Art. II, § 7(b), Fla. Const.) providing that "[t]hose in the Everglades Agricultural Area who caused water pollution within the Everglades Protection Area . . . shall be primarily responsible for paying the costs of the abatement of that pollution." *Id*. at 281. The Court held that the amendment was *not* self-executing because it left unanswered too many questions about its effect and implementation:

> [W]e conclude that Amendment 5 is not self-executing and cannot be implemented without the aid of legislative enactment because it fails to lay down a sufficient rule for accomplishing its purpose. As you suggest in your letter, ***"****too many policy determinations remain unanswered" . . . such as what constitutes "water pollution"; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted.*

Id. (emphasis added).

Like Amendment 5, Amendment 7 left open significant questions of public policy and practical implementation. It is simply unworkable without

implementing laws. It does not even define what a "record" is. "The bill defines several terms not defined in Constitutional Amendment 7, including the type of facilities and providers subject to the amendment." *See* H. Reps. Staff Analysis on HB 1797 CS (2005) at 3. (Tab 17). There are many other unanswered questions:

> Q. Does Amendment 7 mandate access to records generated before passage of Amendment 7?
>
> A. No. Amendment 7 is not retroactive. § 381.028(5), Fla. Stat. (2005).
>
> Q: What records must a health care provider supply to a patient?
>
> A. § 381.028(7)(a), Fla. Stat. (2005), defines the records to which a "patient" has a right of access: "those of the facility or provider of which he or she is a patient and which pertain to any adverse medical incident affecting the patient or any other patient which involves the same or substantially similar condition, treatment, or diagnosis as that of the patient requesting access."
>
> Q. Does Amendment 7 apply to notes, drafts, preliminary memos--every document--related to an "adverse medical incident"?
>
> A. No. § 381.028(3)(j), Fla. Stat. (2005), defines "records" as "the final report of any adverse medical incident." It excludes "nonfinal versions" as well as attorney-client communications and work product.
>
> Q. Does Amendment 7 require disclosure in litigation of medical committee peer review meetings and other formerly privileged and confidential documents? Amendment 7 is silent.

> A. No. § 381.028(2), Fla. Stat. (2005), states that "all existing laws concerning the discoverability or admissibility into evidence of records of an adverse medical incident in any judicial or administrative proceeding remain in full force and effect."
>
> Q. Who will pay for copying and processing the records, including protecting patient identity as required by law (45 C.F.R. Parts 160 and 164, implementing portions of the Health Insurance Portability and Accountability Act of 1996)? Amendment 7 is silent.
>
> A. § 381.028(7)(c), Fla. Stat. (2005), provides details of costs, including "a reasonable charge for the staff time necessary" to protect patient identity by redaction or otherwise.
>
> Q. How far back in time can a request for records extend? Amendment 7 is silent.
>
> A. § 381.028(5), Fla. Stat. (2005), provides that a patient's request for records can extend back four years before the date of his request, which coincides with the statute of repose.

This Court in *1996 Amendment 5 (Everglades)*, 706 So. 2d at 281, specifically listed questions similar to these as indicators that the amendment was not self-executing. When an amendment is not self-executing, legislative action is necessary to implement the amendment. *Id.* at 282. In that event, "the voters expected the legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed, or protected." *Id.* The same was true of Amendment 7 and the legislature's subsequent enactment of § 381.028, Fla. Stat. (2005). See *Bayfront*

Med. Ctr. v. Neavins, 920 So. 2d 185 (Fla. 2d DCA 2006), implying that § 381.028, Fla. Stat. (2005), is "implementing legislation" in the course of holding moot the claim that Amendment 7 was self-executing.

IV. SECTION 381.028, FLA. STAT. (2005), IS A CONSTITUTIONALLY VALID IMPLEMENTATION OF THE AMBIGUITIES OF AMENDMENT 7.

The First District cited a number of cases for the black-letter rule that a statute must "give way" to a constitutional provision when the two are in conflict. *Notami*, 927 So. 2d at 142. Of course. But the courts should be very slow to find such a conflict:

> . . . every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act.

Holley, 238 So. 2d at 404. Indeed, most of the cases cited by the First District did not find such a conflict. The reason for this judicial reticence is clear. Repeating the "beyond reasonable doubt" threshold for a finding of unconstitutionality, this Court invoked the "large discretion … vested in the Legislature to determine the public interest and the measures for its protection" and the Court's correlative duty to seek a rational statutory interpretation that would harmonize the statute and the amendment. *Stewart v. Green*, 300 So. 2d 889, 893 (Fla. 1974). The Court concluded that the challenged statute was valid.

Repeals by implication are strongly disfavored. To the contrary, courts have "a duty to harmonize" the measures if feasible. An amendment to the Constitution repeals by implication only pre-existing *contradictory* laws:

> Implied repeals of statutes by later constitutional provisions is not favored and the courts require that in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary. Pursuant to this rule, if by any fair course of reasoning the statute can be harmonized or reconciled with the new constitutional provision, then it is the duty of the courts to do so.

In re Advisory Opinion to the Governor, 132 So. 2d 163, 169 (Fla. 1961). There must be a "positive repugnancy" between "old" and "new" law. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001). There is none here.

The First District did not seek an interpretation that would "harmonize" the statute and the amendment. Instead, it articulated what it perceived as four conflicts between Amendment 7 and the statute in the course of declaring it invalid. *Notami*, 927 So. 2d at 143. On closer analysis, the "conflicts" recede to *de minimis* proportions; they are rational interpretations of vague and undefined language in Amendment 7.

The "final report" clause is necessary to determine what in fact is an adverse medical incident by creating a standard that approximates probable cause. Without such a standard, those required to respond to Amendment 7 requests are required to guess at the meaning of an incident that "could have caused" injury or death. The

non-retroactivity clause is essential to preserve settled expectations and to protect vested statutory and contractual rights. The maintenance of statutory privileges, not explicitly addressed by the text of Amendment 7, was also essential to preserve quality-of-care programs. Nothing in Amendment 7 required a contrary conclusion. Finally, there is nothing in Amendment 7 that sets up "access" to records as a pretrial discovery weapon in litigation or requires full access to records of other patients not undergoing "substantially similar" procedures.

The First District condemned the statute's preservation of existing privileges[9] as "contrary to the "stated purpose" of Amendment 7. But the language of Amendment 7 does not mention, must less abolish, peer review, risk management, credentialing[10] or quality assurance privileges. An implied intention to sweep those privileges away was inferred by the Court. Such an inference is, of course, possible. But it is not required. On the contrary, the Court's duty was to strive to save the statute. In re-affirming the survival of these crucial privileges, §381.028(6)(a),

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[9] "This section does not repeal or otherwise alter any existing restrictions on the discoverability or admissibility of records relating to adverse medical incidents otherwise provided by law, including, but not limited to, those contained in ss. 395.0191, 395.0193, 395.0197, 766.101, and 766.1016 . . . ."

[10] Even after Amendment 7, a court quashed an order requiring a hospital to produce a physician's credentialing file, holding that the credentialing file "is not subject to discovery because it falls within the statutory privilege." *Columbia/JFK Med. Ctr. v. Sanguonchitte*, 920 So. 2d 711, 711 (Fla. 4th DCA 2006).

Fla. Stat. (2005), rationally implemented a vaguely[11] worded Amendment 7 that did not declare a contrary intention.

In substance, the First District accepted the conclusion of the Fifth District that Amendment 7 "heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality . . . ." *Buster*, 2006 WL 566084 at *8. This "new era" interpretation of Amendment 7 will be radically disruptive for the reasons presented above. There is very little support for it.

The First District's opinion, Notami, 927 So. 2d at 143 n.1, referenced the advisory statement of this Court in its ballot review opinion that Amendment 7 would "affect" two peer review privileges, §§ 395.0193(8) and 766.101(5), Fla. Stat. (2003). *Advisory Opinion to the Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents*, 880 So. 2d 617, 620-21 (Fla. 2004). But that two-sentence passage did not subject Amendment 7 to substantive analysis for its precise impact on the entire body of privileges. The passing comment for ballot-approval purposes cannot be regarded as authoritative. If the statement were taken literally, moreover, the maxim *expresio unius est exclusio alterius* would, by negative implication,

[11] The Acting Deputy General Counsel for DOH opined in the memo of January 24, 2005 that "the Amendment's definition of 'adverse medical incident' is broad and subject to ambiguity." (Tab 14).

mean that credentialing, risk management[12] and all other privileges *not* mentioned in the opinion were intended to survive Amendment 7. This Court's ballot advisory opinion cannot carry the weight that the First District gave it.

There was no indication on the Amendment 7 ballot that voters were being asked to throw out a decades-old, carefully designed and constructed system of critical self-analysis and self-policing affecting the costs and quality of medical care. Amendment 7 did not specify that it would strip the peer review process of confidentiality. Nor could it plausibly be inferred that voters intended this result when they read the ballot summary in the voting booth.[13]

The First District also faulted the statute's prohibition on pretrial discovery. The language of Amendment 7 makes no reference whatever to litigation or pretrial discovery procedures. It would have been an easy matter for the Amendment 7

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[12] A primary purpose of risk management is "[t]he investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents to patients." § 395.0197(1)(a), Fla. Stat. (2005). The goal is to develop "appropriate measures to minimize the risk of adverse incidents to patients . . . ." Because of the indispensable role of confidentiality, risk management information, like credentialing and peer review information, enjoys the same double exemptions from discovery and admissibility. *See* § 395.0197(6)(c), Fla. Stat. (2005).

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

drafters to declare that the patients' "right to know" was really a pretrial discovery device intended to provide ammunition to prospective plaintiffs. They did not do so.

Of course, this Court could construe the phrase "access to" as encompassing pretrial discovery. But it should not do so when the language of Amendment 7 does not. Pretrial discovery requires sharing of the privileged documents with persons who are not entitled to receive them under Amendment 7, *e.g.*, the co-defendants of the hospital in a civil suit. Given the choice, the better view belongs to the drafters of the statute: Amendment 7 provides a consumer information model for prospective patients shopping for medical services, not lawsuits. This model also supports the statutory limitations of adverse medical incident reports to those that are "the same or substantially similar" to those of the patient making the request.[14] §381.028(7)(a), Fla. Stat. (2005).

The opinions of the First and Fifth District kill off an entire network of statutes governing physicians, hospitals, nursing homes and so forth.[15] The crucial

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[14] There is an obvious difference between "substantially similar" and the "any" record language of Amendment 7. But not every deviation in a statute renders the statute unconstitutional. Approximately the same interpretive process has occurred in the legislative exegesis of the public records amendment, Art. I, §24, Fla. Const., through the statutory enactments of Ch. 119, Fla. Stat. (2005). There is scope for legislative implementation; perfect congruence is not required.

[15] Numerous statutes, both state and federal, are potentially affected by Amendment 7: (1) § 766.101(5), Fla. Stat (2005) (Medical Review Committee); (2)

role of confidentiality in credentialing, peer review, quality assurance and risk management functions was demonstrated above. There is no reasonable basis to conclude that the half-page Amendment 7 ballot measure was intended to tear down the entire, carefully built system of self-regulation. Amendment 7 did not in terms do so. This Court should not supply the missing intention. *Lopez*, 531 So. 2d at 949 (Fla. 1988).

Severability

Section 381.028, Fla. Stat. (2005), should be upheld in its entirety. But if this Court should determine to strike any of the four subsections targeted by the First District, the doctrine of severability would save the rest. In *Cramp v. Board of Pub. Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962), this Court set out a four-prong test for analyzing whether an unconstitutional portion of a statute is severable from the remaining portions.

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are

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§ 766.1016(2), Fla. Stat. (2005) (Patient Safety Data); (3) § 459.016(3), Fla. Stat. (2005) (Reports of Disciplinary Actions for Osteopaths); (4) § 458.337(3), Fla. Stat. (2005) (Reports of Disciplinary Physician Actions); (5) § 400.118(2)(c), Fla. Stat. (2005) (Quality Assurance-Nursing Homes); (6) § 395.0191(8) Fla. Stat. (2005) (Staff Membership and Clinical Privileges); (7-10) §§ 395.0197(4), (6)(c), (7), (13), Fla. Stat. (2005) (Internal Risk Management); and (11) §395.0193(8), Fla. Stat. (2005) (Peer Review). *See Rusiecki v. Jackson*, 2005 WL 408133 at *4 (Fla. 6th Cir. Ct. Jan. 31, 2005).

> void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Severability is an option for the reviewing court if the legislature's clear purpose in enacting the statute remains after severing the unconstitutional portion. *Richardson v. Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000). That is true here of the four putatively conflicting subsections. The challenged portions are not inseparable from each other or the remainder. Thus, the look-back period stands free and independent of the others at issue and of the remaining body of the statute. The same is true of the final report clause. The same is true of the "substantially similar" clause. Section 381.028, Fla. Stat. (2005), should survive judicial surgery because it would still function and would accomplish its valid legislative purposes.

V. AMENDMENT 7 IS INVALID UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION IF THE ABOLITION OF PEER REVIEW PRIVILEGES IS UPHELD.

Conflict (or obstacle) preemption exists when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal citations and quotations omitted).

> When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered . . . . If the purpose of the act cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural

> effect – the state law must yield to the regulation of Congress within the sphere of its delegated power.

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

Any interpretation of Amendment 7 which gives patients access to all documents connected to the peer review process renders it unconstitutional under the Supremacy Clause. Specifically, Amendment 7's right of access to all such documents is preempted by the Health Care Quality Improvement Act (HCQIA) because it prevents Congress from achieving its core objective of effective peer review.[16]

Effective peer review requires the assurances of confidentiality that Amendment 7 would eradicate if the opinion below is upheld. This Court has indelibly stamped confidentiality as an indispensable component of the process of effective peer review. With regard to credentialing and peer review activities, the discovery privilege is clearly designed to provide the confidentiality necessary for a full and frank medical peer evaluation. *Auld*, 450 So. 2d 217. Thus, this Court spoke quite clearly when it said "meaningful peer review would not be possible

[16] Preemption was what the Florida Legislature attempted to avoid by enacting § 381.028(3)(j), Fla. Stat. (2005), defining "records" as "the final report of any adverse medical incident." HCQIA expressly authorizes that limited form of disclosure.

with a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues." *Id.* at 220.

Viewing HCQIA in its entirety, it is clear that Congress considered effective peer review to be an essential tool in limiting medical malpractice. When Congress enacted HCQIA, it made five findings:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be *remedied through effective professional peer review.*
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.
>
> (5) *There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.*

42 U.S.C. § 11101 (2000) (emphasis added).

Congress viewed immunity as supplemental protection to the confidentiality that was *already accorded peer review at the state level.* The House Report states:

> The Committee feels the purposes of this bill require protection for persons engaging in professional review. *Under current state law, most professional review activities are protected by immunity and*

> *confidentiality provisions.* A small but growing number of antitrust actions, however, *have been used to override those protections.* Because the reporting system required under this legislation will most likely increase the volume of such suits, the Committee feels that some immunity for the peer review process is necessary.

H. Rep. No. 99-903, 99th Cong. 2d Sess. 245, reprinted in U.S.C.C.A.N. 6384, 6391 (emphasis added).

Consistent with these ends, Congress did *not* preempt state laws "which provide[] incentives, immunities, or protection for those engaged in a professional review action *that [are] in addition to or greater than*" the incentives, immunities and protections provided under HCQIA. 42 U.S.C. § 11115 (emphasis added).

The core of HCQIA consists of two elements. First, HCQIA establishes federal standards for peer review. *Id.* at § 11112 (2000). Second, HCQIA establishes a National Practitioner Data Bank ("NPDB") by requiring hospitals, state medical boards, and parties paying out settlements or judgments to make specific reports to state and federal authorities. HCQIA therefore mandates that any health care entity, which makes a determination affecting a physician's credentials for more than 30 days, report the following information to the NPDB and the State Medical Board:

> (A) the name of the physician involved,
>
> (B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or surrender of license or privileges, and

> (C) such other information respecting the circumstances of the action or surrender as the Secretary [of Health and Human Services] deems appropriate.

Id. at § 11133(a)(3) (2000).

HCQIA then uses the NPDB to track physicians who engage in malpractice. Pursuant to § 11135(a), hospitals must consult the NPDB to review whether reports have been filed concerning (1) any new physicians, and (2) existing physicians once every two years. *Id.* at § 11135(a). If a hospital is subsequently sued for medical malpractice and the hospital failed to comply with § 11135(a)'s verification requirement, the hospital "is presumed to have knowledge of any information reported under this subchapter to the Secretary . . . ." *Id.* at § 11135(b).

Congress created immunity from suit as an incentive for hospitals and physicians to engage in peer review; as a condition of immunity, hospitals must report adverse peer review findings to the applicable state licensing board and to the NPDB. As a practical matter, if a hospital failed to conduct the required peer review in an effective manner, it could not generate reliable information for the NPDB and would thereby prevent HCQIA from serving its primary purpose. Amendment 7, as interpreted by the First District, has that effect.

In that event, Amendment 7 must yield to HCQIA under the Supremacy Clause principle of conflict preemption.

CONCLUSION

Based on the forgoing points and authorities, this Court should decide that (1) Amendment 7 is not retroactive in application; (2) Amendment 7 applies only to "records" and not to testimonial information; (3) Amendment 7 as applied to extant hospital-medical staff contracts violates the Contract Clause; and (4) Amendment 7, if interpreted to abolish peer review privileges, is unconstitutional under the Supremacy Clause.

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I HEREBY CERTIFY that this Brief was prepared using the Times New Roman in 14-point font pursuant to the requirements of Rule 9.100 of the Florida Rules of Appellate Procedure.

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