IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2423

JODI BENJAMIN as Personal Representative of the Estate of MARLENE GAGNON, Deceased,

Petitioner,

v.

TANDEM HEALTHCARE, INC., a foreign Corporation d/b/a TANDEM HEALTHCARE OF WEST PALM BEACH, INC. a Florida Corporation,

Respondent.
_____/

L.T. CASE NOS.:
4th DCA: 4D07-949
PALM BEACH CIRCUIT: 2005CA005482

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

Statutes and Other Authorities **Page(s)**

Other Authorities

PROCEDURAL NOTE

All references in this brief to RESPONDENT or TANDEM are meant to be references to TANDEM HEALTHCARE, INC., d/b/a TANDEM HEALTHCARE OF WEST PALM BEACH, INC., which is the Defendant in the trial court proceeding, was the Petitioner in the proceeding before the Fourth District, and is the Respondent here.

All references in this brief to Petitioner are meant to be references to JODI BENJAMIN as Personal Representative of the Estate of MARLENE GAGNON, which is the Plaintiff in the trial court proceeding, was the Respondent in the proceeding before the Fourth District, and is the Petitioner here.

Article X, Section 25, Florida Constitution is commonly known and referred to colloquially as "Amendment 7". Any references in this brief to "Amendment 7" or "the Amendment" are meant to be and should be understood to be references to Article X, Section 25, Florida Constitution.

Appendices were filed by both parties below and are part of the record. Accordingly, rather than create an identical appendix here, Respondent will refer to those Appendices as necessary for citation purposes. All references in this brief to Respondent's Appendix (hereinafter referred to as "AA") shall be in the following format: (AA-tab: page). All references in this brief to Petitioner's Appendix (hereinafter referred to as "A") shall be in the following format: (A-tab: page).

JURISDICTION

Petitioner appealed to this court preliminarily by invoking the Court's discretionary jurisdiction to resolve the following question, which the Fourth District Court of Appeal, in Tandem Healthcare, Inc. v. Benjamin, 969 So.2d 519, 521-22 (4th DCA 2007), certified as one of great public importance:

> WHETHER "NURSING HOMES" OR "SKILLED NURSING FACILITIES" FALL WITHIN THE DEFINITION OF "HEALTH CARE FACILITY" OR "HEALTH CARE PROVIDER" AS CONTEMPLATED BY AMENDMENT 7 TO THE FLORIDA CONSTITUTION

This Court has discretionary jurisdiction to review the question certified by the Fourth District as an issue of great public importance. See Art. V, § 3(b)(4), Fla. Const.; see also Fla.R.App.P. 9.030(a)(2)(v). As this Court has apparently accepted jurisdiction on this basis, it should now exercise that jurisdiction for the purpose of expressly answering the certified question in the negative and affirming the well reasoned and harmonious opinions of the Fourth District in this case Tandem Healthcare, Inc. v. Benjamin, 969 So.2d 519 (4th DCA 2007), and the First District in Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So.2d 1031 (1st DCA 2007).

Petitioner appealed to this court secondarily invoking the Court's jurisdiction under Art. V, § 3(b)(3) based on a claimed conflict between the Fourth District's decision in this case and the Fifth District's decision in Florida Hospital Waterman,

Inc. v. Buster, 932 So.2d 344, 351 n.6 (Fla. 5th DCA 2006) ("Buster I"), approved in part, quashed in part, by this Court in Fla. Hosp. Waterman, Inc. v. Buster, 33 Fla. L. Weekly S154 (Fla. Mar. 6, 2008)("Buster II"). Respondent respectfully asserts that the so called conflict no longer exists given this Court's ruling in Buster II, which approved the Legislature's conclusion that Amendment 7 applies only to Hospitals and Physicians and vacated the negative treatment of the sections of 400 implicated in Buster I, which formed the basis of Petitioner's claim of conflict jurisdiction.

STATEMENT OF THE CASE AND FACTS

The suit underlying this Petition arises out of the residency of MARLENE GAGNON, at a nursing home known as TANDEM WEST PALM BEACH from July 1, 2004 to July 9, 2004. The various versions of the Complaint allege the staff at the facility was negligent in their care of Ms. GAGNON and/or violated her nursing home resident's rights as set forth in section 400.022, Florida Statutes (AA. 1). The claim is brought pursuant to the authority of section 400.023, Florida Statutes, which provides the "exclusive remedy" for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in 400.022.

On or about June 23, 2006, Petitioner propounded her Fifth Request for Production to the Respondent (AA. 2) seeking reports of records of any "Adverse

Medical Incident" as provided in Amendment 25 to Article X of the Florida Constitution. Respondent objected to that request contending that Article X section 25 did not apply to Nursing Homes and that the request sought documents that are privileged and not subject to discovery under Florida Statutes. (AA. 3-4).

On or about December 1, 2006, Petitioner served a Motion to Compel Production of Amendment 7 Materials (AA. 5). On December 13, 2006, Petitioner filed its Response to Plaintiff's Motion to Compel Production of Amendment 7 Materials. (AA. 6). Petitioner's Motion to Compel was heard on December 13, 2006. (Transcript, AA. 7). Counsel for the Respondent reiterated its objection to the production of documents on the grounds that Amendment 7 did not apply because, based on the express language of the Amendment, skilled nursing facilities were not "health care providers" or "healthcare facilities" for purposes of Amendment. (AA. 7: P. 3).

Counsel for Petitioner argued to the trial court that Amendment 7 should nullify or preempt the evidentiary privileges conferred by Chapter 400 of the Florida Statutes. (AA. 7: P. 5). See §§ 400.119, 400.147, Florida Statutes (regarding confidentiality for long term care risk management and quality assurance efforts). The trial court reserved ruling and allowed the parties to submit supplemental memoranda of law and reviewed the same.

The trial court rendered its Order on February 7, 2007, incorrectly holding that Amendment 7 applies to Nursing Homes under Chapter 400 and ordering; "[Respondent] Tandem shall produce the documents previously withheld pursuant to the peer review privilege which are responsive to the personal representative's request for production dated August 4, 2006." (AA. 9). On February 27, 2007, the Court granted a stay of production of that Order pending appellate review. (AA. 10). On March 9, 2007, Respondent filed a Petition for Writ of Certiorari with the Fourth District Court of Appeal. Petitioner responded to the same; and briefs were filed on behalf of both parties by amici curiae.

On November 27, 2007, after having reviewed the record and the briefs of all parties, including *amici curiae*, the Fourth District reversed the trial court's Order requiring production of the privileged documents on the ground that Amendment 7 does not apply to Nursing Homes/Skilled Nursing Facilities. Petitioner subsequently appealed to this Court. See Tandem Healthcare, Inc. v. Benjamin, 969 So.2d 519 (4th DCA 2007)

SUMMARY OF ARGUMENT

Amendment 7 is limited in its scope and does not apply to Nursing Homes. By its plain and unambiguous terms, the Amendment applies only to "healthcare facilities" and "health care providers"**,** which are precisely defined for purposes of the Amendment by a statute incorporated into the Amendment as Hospitals and Physicians. There is nothing in the plain language of the Amendment that would demonstrate that it was the intent of the framers or the voters that the Amendment be interpreted to include any entities other than Physicians and Hospitals.

To the extent the Court reviews the available evaluative materials, historical precedent, present facts, and the dictates of common sense, all of which would have been available to voters during the decision making process as a predicate for their decision, which are addressed in two different sections of this brief, it will find that the same support the conclusion that Amendment 7 does not and was never meant to apply to Nursing Homes.

The conclusion that by it plain language Amendment 7 does not apply to Nursing Homes is supported by this Court's recent ruling in Buster II which approved definitions of the terms "health care facility" and "health care provider" contained in the statutory codification of Amendment 7, which defined those terms to mean Hospitals and Physicians.

The conclusion that by it plain language Amendment 7 does not apply to Nursing Homes is further supported by the fact that the Amendment references "patients" as opposed to "residents" and "patients' right" instead of residents' rights". These words and terms have very precise and different meanings.

Petitioner's flawed interpretation of the terms Amendment 7 which isolates and focuses on the term "general law" but ignores and fails to give meaning to that terms modifying language; runs afoul of the law requiring all language in an amendment be given meaning so that none of it is rendered "superfluous".

The fact section 381.026 is incorporated into the Amendment by reference to its name and other undeniable references rather than its number does not change the fact that the section was incorporated in the Amendment.

There is no legitimate basis for giving Amendment 7 a broader construction that that given by the District Courts; or expanding its terms based on Petitioner's claim that doing the same would accomplish some social good.

Even if skilled nursing facilities were within the purview of Amendment 7, that the Amendment would be inconsistent with, contrary to, and therefore preempted by Federal law.

ARGUMENT

Respondent respectfully asserts that this Honorable Court should: (1) answer the question certified by the Fourth District in this case as one of great public importance in the negative, and hold that: "Skilled Nursing Facilities", known colloquially as "Nursing Homes", do not fall within the definition of "Health Care Facility" or "Health Care Provider" as contemplated by "Amendment 7", the Amendment known formally as Article X, Section 25, Florida Constitution (*thereby approving the Fourth District's ruling below*); and (2) hold, to the extent it must address the issue at all, that even if skilled nursing facilities were within the purview of Amendment 7, that the Amendment would be inconsistent with, contrary to, and therefore preempted by Federal law.

I. AMENDMENT 7 IS LIMITED IN ITS SCOPE AND DOES NOT APPLY TO NURSING HOMES THEREFORE THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION BEFORE IT IN THE NEGATIVE

Based on a review of the express language of Amendment 7, the long standing principles of construction applicable in this case, the explanatory materials related to it, and this Court's most recent decision relating to Amendment 7, it is clear that the Amendment does not apply to Nursing Homes; and that the inclusion of Nursing Homes within the scope was never the intent of the framers or the voters. Therefore, this Court should answer the certified question posed by the Fourth District in this case in the negative.

A. AMENDMENT 7 DOES NOT APPLY TO NURSING HOMES BECAUSE NURSING HOMES DO NOT FALL WITHIN THE DEFINITION OF THE PLAIN MEANING OF THE TERM "HEALTH CARE FACILITY" OR "HEALTH CARE PROVIDER" CONTEMPLATED BY THE AMENDMENT

A review of the clear, unambiguous, express terms of the "Statement and Purpose"; the full text of the Amendment presented to the citizens of the State of Florida; and the statutory definitions of the key terms "Health Care Facility" and "Health Care Provider" incorporated by reference in the Amendment, leads to the undeniable conclusion that the Amendment does not apply to "Nursing Homes".

As a preliminary matter, there are three cardinal rules of constitutional construction relevant to the decision of the issue in this case. The first cardinal rule is that the intent of the framers and adopters be given effect in interpreting a constitutional provision. See Coastal Fla. Police Benevolent Ass'n v. Williams, 838 So.2d 543, 548 (Fla. 2003)

The second cardinal rule is that to determine the intent of the framers and adopters of a constitutional amendment, the Court must give effect to the plain meaning of the words actually used in the provision or amendment. See Coastal Fla. Police Benevolent Ass'n at 548; In re Advisory Opinion to the Governor, 374 So.2d 959, 964 (Fla.1979); Fla. League of Cities v. Smith, 607 So.2d 397, 400 (Fla.1992); City of St. Petersburg v. Briley, Wild & Assocs., Inc., 239 So.2d 817,

822 (Fla.1970); see also Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So.2d 1031, 1033 (1st DCA 2007)(citing the foregoing authorities).

The third cardinal rule is that where a constitutional provision is clear and unambiguous, there is nothing to interpret, and no reason to resort to extrinsic rules of construction. See Fla. League of Cities at 400 ("extrinsic guides to construction are not allowed to defeat the plain language"); City of St. Petersburg v. Briley, Wild & Assocs., Inc., at 822 (courts have no power "to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to words used therein"). See Coastal Fla. Police Benevolent Ass'n at 548 (clear and unambiguous provision must be "enforced as written").

The interrelationship and application of these cardinal rules is really quite straightforward and simple. As explained by this Court in numerous cases, "[a]ny inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language. If [the language of a constitutional provision] is clear, unambiguous, and addresses the matter at issue, then it must be enforced as written....". See e.g. See Fla. League of Cities at 400; Coastal Fla. Police Benevolent Ass'n at 548.

Applying these cardinal rules in this case leads to the conclusion that "Amendment 7" does not apply to "Nursing Homes". Specifically, an examination of the explicit language of Amendment 7 and its related parts (specifically the

language indicating that the Amendment applies only to "health care provider" and "health care facility" and the language that defines those terms), demonstrates that language of the Amendment is clear, precise, and unambiguous; that there is therefore no reason to refer to extrinsic rules of construction; and that as a result its language "**must be allowed to speak for itself**" and the Amendment should be "**enforced as written**". Id. To wit, that the Amendment, should be read to be limited to physicians and hospitals, but inapplicable and unenforceable against Nursing Homes.

The voters who approved Amendment 7 were presented with a ballot which consisted of two substantive sections: the first entitled "Statement and Purpose" which was a pre-amble to the Amendment; and the second entitled "Amendment of Florida Constitution," which included the entire text of the proposed Amendment. The language of these two sections and the statute they incorporate by reference, which are discussed in detail in the following sections, clearly and unambiguously indicate that the Amendment applies to **doctors** and **hospitals**; and does not apply to Nursing Homes or any other entities.

1. The "Statement and Purpose" of Amendment 7

A review of the first section of the ballot, entitled "Statement and Purpose" is enlightening. That section begins, "**[t]he Legislature has enacted provisions relating to a patients' bill of rights and responsibilities …"** This is significant

because, in the first substantive words presented to and read by voters, this preamble to the Amendment makes it clear that the Amendment is to apply to "**patients**" (a term whose significance is addressed in great detail below) and that the Amendment is directly tied to an existing statutory provision relating to a **"patients' bill of rights and responsibilities"**. That section goes on to explain in its subsequent paragraphs that the purpose of the Amendment was to create a constitutional right for a "**patient**" or "**potential patient**" to know and have access to records of the "adverse medical incidents" of a "health care facility or provider". This is significant because it repeats that the Amendment is to apply to "**patients**" or "**potential patients**" and explains that the Amendment applies only to "health care facilities" and "health care providers" which, as explained below, are defined as hospitals and physicians.

2. The Text of Amendment 7: "Amendment of Florida Constitution"

A review of the second section of the ballot, entitled "Amendment of Florida Constitution", is even more enlightening. That section, which contains the actual text of the Amendment, like the "Statement and Purpose" section, provides for "**patients"** to 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". Moreover, it indicates the terms "**health care facility"** and

"health care provider" are to have the meaning given in **general law *related to a patient's rights and responsibilities".***

This is significant because, like the language in the "Statement and Purpose" section of the Amendment, the text of the Amendment makes it clear the Amendment was to apply to "**patients**" (again a term whose significance is addressed in great detail below). Moreover, this is significant because it indicates that an existing statute "**relating to a patients' bill of rights and responsibilities"** referenced in the "Statement and Purpose" section is to provide the definitions of the terms "**health care facility"** and **"health care provider",** which, as explained below, are defined as hospitals and physicians.

3. Section 381.026, Florida Statutes

The reference in the Statement and Purpose section to the fact that the "**Legislature has enacted provisions relating to a patients' bill of rights and responsibilities"**; and the reference in the express language of the Amendment to the "**general law *related to a patient's rights and responsibilities***" are both clear and precise references to a statute that existed at the time Amendment 7 was voted on. A review of the language of the Amendment and entire body of the Florida Statutes leads to the undeniable conclusion that the statute which is referenced and thereby incorporated into the Amendment is Section 381.026, Florida Statutes.

Section 381.026, Florida Statutes was enacted prior to the passage of Amendment 7. It is specifically entitled, "**Florida Patient's Bill of Rights and Responsibilities**". This should sound familiar because the first sentence of the "Statement and Purpose" section of the Amendment which states "**[t]he Legislature has enacted provisions relating to a patients' bill of rights and responsibilities …"** tracks the title of Section 381.026 verbatim.

Moreover, Section 381.026, is the **only** section of the Florida Statutes that used the specific term "**patient's rights and responsibilities**" at the time of the adoption of Amendment 7. See Tandem Healthcare, Inc. v. Benjamin, 969 So.2d 519, 521 (4th DCA 2007)(the Fourth District's decision in this case)("Benjamin"); and Avante Villa at Jacksonville Beach, Inc. v. Breidert, 958 So.2d 1031, 1033 (1st DCA 2007)("Breidert"). In other words, there was no **"general law *related to a patient's rights and responsibilities***" other than Section 381.026 in existence at the time Amendment 7 was voted on.

Therefore, the first sentence of the "Statement and Purpose" and the text of the Amendment incorporates Section 381.026 into the Amendment by reference to its name and other unmistakable references. The First District stated that this incorporation can be reasonably interpreted to require the adoption of the definitions of those terms used in the Florida Patient's Bill of Rights and Responsibilities (section 381.026). See Breidert at 1033; and Benjamin at 521.

Petitioner would respectfully assert, given the facts discussed herein, that there can be no other reasonable interpretation of the effect of the incorporation of Section 381.026.

The incorporation of Section 381.026 into the "Statement and Purpose" and the text of Amendment 7 was clearly intended to require the adoption of the definitions of the terms "health care facility" and "health care provider" therein as part of the Amendment. Importantly for purposes of this appeal, Section 381.026, defines a health care facility as "a facility licensed under chapter 395" (i.e. a hospital) and a health care provider as "a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, or a podiatric physician licensed under chapter 461" (i.e. Doctors). See Section 381.026(2)(b) & (c), Florida Statutes.

The fact that the Amendment, by incorporation of the statute, expressly defines the facilities and providers to which it applies to (hospitals and physicians), while making no explicit or implicit reference to "Nursing Homes", "skilled nursing facilities", "nursing facilities", or Sections, 400.011-400.334, Florida Statutes (which govern Nursing Homes), makes it clear the Amendment was not meant to apply to those entities. This conclusion is the conclusion supported by the venerable and familiar latin maxim "*expressio unius est exclusio alterius*", which means "the expression of one thing means the exclusion of another". See

Blacks Law Dictionary (6th Ed. 1990). The application of that maxim here supports the interpretation of the Amendment adopted by the Fourth District, First District, and Respondent.

4. Conclusion

It is clear from the plain language of Amendment 7 that the Amendment does not apply to Nursing Homes; and that the plain language of the Amendment does not support any argument that it was the intent of the framers or voters to have the Amendment apply to Nursing Homes. Thus, this Court should answer the question certified by the Fourth District in the negative and hold that Nursing Homes do not fall within the definition of "Health Care Facility" or "Health Care Provider" as contemplated by the express language of Amendment 7.

B. THE EXPLANATORY MATERIALS AVAILABLE TO THE VOTERS REGARDING AMENDMENT 7 FURTHER EVIDENCE THE FACT THAT THE AMENDMENT DOES NOT APPLY TO NURSING HOMES

During the petition process for Amendment 7, the voters of Florida had access to various "explanatory materials" as a predicate for their decision on Amendment 7. These included materials available on the Floridians for Patient Protection website (which are unfortunately no longer available as their website is inaccessible), materials available on various government websites, newspaper articles and editorials, informational materials disseminated by non-partisan and

partisan groups, the petition filed with the Secretary of State, the ballot summary, the "Statement and Purpose" of and entire proposed text of the Amendment.

The Court may look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent. See Plante v. Smathers, 372 So.2d 933, 936 (Fla. 1979). Consideration of the explanatory materials in this case is not necessary in light of the clear, precise, and unambiguous language of the Amendment and the statute incorporated therein. However, to the extent the Court reviews those materials, it will find they support the conclusion that Amendment 7 does not apply to Nursing Homes; and that they do not support any argument that the framers or voters intended for the Amendment to apply to Nursing Homes. In fact, the Court will find that any voter who reviewed these evaluative materials or materials similar to them could not *reasonably* have walked into the voting booth with the understanding or intent that voting for the Amendment would affect any entities other than physicians and hospitals.

The "Statement and Purpose" and proposed text of the Amendment have been discussed previously herein; and, as indicated above any materials that were available on the Floridians for Patient Protection Website are unfortunately no longer available for analysis as that entity's website is no longer accessible. Accordingly, they cannot be addressed here other than to note: any such materials have not been put forward by Petitioners or their Amicus proponent to support

their claims regarding framer and/or voter intent. Fortunately, however, there are some exemplars of explanatory materials that were available to voters prior to the November 2004 vote on Amendment 7. Those materials support the conclusion that Amendment 7 does not and was never meant to apply to Nursing Homes; and do not support any argument that it was the intent of the framers or voters that the Amendment would to apply to Nursing Homes.

One example is a document titled Proposed Florida Constitutional Amendments Pros and Cons which was made available to Volusia County voters prior to November 2004 on the Volusia County government website and perhapd elsewhere, addresses the various Amendments that were proposed on the November 2004 ballot. See Proposed Florida Constitutional Amendments Pros and Cons at www.volusia.org/elections/proscons.htm. With regard to Amendment 7, this public record document was designed to inform voters and allow them to make an educated decision on the Amendment indicates that the Amendment's sponsor was *Floridians for Patient Protection*; that its proponent was the *Academy of Florida Trial Lawyers*. Further, under a section of the document entitled **"**Proponents' point of view", it states "Proponents argue that this amendment will arm patients with information regarding their **doctor's malpractice incidents and adverse judgments**. This amendment will provide patients with critical information about **doctors and hospitals** in Florida". Id. (emphasis added).

A second example is an analysis of Amendment 7 prepared by a non-partisan group called VoteSmartFlorida.org and made available to the public prior to November 2004 also states "Proponents argue that this amendment will arm patients with information regarding their **doctor's malpractice incidents and adverse judgments**. This amendment will provide patients with critical information about **doctors and hospitals** in Florida" (emphasis added).

A third example is a St. Petersburg Times Article titled "Gambling, Malpractice Top Amendment Lists," published on October 26, 2004, discussed the various proposed Amendments on the November 2004 ballot. With regard to Amendment 7, it reported "[t]his amendment would require **doctors and hospitals** to give patients information about mistakes they have made" (emphasis added).

A fourth example is a St. Petersburg Times Article titled "Is Sunshine the Best Disinfectant for Errors," published on October 31, 2004, discussed Amendment 7 and reported "Amendment 7 to the Florida Constitution would force **hospitals and doctors** to give patients records about past medical mistakes that either led to or could have led to patients being hurt or killed" (emphasis added).

There are undoubtedly countless more "explanatory materials" relating to Amendment 7 which, given the passage of time, were not as readily available as the cited items. However, these exemplars of the evaluative materials available to voters prior to the November 2004 election contain information consistent with

the language of the Amendment, its Statement and Purpose, and the Patient's Bill of Rights (Section 386.021) incorporated in it by reference. More importantly, these materials consistently disseminated to the voters the message that, according to the proponents of the Amendment, its purpose was to provide patients with critical information about **doctors and hospitals**. Finally, none of the available materials mentioned Nursing Homes, Skilled Nursing Facilities, Nurses, Chapter 400, Florida Statutes, or Section 400.022, Florida Statutes (the "Nursing Home Resident's Bill of Rights") mentioned either expressly or implicitly

In sum, consideration of the explanatory materials in this case is not necessary in light of the clear, precise, and unambiguous language of the Amendment and the definitional statute incorporated therein. However, to the extent the Court chooses to review those materials, it will find that they support the conclusion that Amendment 7 does not apply to Nursing Homes; and <u>do</u> <u>not</u> support any argument that it was the intent of the framers or voters that the Amendment would to apply to Nursing Homes. Specifically, it will find that any voter who reviewed those evaluative materials could not reasonably have walked into the voting booth with the understanding that the intent of the Amendment was to affect any entities other than physicians and hospitals.

C. THE USE OF THE TERM "PATIENT" IN AMENDMENT 7 FURTHER EVIDENCES THE FACT THAT NURSING HOMES DO NOT FALL WITHIN THE SCOPE OF AMENDMENT 7

Returning to the language of Amendment 7, further support for the conclusion of the First District, Fourth District, and Respondent that the Amendment does not apply to Nursing Homes is found in the fact that Amendment 7 refers repeatedly to "patients" and "patients' rights", but does not include a single reference to "residents" or "residents' rights". These facts are significant because these terms have separate and distinct meanings. As such, they are not considered interchangeable or used interchangeably in the law of Florida; and should not be considered interchangeable or used interchangeably in the context of Amendment 7.

The fact that Amendment 7 refers repeatedly to "patients" but does not include a single reference to "residents" is important because under both Florida and Federal law, persons who reside in Nursing Homes are purposely referred to continuously and consistently as "residents" as opposed to "patients"". See Sections, 400.011- 400.334, Florida Statutes; see also 42 U.S.C. §§ 1395i-3, 1396r and 42 C.F.R. Part 483 (the "Federal Nursing Home Reform Act").

The continuous and consistent identification of the occupants of Nursing Homes as **residents** (as opposed to **patients**) by The Florida Legislature and the United States Congress is significant; and should be presumed to be deliberate and

not a misnomer. See e.g., Rinker Materials Corp. v. City of N. Miami, 286 So.2d 552, 553 (Fla.1973) ("In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words."); see also State ex rel. Bie v. Swope, 30 So.2d 748, 751(1947); Sailboat Apartment Corp. v. Chase Manhattan Mortgage & Realty Trust, 363 So.2d 564, 568 (3d DCA 1978).

The fact that Amendment 7 refers repeatedly to "patients' rights" does not include a single reference to "residents' rights" is equally important because under Florida Law "residents" of skilled nursing facilities are provided with their own specific and detailed set of "residents' rights". See, Section 400.022, Florida Statutes. These "resident's rights" are entirely separate, distinct from, and unrelated to the "patient's rights" provided to "patients" pursuant section 381.026, Florida Statutes. Thus, again, the Florida Legislature's purposeful, continual, and consistent use of that language in the Florida Statutes should be presumed to be deliberate and not a misnomer. See e.g., Rinker Materials Corp. v. City of N. Miami, 286 So.2d 552, 553 (Fla.1973)

Similarly, the use by the proponents of the Amendment of the terms "patient" and "patients' rights" - as opposed to the terms "resident" and "residents' rights" - should also construed to be should be presumed to be deliberate and not a misnomer. This deliberate choice of words supports the conclusion that

Amendment 7 does not and was never meant to include Nursing Homes. As the Supreme Court held in Ervin v. Collins, 85 So.2d 852 (Fla. 1952):

> **[When] We are called on to construe the terms of the Constitution, an instrument from the people, and we are to effectuate their purpose from the words employed in the document. We are not permitted to color it by the addition of words or the engrafting of our views as to how it should have been written** …

Construction of Amendment 7 to apply to and include Nursing Home Residents would require this Court to either equate the words "patients" and "residents" and the terms "patients' rights" and "residents' rights" as having the same meaning or require this Court to insert the word "Resident" or the phrase "residents' rights" into the Amendment. Neither of these actions would be appropriate. See Ervin v. Collins, 85 So.2d 852 (Fla. 1952): Dept. of Environmental Protection v. Millender, 666 So.2d 882, 886 (Fla. 1996).

Equating the terms "resident" and "patient" would be improper because those terms have separate and distinct meanings. As such, they are not considered interchangeable or used interchangeably in the law of Florida; and should not be considered interchangeable or used interchangeably in the context of Amendment 7. Similarly, the terms "residents' rights" and "patients' rights" have separate and distinct meanings. As such, those terms are not considered interchangeable or used interchangeably in the law of Florida; and should not be considered interchangeable or used interchangeably in the context of Amendment 7. The

same meaning or require this Court to insert the word "Resident" to the Amendment. Inserting the word "resident" into the Amendment would clearly violate the rules of constitutional construction and defeat the intent of both the drafters and the voters.

II. THE CONSTITUTIONAL TERMS OF SECTION 381.028, FLORIDA STATUTES, APPROVED BY THIS COURT IN "BUSTER II" CONFIRM THAT AMENDMENT 7 DOES NOT APPLY TO NURSING HOMES

In addition to the foregoing, further support for Respondent's position is found in this Court's recent decision in "Buster II", which approved in part and quashed in part the Fifth District's decision in "Buster I", and passed judgment on the constitutionality of Section 381.028, Florida Statutes, the statute in which the Legislature sought to codify Amendment 7.

In Buster II, this Court concluded, in pertinent part, that six of the subsections of 381.028, as initially enacted by the Legislature, unconstitutionally impinged upon the rights granted pursuant to Amendment 7 (four sections pointed out by the First District in Notami Hosp. of Fla., Inc. v. Bowen, 927 So. 2d 139; and two additional sections which this Court addressed based on the fact that its review was de novo); severed those unconstitutional sections from the statute; and allowed the remainder of the statute to stand because the remainder of the statute "appeared to fulfill its stated purpose of implementing Amendment 7". See Buster II at 11-12.

To make its point that the statute, as modified by the severance of the provisions the Court found unconstitutional, fulfilled its stated purpose of implementing Amendment 7, the Court pointed to several of the remaining provisions of the statute which it found helpful in that regard. Amongst these was Section 381.028(3), the section of the statute that "provides definitions of important terms" See Buster II at 12 (citing Section 381.028(3) with approval).

The terms labeled by this Court as "important terms" defined in section 381.028(3) are the terms "health care facility" and "health care provider", which are defined in that section as follows: (e) "Health care provider" means a physician licensed under chapter 458, chapter 459, or chapter 461; (f) "Health care facility" means a facility licensed under chapter 395. See Buster II at 12 (citing with approval section 381.028(3), Florida Statutes (2005). Not coincidentally, the definitions of these terms in section 381.028(3) are identical to those of the same terms in section 381.026, Florida Statutes, the section incorporated by reference in Amendment 7, which was previously discussed herein.

In sum, Buster II approved the Legislature's conclusion and by extension, the conclusions of the First District, Fourth District, and Respondent, that by its express terms Amendment 7 applies only to Hospitals and Physicians; and does not include or apply to Nursing Homes.

III. PETITIONER'S ARGUMENTS IN OPPOSITION TO FOREGOING HAVE NO LEGITIMATE FACTUAL OR LEGAL BASIS AND SHOULD, THEREFORE, BE REJECTED BY THE COURT

Petitioner offers no good counter to any of the foregoing reasoning, which was adopted by the First District in Breidert; the Fourth District in this case; and Respondent here; and offers no legitimate reason why this reasoning should even arguably be rejected. Instead, it offers only baseless and easily defeated arguments.

A. THE REASONING OF THE FIRST AND FOURTH DISTRICT OFFER NO SUPPORT FOR PETITIONER'S FLAWED INTERPRETATION OF AMENDMENT THAT FAILS TO ACKNOWLEDGE AND GIVE MEANING TO ALL OF THE LANGUAGE IN AMENDMENT 7

First, in an effort to counter the reasoning of the Fourth District, the First District, and Respondent, Petitioner claims both courts recognized there were some "general laws" that included Nursing Homes within the meaning of the term "health care facility". Petitioner does this in an effort to suggest those courts conceded a point or made an error that would support its argument that the inclusion of the term "general law" in the Amendment should cause it to be interpreted more broadly than the District Courts have interpreted it. This is simply inaccurate.

The Fourth District and First District agreed that "[a]lthough in certain general law provisions Nursing Homes have been included in the definition of health care facility and health care provider (citations omitted), Amendment 7 limits the definitions to the "meaning given in general law ***related to a patient's***

rights and responsibilities." Art. X, § 25(c)(1), Fla. Const. (emphasis in original). See Breidert at 1033. This statement by the Fourth District and the First District refutes any suggestion that those courts conceded a point or made an error that would support Petitioner's argument. It demonstrates that the Fourth and First District correctly construed and gave effect to **all** of the language of Amendment 7 in arriving at their respective interpretations of Amendment 7; something Petitioner did not do.

A Constitutional Amendment should be construed as a whole in order to ascertain the general purpose and meaning of each part and should not be read in a way that renders any language "superfluous". See Department of Environmental Protection v. Millinder, 666 So.2d 882 (Fla. 1996)(citation omitted). Consistent with Millinder and similar cases, the First District and Fourth District properly and correctly took all of the relevant language of the Amendment into account in interpreting it.

Those courts agreed that "[a]lthough in certain general law provisions Nursing homes have been included in the definition of health care facility and health care provider (citations omitted), Amendment 7 limits the definitions to the 'meaning given in general law ***related to a patient's rights and responsibilities***'" (emphasis in original). See Breidert at 1033. As required by the case law, those courts took all of the relevant language of the Amendment into account in

interpreting it and gave meaning to all of that language, including the term "general law" and the limiting language that modified that term: "***related to a patient's rights and responsibilities***". In short, as required by the controlling case law these courts read the relevant language of the Amendment in context, including the term "general law' and the modifying phrase "***related to a patient's rights and responsibilities***", and gave all of that language meaning in coming to their respective decisions..

Petitioner, on the other hand, does not. Throughout its argument, Petitioner seeks to isolate the term "general law", while completely ignoring the precise, limiting language which modifies that term in the Amendment ("related to a patient's rights and responsibilities"). It claims Amendment 7 requires the terms "healthcare facility" and "healthcare provider" be given the meaning they have in the "general law"; and ignores the fact that Amendment 7 actually requires that the terms are to be given the meaning they have in the "general law ***related to a patient's rights and responsibilities***" (See Petitioner's Initial Brief at 15)(claiming erroneously that "[n]o language in Amendment 7 indicates an intent to limit the definitions of health care provider and health care facility to the definitions used in section 381.026(2)").

By ignoring the existence and import of the phrase "***related to a patient's rights and responsibilities***" as a modifier to the term "General Law" in its

interpretation of the Amendment; Petitioner renders that undeniably key phrase "superfluous". This interpretation directly at odds with Millinder and the other cases decided by this Court which require that **all** of the language contained in a constitutional amendment or provision be given meaning; and that non be rendered "superfluous".

The modifying language "**related to a patient's rights and responsibilities**" is not "superfluous" and must be "given meaning". It cannot be ignored. In the context of the Amendment, the term "general law" must be interpreted in context with its modifying language; and that modifying language must be taken into account and given full effect as both the First and Fourth District did in interpreting the Amendment. The Petitioner's failure to address or take into account this precise and critical modifying language is a fatal flaw, which renders the authorities Petitioner cites to in an effort to support its overly broad definition of the term "general law" irrelevant (because none of them deal with the "general law **related to a patient's rights and responsibilities**"); and renders Petitioner's overall argument on this point ineffective.

B. THE FACT SECTION 381.026 IS INCORPORATED INTO THE AMENDMENT BY REFERENCE TO ITS NAME AND OTHER UNDENIABLE REFERENCES RATHER THAN ITS NUMBER PROVIDES NO SUPPORT FOR PETITIONER'S POSITION

Second, in an effort to counter the reasoning of the First District, the Fourth District and Respondent, Petitioner asserts that the Court should accept its position

because the Amendment does not mention Section 381.026 by number. Petitioner's argument on this point is flawed in two respects. First, it ignores the obvious fact that the section, though not mentioned by number, was incorporated by name and by other unmistakable references. This is not improper or unusual. See e.g. State v. Rodriquez, 365 So.2d 157 (Fla. 1978)(holding that that inclusion of the words "in any manner not authorized by law" in statute imposing criminal penalties for the misuse of food stamps was sufficient to incorporate both state and federal food stamp law into statute by reference). Moreover, it ignores the common sense fact that a decision to include a verbal reference to a statute in the Amendment rather than a numerical statute reference is completely understandable given that the section numbers of statutes can be and often are changed. These flaws are fatal flaws, which render Petitioner's argument on this point ineffective.

C. THERE IS NO CONFLICT BETWEEN THE FOURTH DISTRICT'S RULING IN THIS CASE AND THE FIFTH DISTRICT'S RULING IN BUSTER I

Petitioner erroneously argues that the Fifth District in Buster I, meant to imply that Amendment 7 applied to skilled nursing facilities when it erroneously included section 400.118, Florida Statutes, in a string cite contained in a footnote which listed numerous privileges otherwise applicable to "health care providers"; and that this erroneous dicta conflicts with the Fourth District's ruling in this case. This argument is without merit. This is particularly clear given this Court's ruling

in Buster II, discussed in detail above, which undeniably defeats the Petitioner's tenuous argument in this regard.

D. THERE IS NO LEGITIMATE BASIS FOR EXPANDING THE SCOPE OF AMENDMENT 7 BEYOND THE LIMITATIONS OF ITS PLAIN AND PRECISE STATED TERMS

Finally, in an effort to draw this Court's attention away from the precision and clarity of the language of Amendment 7, Petitioner and the Florida Justice Association cite cases which stand for the proposition that the Constitutional amendments are granted a broader and more liberal construction than statutes. Relying on these cases, Petitioner, in effect, urges the Court to use extrinsic guides to construction to defeat the plain language of the statute; and to go outside the bounds of the constitutional provision in search of justifications to broaden and give a different meaning to words used therein.

More specifically, Petitioner and its Amicus proponent, the "Florida Justice Association" f/k/a "The Academy of Florida Trial Lawyers", tempt the Court to expand the scope of Amendment 7 beyond its express terms based on the unsupported claim that the intent of the voters in passing Amendment 7 was to abrogate any and all peer review statutes including those in Florida's nursing home statute (Chapter 400); the unsupported claim that including Nursing Homes within the scope of Amendment 7 would help to protect vulnerable nursing home residents in furtherance of the purpose of the Nursing Home Act (Chapter 400,

Florida Statutes); and that reading the terms of Amendment 7 broadly is required by "offsetting" principles of construction.

1. There is no evidence to support for Petitioner's claim that it was the intent of voters to include Nursing Homes within the scope of the Amendment

There is nothing in the plain language of Amendment 7, its evaluative materials, or the historical facts surrounding its adoption that indicates it was meant to apply to Nursing Homes; and nothing that would support Petitioner's contention that it was the intent of the voters that the Amendment would apply to Nursing Homes and eliminate peer review or quality assurance protections or privileges in any health related setting. On the contrary, as discussed above, there is nothing to suggest that it was the intent of the framers or the voters to affect any entities other than physicians and hospitals via the passage of this Amendment.

Moreover, the historical information addressed in the next section provides insight into both the intent of the framers of the Amendment and that of the voters. Those facts which can be taken into account by this Court on the basis that they represent historical precedent, present facts, common sense, or on the basis that the source materials memorializing those facts qualify as additional evaluative material that would have been available to voters during the decision making process as a predicate for their decision – all of which are persuasive of their intent. See Plante

v. Smathers at 936 (citing Advisory Opinion to the Governor, 276 S0.2d 25 (Fla. 1973) and Williams v. Smith, 360 So.2d 417 (Fla. 1978)).

2. The Academy of Florida Trial Lawyers n/k/a The Florida Justice Association was the de facto drafter of Amendment 7, chose the precise language contained therein, meant for the key terms therein to be defined as they were in "The Patients' Bill of Rights"

While there is no debate or legislative history in this case, there are some relevant historical facts and evaluative materials which were available during the decision-making process that will provide further guidance in interpreting Amendment 7 if the Court finds that further guidance is necessary. These historical facts provide even further support Respondent's position in this matter because they give insight into the intent of both the framers of the Amendment and the majority of voters who were made aware of these facts during the decision making process regarding Amendment 7.

First, Amendment 7 was drafted by "Floridian's for Patient Care" a "patient rights and malpractice reform organization" created and funded by the "Academy of Florida Trial Lawyers" n/k/a "Florida Justice Association". See Florida Department of State – Division of Elections Website – Committee Information Re Floridians for Patient Protection. In short, "The Academy of Florida Trial Lawyers" n/k/a "The Florida Justice Association" was the de facto drafter or "framer" of Amendment 7.

Accordingly, it cannot reasonably be argued by "The Academy of Florida Trial Lawyers" n/k/a "Florida Justice Association" or anyone else that the meanings of the precise words that were used by the "The Academy of Florida Trial Lawyers" n/k/a "Florida Justice Association" in the Amendment were not known. For example, it cannot reasonably be argued that the difference between the term "patients" and "residents" as discussed herein was not known to them. Moreover, it cannot reasonably be argued that the references in the Statement and Purpose section of the Amendment to the fact that the "**Legislature has enacted provisions relating to a patients' bill of rights and responsibilities"** and the reference in the express language of the Amendment to the "**general law *related to a patient's rights and responsibilities***" were intended to do anything other than direct reference and thereby incorporate Section 381.026, Florida Statutes, and the definitions contained therein into the Amendment.

On the contrary, given the positions taken by Counsel for Floridians for Patient Protection during oral argument in Advisory Opinion to the Attorney Gen. re: Patients' Right to Know About Adverse Med. Incidents, 880 So. 2d 617 (Fla. 2004), it is clear the Academy of Florida Trial Lawyers n/k/a Florida Justice Association knew exactly what these terms meant. In fact, it is clear that they meant to incorporate the Patient's Bill of Rights by reference in the Amendment to define the key terms ("health care facility" and "health care provider") exactly as

the First District, Fourth District, and Respondent have defined them, based on a review of the plain language of the Amendment and precise definitions contained in the incorporated statute, **to include Physicians and Hospitals only**.

Specifically, as the members of this Court may recall, during the course of oral argument, Timothy McLendon, Counsel for Floridians for Patient Protection admitted that the language of Amendment 7, tracked the Florida Patients' Bill of Rights ("This tracks the Patients' Bill of Rights in the Florida Statutes"). See Archived Oral Argument – Advisory Opinion - Amendment 7 - June 7, 2004. Moreover, Jon Mills, Co-Counsel for Floridians for Patient Protection specifically stated that the term "general law related to a patient's rights and responsibilities" was a reference to the "Patients' Bill of Rights" See Archived Florida Supreme Court Oral Argument for June 7, 2004. . See Archived Oral Argument – Advisory Opinion - Amendment 7 - June 7, 2004.

That the "Academy of Florida Trial Lawyers" n/k/a "Florida Justice Association" meant to direct and limit Amendment 7 to Physicians and Hospitals is not surprising. If the Court recalls the history of Amendment 7, it will recall that Amendment 7 was the product of a battle between the "Academy of Florida Trial Lawyers" and the "Florida Medical Association". This battle was widely recognized and reported both locally and nationally; and information regarding the battle, is a matter of historical fact which can be taken into account on that basis or

on the basis that the source materials containing those facts qualify as additional evaluative material that would have been available to voters during the decision making process.

A *Wall Street Journal* Article dated October 24, 2004, and entitled "Stop the Shakedown", summarized the history of that battle. See Olson, Walter, Stop the Shakedown, *Wall Street Journal*, October 24, 2004. That article reported that, dissatisfied with the relatively weak damage limit enacted by the state legislature, Florida's Doctors came up with Amendment 3 ("The Medical Liability Claimant's Compensation Amendment"), an amendment aimed at sharply limiting lawyers' fee percentages in malpractice cases. Id. It further reported that Plaintiff's lawyers "struck back" with a "teach-a-lesson 'revenge initiatives'". Id. Specifically, it reported that The Academy of Florida Trial Lawyers devised what its executive director called "countermeasures to ensure that [the Florida Medical Association] must play defense first and offense second". Id. The countermeasures or "revenge initiatives" the Academy's executive director was referencing were Amendment 7 (which is the subject of this case) and Amendment 8 ("Public Protection from Repeated Malpractice"). Id.

An article in the *Florida Bar News* dated 7/1/2004 and titled "Academy, FMA Square Off Over Amendments", also recognized and reported on the battle. This article documented that the Florida Bar and the media were not the only

entities who recognized that these amendments were the product of a battle between the “Academy of Florida Trial Lawyers” and the “Florida Medical Association”. As reported in that article, at some point well into oral argument on these three Amendments, Justice Pariente, voiced her recognition of this fact, when she described this set of amendments as "tit for tat" proposed constitutional amendments. See Killian, Mark D., Academy, FMA Square Off Over Amendments”, *Florida Bar News*, 7/1/2004.

The fact that Amendment 7 was a product of the battle between the “Academy of Florida Trial Lawyers” and the “Florida Medical Association” explains why the Amendment is limited to Physicians and Hospitals. Put simply, Physicians and Hospitals were involved in the “tit for tat” battle with the Academy of Florida Trial Lawyers, and were therefore the target of the Amendment; while Nursing Homes were not involved in that battle and, therefore, were not the target of the Amendment.

All of these historical precedents, facts, and/or evaluative materials, like the evaluative materials discussed previously herein, provide even further support for the conclusion that Amendment 7 does not apply to Nursing Homes and was never meant to; because they give insight into the intent of both the framers of the Amendment and the majority of voters who accessed these facts (including the fact

that Nursing Homes were not involved in the battle and therefore not the target of the Amendment) as a predicate for their respective decisions.

3. The fact that there are definitions of the terms "health care provider" and "health care facility in sections of the Florida Statutes other than section 381.026 have no impact on Respondents' argument

Petitioner and Florida Justice Association have cited numerous statutory sections which provide varying definitions of the terms "health care provider" and "health care facility". However, Nursing Homes are nowhere defined as healthcare providers. In fact, on the contrary, this Court and other have specifically held that Nursing Homes are not healthcare providers. See generally, NME Properties, Inc. v. McCullough, 590 So.2d 439 (Fla. 2d DCA 1991); Weinstock v. Groth, 629 So.2d 835 (Fla. 1993); Integrated Health Care Services, Inc. v. Lang-Redway, 840 So.2d 974 (Fla. 2002). Moreover, as noted by the Fourth District in this case, "[a]lthough there are many definitions of the terms "health care provider" and "health care facility" scattered throughout the Florida Statutes, only one was incorporated into the amendment by reference..." See Benjamin at 522.

Finally, as noted in the foregoing discussion of this Court's decision in Buster II, this Court approved of the limited definitions of those terms as set out in Section 381.028(3), the codification of Amendment 7, which are identical to those contained in Section 381.026. Accordingly, none of the statutory sections cited by Petitioner or the Florida Justice Association in an attempt to support their position

have anything to do with Amendment 7 or its definition of the terms "healthcare facility" or "healthcare provider". Therefore, none of the cited sections should have any impact on the decision of this case.

4. The Court should refrain from improperly expanding the precise terms of Amendment 7 based on the Petitioner's argument that doing so is required by 'offsetting" principles of constitutional construction

The Court should not expand the scope of Amendment 7 based on the rationale put forward by Petitioner. Acting in the manner suggested by Petitioner would involve inserting the Court's views and opinions of what Amendment 7 "should be" into the Amendment, rather than interpreting the Amendment as it is. To say the least, this would be highly improper.

As explained previously herein, it is a cardinal rule of constitutional interpretation that, where the language used is clear and unambiguous, as it is in this case, **there is nothing to interpret, and no reason to resort to rules of construction**. See Fla. League of Cities at 400; See City of St. Petersburg v. Briley, Wild & Assocs., Inc., at 822. In other words, "[a]mbiguity is an absolute prerequisite to judicial construction…" See Fla. League of Cities v. Smith, at 400.

Where a constitutional provision is clear and unambiguous "extrinsic guides to construction are not allowed to defeat the plain language". Id. In other words, in the absence of ambiguity, the Courts have no power "to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to

words used therein". See City of St. Petersburg v. Briley, Wild & Assocs., Inc., at 822. Thus, given the absence of ambiguity in the Amendment, it must be "**enforced as written**...." See Costal Fla. Police Benevolent Assn. at 548.

Given the facts of this case, this conclusion is not meaningfully affected by the "offsetting" principles that the constitutional language must be "tempered" by judicial deference to the principles that constitutional provisions receive a "broader and more liberal construction that statutes" and that "constitutional provisions should not be construed to defeat their underlying objectives". See Costal Fla. Police Benevolent Assn. Inc. v. Williams at 548-549. This is because neither principle impacts the First District's or Fourth District's construction of the key language at issue in this case.

First, the principle that constitutional provisions receive a "broader and more liberal construction that statutes" has no application or effect in this case. This principle might allow for a broader construction of language in some cases. However, it does not allow for a broader construction of the key language or terms at issue in this case because that language and those terms are purposefully and precisely limited. Thus, the language and terms in questions do not allow for a construction any broader than the one accorded by the First District, Fourth District and Respondent. To afford this language the interpretation advocated by Petitioner, and allegedly supported by this principle, would require the Court to ignore the

language altogether. As discussed previously, this would be improper. In fact, it would require the Court to run afoul of the second "offsetting" principle by construing the language in manner that to would defeat the Amendments underlying and limited objectives.

Moreover, it would require the Court to assume the electorate was incapable of understanding the import and express limitation imposed by the language in question and/or that the electorate was incapable of or unwilling to discern the meaning of those terms sufficiently to allow them to gain an understanding of those terms prior to voting on the Amendment. Further, it would require the Court to assume that, as a result, the electorate attached a wholly incorrect meaning to the terms of the Amendment; and that this incorrectly ascribed meaning (rather than the meaning of the clear and precise terms) should control the Court's interpretation of the Amendment and broaden the scope of the Amendment.

Second, the principle that "constitutional provisions should not be construed to defeat their underlying objectives" has no application or effect in this case because the interpretation of that plain language at issue, adopted by the First District, Fourth District, and Respondent, does nothing that would arguably defeat the underlying purpose of the Amendment (to give "patients" or potential "patients" of physicians or hospitals access to records of "adverse medical incidents" involving those persons or entities). On the contrary, the interpretation

of the plain language adopted by the First District, Fourth District, and Petitioner would serve to prevent a distortion and improper expansion of the purpose and scope of the Amendment based on that distortion (i.e. Petitioner's baseless claim that the Amendment was mean to eliminate all peer review or quality assurance protection in any Florida Statute).

This Court should not accept Petitioner's interpretation of the Amendment or the baseless assumptions underlying it which is simply inappropriate given the facts at issue in this case. As this Court explained in City of Jacksonville v. Continental Can Co., 151 So. 488 (Fla. 1933):

> The provisions of a written Constitution are presumed to have been more carefully and deliberately framed than is the case with statutes; hence it would seem that less latitude should be taken by the courts in construing constitutions than in the construction of statutes, but it is a well-settled principle of construction that the construction should not be technical nor liberal, but the aim should be to give effect to the purpose indicated by a fair interpretation of the language, the natural signification of the words used in the order, and grammatical arrangement in which they have been placed. If the words thus regarded convey a definite meaning and involve no absurdity or contradiction between the parts of the same instrument, no construction is allowable.

Because the express terms of an Amendment have a clear, unambiguous, definite, and precise meaning, the Court should presume that the electorate understood those terms and enforce the Amendment as written; particularly where all of the historical facts and evaluative materials available are consistent with the plain meaning of the Amendment and support the fact that it was the intent of the

voters to enforce the Amendment as written (limited to physicians and hospitals). It should give effect to the purpose indicated by a fair interpretation of the language, the natural significance of the words used in the order in which they were used, and the grammatical arrangement in which they have been placed. In short, it should affirm the interpretation given to the key terms of the Amendment by the First and Fourth District.

5. The Court should refrain from improperly expanding the scope of Amendment 7 based on the Petitioner's claim that doing so would advance the purpose of Chapter 400 or that there might be some social benefit in doing so

Petitioner's next suggests that the language of Amendment 7 should be interpreted more broadly than it was interpreted by the First District and Fourth District because doing so would advance the Legislature's purpose in drafting and passing Chapter 400 or that doing so might provide some social benefit (i.e. striking down any peer review provisions similar to those struck down by operation of Amendment 7 because that is supposedly what the public wants). These are "red herring" arguments.

With regard to the first argument, the Legislature that created Chapter 400 for the purpose of protecting vulnerable nursing home residents, obviously understood its own purpose. Nonetheless, it included the statutory peer review or quality assurance provisions that are the indirect subject of this appeal in that Chapter. See Sections 400.119 and 400.147, Florida Statutes. Obviously the

Legislature did not feel that these provisions impeded the purpose of the statute or that it was necessary to remove them to advance their purpose in drafting and passing the statute. If they had, they would simply have excluded them. Arguing that the Court should undo what the Legislature did under the guise of advancing its purpose in passing the statute would be improper.

With regard to second argument, amendments cannot be expanded based on no more than an unsupported claim that expansion might promote some social good or because. In short, it cannot be expanded based on the argument that if voter's eliminated peer review protections for doctors and hospitals, they must have meant to eliminate them in any health related context (or likely will want to eliminate them in any health related context in the near future) and/or that eliminating such protections in any health related context would promote the social good. This argument amount to no more than an emotional appeals by Petitioner, made in an effort to coax the Court into rewriting Amendment 7 based on Petitioner's conception of what the Amendment should say, instead of interpreting what it does say.

The plain language of the Amendment cannot be ignored or given a meaning more broad than its plain and precise terms intended based on the suggestion that there might be some social benefit in doing so. As the Fourth District court noted below, in concluding that Breidert was correctly decided and certifying the

question now being considered by this Court:

> "It may well be that there is substantial social benefit in recognizing freedom of information over a nursing home's privilege with respect to health care matters generally, and that the purpose of the voters adopting the amendment would be well served by applying the amendment to privileged incident reports in *any* health-related context, including those prepared in a nursing home. **However, although there are many definitions of the terms "health care provider" and "health care facility" scattered throughout the Florida Statutes, only one was incorporated into the amendment by reference**..." (emphasis added).

Benjamin at 522.

In sum, like the rest of the arguments put forward by Petitioner in an effort to counter the interpretation of the plain meaning of Amendment 7 by the First District, Fourth District, and Respondent, Petitioner's argument that the Amendment should be interpreted more broadly than its plain and precise terms would suggest on their face in the name of Petitioner's idea of "social good" is fatally flawed; has no legitimate basis; and should be rejected by this Court.

IV. AMENDMENT 7 IS INCONSISTENT WITH AND CONTRARY TO FEDERAL LAW REGARDING NURSING HOMES BECAUSE CONGRESS HAS PREEMPTED AMENDMENT 7 BY ITS CLEAR INTENT TO PROTECT QUALITY ASSESSMENT RECORDS GENERATED BY NURSING HOMES

Even if the Court is were to decide that skilled nursing facilities were within the purview of Amendment 7, that amendment stands as an obstacle to the accomplishment of the purposes and objectives of Congress and is thus preempted as inconsistent with and contrary to Federal law. See State v. Harden, 938 So.2d

480, 492-493 (Fla. 2006). Under the Supremacy Clause a federal law may expressly or impliedly preempt state law. See State v. Harden, 938 So.2d at 485(citing, U.S.C.A. Const. Art. VI, §2). As set forth below, in its efforts to regulate quality assurance in the nursing home industry, the United States Congress has clearly sought to protect nursing home quality assurance records from disclosure.

Congress passed the Federal Nursing Home Reform Act (hereinafter referred to as "FNHRA") as part of the Omnibus Budget Reconciliation Act of 1987 (hereinafter referred to a "OBRA 87") enacting national standards to insure that the highest quality of care was provided to nursing home residents. The statute and regulations governing skilled nursing facilities and nursing facilities are codified in the FNHRA at 42 U.S.C. §§ 1395i-3, 1396r and 42 C.F.R. Part 483.

When the FNHRA was enacted, the United States Congress, included clear protections providing quality assessment and quality assurance reports could not be compelled by any state. The identical non-disclosure provisions in 42 U.S.C. §§ 1395i-3(b)(1)(B) and 1396r(b)(1)(B) provide, in pertinent part, as follows:

> *Quality Assessment and Assurance* - A skilled nursing facility must maintain a quality assessment and assurance committee, consisting of the director of nursing services, a physician designated by the facility, and at least 3 other members of the facility's staff, which (i) meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and (ii) develops and implements appropriate plans of action to correct identified quality deficiencies. **A State or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph** (Emphasis supplied).

Congress' recognition of the importance of candor in quality assessment committee reports in the statute is clear and provides unequivocal protection for such information from public disclosure.

The United States Supreme Court has recognized three categories of federal preemption of state laws, (1) where there is explicit language of congress which expressly preempts state law; (2) where Congress has enacted a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; and, (3) under implied conflict where compliance with both state and federal regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress. See State v. Harden, 938 So.2d at 486.

Nursing home quality assurance committees, as mandated in Title 42 of the United States Code, are "key internal mechanisms that allow skilled nursing facilities (*i.e.*, Nursing Homes) opportunities to deal with quality concerns in a confidential manner and can help them sustain a culture of quality improvement." *See* Report of Office of Inspector Gen., Dept. of Health and Human Servs., Quality Assurance Committees in Nursing Homes (Jan. 2003). Courts in Florida and other states have held that the records of quality assurance/risk management meetings or communications which are maintained in compliance with federal or state

regulations[1] are exempt from disclosure under the FNHRA. See, e.g., 1602 Health Partners, L.C. v. Fluitt, 830 So.2d 935 (Fla. 4th DCA 2002); Matter of Subpoena Duces Tecum to Jane Doe, 757 N.Y.S.2d 507 (N.Y. 2003); State ex rel Boone Retirement Center, Inc. v. Hamilton, 946 S.W.2d 740 (Mo. 1997).

In enacting the FNHRA, Congress' primary objective was to improve the quality of nursing home care on a national level. H.R. 391(I), 100th Cong. § 4000 (1987) (enacted). To this end, Congress made "major revisions in the existing Medicaid law in the form of an amendment which would 'apply a single, uniform set of requirements for all nursing facilities participating in Medicaid.'" Newman v. Kelly, 848 F. Supp. 228 (D.D.C. 1994) (citing H.R. 391(I), 100th Cong. § 4000 (1987) (enacted)). The Newman Court analogized the FNHRA to ERISA and held that "the Medicare and Medicaid schemes are so pervasive that the Court has no alternative but to hold that those schemes preempt local regulation from the field." Id. The Court continued, "That any deviation from that single standard is contravention to the federal law, and therefore . . . such a deviation . . . is preempted." Id. However even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. See Hillsborough County, Fl. v. Automated Medical

[1] 42 U.S.C. § 1395i-3(b)(1)(B), 42 U.S.C. § 1396r(b)(1)(B), and 42 C.F.R. § 483.75(o).

Laboratories, Inc., 471 U.S. 707 (1985)(citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

In State v. Harden, this Court held that where a federal program establishes a program such as Medicaid that utilizes coordinated state and federal cooperative efforts the case for federal preemption is less persuasive. Harden, 938 So.2d at 486. However, the court went on to invalidate state Medicare anti-kickback legislation under a direct conflict standard as that legislation provided for a different standard of proof than federal statues and provided no exceptions or safe harbors. Harden, 938 So.2d at 491, 493. The court held that because the state law directly conflicted with the federal statute it presented an obstacle to accomplishment of the federal law. Id. at 493. In this case Amendment 7 nullifies the express protection provided by Congress to quality assurance records. Accordingly, even if Amendment 7 were applicable to Nursing Homes, it would be preempted by Federal law because it would frustrate the purpose of the FNHRA.

Based on the foregoing**,** the United States Congress, in enacting the FNHRA, manifested its intent to protect nursing home quality assessment and assurance reports, such as adverse incident reports, from disclosure. Analysis of the intent, purpose, and text of the FNHRA reveals that Congress intended to preempt state legislation regarding disclosure of nursing home quality assurance records. Accordingly, Amendment 7 is inconsistent with federal law and the intent

of the Congress; and should thus be held to be preempted by Congressional legislation.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Honorable Court: (1) answer the question certified by the Fourth District in this case as one of great public importance in the negative, and hold that: "Skilled Nursing Facilities", known colloquially as "Nursing Homes", do not fall within the definition of "Health Care Facility" or "Health Care Provider" as contemplated by "Amendment 7", the Amendment known formally as Article X, Section 25, Florida Constitution; and (2) hold, to the extent it must address the issue at all, that even if skilled nursing facilities were within the purview of Amendment 7, the Amendment would be inconsistent with, contrary to, and therefore preempted by Federal law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished via facsimile and U.S. Mail this 25th day of April 2008 to: Rebecca Mercier Vargas, Esquire of Kreusler-Walsh, Compiani & Vargas, P.A., 501 S. Flagler Drive, Suite 503, West Palm Beach, Florida 33401-5913; Philip M. Burlington, Burlington & Rockenbach, P.A., 2001 Palm Beach Lakes Blvd, Suite 410, West Palm Beach, FL 33409; and Jonathan S. Grout, Goldsmith, Grout & Lewis, P.A., 2160 Park Avenue North, Winter Park, Florida 32789.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Answer Brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure and is in the required font of Times New Roman 14.

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