**IN THE SUPREME COURT**
**STATE OF FLORIDA**

Case Number: SC10-1295
Lower Tribunal Case No.: 5D09-3378

ANGELA SAMPLES and
KENNETH RAY SAMPLES,
individually and as parents and
next friends of MACKENZIE
SAMPLES, a minor,

Petitioners,

vs.

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION,

Respondent.
_____/

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# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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On Discretionary Review from the
Fifth District Court of Appeal

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## PRELIMINARY STATEMENT

In this Answer Brief, the following terms and abbreviations will be utilized: Petitioners, ANGELA SAMPLES and KENNETH RAY SAMPLES, individually and as parents and next friends of MACKENZIE SAMPLES, a minor, will be referred to as the "the Samples" or "the Petitioners."

Respondent, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, will be referred to as "NICA."

The Fifth District Court of Appeal will be referred to as "the Fifth District Court" or "the Fifth District."

Sections 766.301, et seq., Florida Statutes, will be referred to as "the NICA Statute" or the "NICA Plan."

The Record on Appeal will be cited as "R:" followed by the appropriate page number(s). The Exhibits introduced into evidence by the parties will be cited by the Exhibit number, followed by "p." and the appropriate page number(s). The transcript of the hearing will be cited as "Tr:" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

NICA generally agrees with the Petitioners' Statement of the Case and Facts set forth in the Initial Brief. NICA disagrees, however, with the statements set forth in footnote 1 as containing improper argument. NICA also disagrees with the Petitioners' statement on page 5 of the Initial Brief that the Fifth District certified the instant question "based on this case's similarity to St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000)." The Fifth District Court of Appeal did not find these two cases similar. Instead, the Fifth District Court of Appeal concluded:

> Section 766.31(1)(b)1. is neither ambiguous, nor violative of constitutional prescriptions related to equal protection, vagueness or access to courts. Although we have concluded **that the statute discussed in *St. Mary's Hospital* is sufficiently different from the statute at issue in this case** to make the St. Mary's Hospital precedent distinguishable, we acknowledge that the statutes are analogous enough that our supreme court may view the issue differently. We also believe that the issue is one of great public importance, and as such certify the following question to the Florida Supreme Court:
>
> > *Does the limitation in section 766.31(1)(b)1., Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?* [Underlined and bolded emphasis added.]

Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n, 40 So. 3d 18, 31(Fla. 5th DCA 2010). The complete list of Stipulated Facts as accepted by the Administrative Law Judge are fully set forth in the Final Order. [R: 202-204]

## SUMMARY OF THE ARGUMENT

Section 766.31(1)(b)1., Florida Statutes, authorizes one award only in an amount not to exceed $100,000, to the parents, combined, regardless of whether there are one or two parents involved in the claim. Such an interpretation is supported by the plain language of the statute and the legislative history. The award to the parents is but one of many benefits provided for in the NICA Statute, which establishes an exclusive alternative administrative remedy to provide limited compensation under the terms of the Florida Birth-Related Neurological Injury Compensation Plan ("the Plan") in lieu of traditional common law remedies. Contrary to the argument of the Petitioners, Section 766.31(1)(b)1., Florida Statutes, as interpreted by the Fifth District Court of Appeal and the Administrative Law Judge ("ALJ"), does not violate any constitutionally protected rights, including the equal protection rights of the Petitioners or any other parents of children accepted for compensation under the Plan.

## ARGUMENT

THE PARENTAL AWARD IN SECTION 766.31(1)(b)1., FLORIDA STATUTES, AS CONSTRUED BY THE FIFTH DISTRICT COURT OF APPEAL, DOES NOT VIOLATE THE FEDERAL AND STATE CONSTITUTIONS.

## I. Standard of Review

The appellate standard of review for pure questions of law is de novo. See Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

## II. Argument

### A. Equal Protection.

The Equal Protection clause of the United States Constitution provides that "[n]o state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. The Florida Constitution provides that "[a]ll natural persons are equal before the law. . . ." Art. I, §2, Florida Const. Equal protection requires that similarly situated persons be treated similarly. See Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000); Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007).

Section 766.31(1)(b)1., Florida Statutes, provides, in pertinent part:

> (1) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the following items relative to such injury.
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> ***
>
> (b)1. Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award shall not exceed $100,000. However, at the discretion of the administrative law judge, such award may be made in a lump sum.

The Fifth District, consistent with the interpretation of the ALJ and the Florida Birth-Related Neurological Injury Compensation Association ("NICA"), interpreted the plain language of this section as authorizing an aggregate award to the "parents" of the injured child in an amount not to exceed $100,000. The Fifth District further held that Section 766.31(1)(b)1., Florida Statutes, does not violate equal protection concerns because the statute does not treat similarly situated persons differently and found that the statute is rationally related to a legitimate state objective. Ultimately, the Fifth District upheld the statute as constitutional on all grounds challenged by the Samples. In so holding, the Fifth District acknowledged that this Court may view the issues differently based on this Court's decision in St. Mary's supra, even though the Fifth District found that "the statute at issue in *St. Mary's Hospital* is sufficiently different from the statute at issue in this case to make the *St. Mary's Hospital* precedent distinguishable . . . ." Samples at 31.

The question of great public importance at issue here is:

> *Does the limitation in section 766.31(1)(b)1., Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions* [1]

[1] The certified question regarding equal protection is the only issue squarely before this Court. The Petitioners request the Court to use its discretion to address the other constitutional issues raised below. NICA respectfully requests the Court

Samples at 31. NICA agrees with the Fifth District's holding that Section 766.31(1)(b)1., Florida Statutes, does not violate the Equal Protection Clauses of the United States and Florida Constitutions. NICA respectfully submits that the certified question should be answered in the negative for all the reasons cited by the Fifth District and all reasons set forth below.

1. Section 766.31(1)(b)1., does not treat parents disparately.

Before entering into an analysis of whether a classification is permissible under the equal protection clause, the threshold question is whether there is a classification that affects two or more similarly situated groups in an unequal manner. See T.M. v. State, 689 So. 2d 443, 444 (Fla. 3d DCA 1997) ("[A] prerequisite to any valid equal protection claim is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner."); Fredman v. Fredman, 960 So. 2d 52 (Fla. 2d DCA 2007) ("An equal protection analysis is appropriate only if similarly situated individuals are treated differently.").[2] Only when it is established that there are two similarly

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to exercise its discretion to review only the certified question as is more fully explained in Section B, herein.

[2] The Petitioners note in their Initial Brief that they believe the Fifth District applied a different test than rational basis when it set forth that the Petitioners were required to show: (1) they were treated differently under the law from similarly situated persons; (2) the statute "intentionally discriminates" against them; and

situated groups does the court proceed with the equal protection analysis to determine whether the classification is permissible. State v. McInnis, 581 So. 2d 1370, 1372 (Fla. 5th DCA 1991).

Here, the Fifth District found that the classification of "parents" within Section 766.31(1)(b)1., Florida Statutes, does not treat people falling within that classification dissimilarly. Section 766.31(1)(b)1., Florida Statutes, authorizes $100,000 to the "parents" of an infant who has sustained a birth-related neurological injury. Under Section 766.31(1)(b)1., Florida Statutes, there is no difference in treatment whether there is one parent or two parents involved in a claim because in each case, the maximum award authorized to the parents is $100,000. As acknowledged by the Fifth District and the Samples, each child has but two parents. If one parent receives the maximum award, then the other parent necessarily receives no award. See Samples at 24. As the facts of the case reveal,

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(3) that there was no rational basis for the discrimination. The Petitioners assert that the second prong of the announced test is from a case that misstates a test used in another district court opinion. The cases relied on by the Fifth District identify this test as the test to use in an as-applied equal protection challenge, which is how the Petitioners couched their challenge below. See Miller v. State, 971 So. 2d 951, 952-53 (Fla. 5th DCA 2007); Florida Hometown Democracy, Inc., 953 So. 2d 666, 676 (Fla. 1st DCA 2007); McElrath v. Burley, 707 So. 2d 836, 839 (Fla. 1st DCA 1998). Regardless, when a Court begins an equal protection analysis, it must determine if similarly situated people are treated unequally. The Fifth District found that there was no disparate treatment within the class of parents in the instant case. See Samples at 25-27.

"[a]n ALJ has never ordered NICA to pay a parental award in excess of $100,000, regardless of whether there was one parent or two parents involved in the claim." [R: 75] Even in the cases cited by the Petitioners, wherein the parents requested the ALJ to apportion the award between them, the end result was the "parents" received an amount which did not exceed a total of $100,000. [R: 75] The fact is, Section 766.31(1)(b)1., Florida Statutes, does not treat the Petitioners any differently than any other "parents" of children accepted for compensation under the Plan (hereinafter "NICA Children"). All parents of a NICA child receive no more than $100,000, in the aggregate. Thus, the members of the class of "parents" as set forth in Section 766.31(1)(b)1., Florida Statutes, are treated similarly, and, as such, the Equal Protection Clauses of the United States and Florida Constitutions are not implicated. See Samples at 27.

In an attempt to show disparate treatment between one and two parent families with respect to the parental award authorized in Section 766.31(1)(b)1., Florida Statutes, the Petitioners rely on this Court's decision in St. Mary's. The issue in St. Mary's was, in part, "whether the $250,000 'per incident' limitation of noneconomic damages in the arbitration provisions of the Medical Malpractice Act limits the total recovery of all claimants in the aggregate to $250,000 or limits recovery of each claimant individually to $250,000." St. Mary's at 967. In St.

Mary's, this Court determined that to read the statute as limiting the total recovery of noneconomic damages to all claimants in the aggregate to $250,000 would create equal protection concerns. Id. The reasoning in St. Mary's for the Court's concerns for equal protection was based on the underlying premise that if non-economic damages are "limited to $250,000 per incident in the aggregate, then the death of a wife who leaves only a surviving spouse to claim the $250,000 is not equal to the death of a wife who leaves a surviving spouse and four minor children, resulting in five claimants to divide $250,000." Id. at 972.

The Fifth District correctly declined to apply this Court's equal protection analysis in St. Mary's to Section 766.31(1)(b)1., Florida Statutes, at issue here finding the two statutes and this Court's reasoning in St. Mary's distinguishable. Samples at 31. Unlike the statutes at issue in St. Mary's which cap the amount of noneconomic damages recoverable by a claimant in a wrongful death action, the NICA Plan, as a whole, is an alternative exclusive administrative remedy providing a limited system of compensation "on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." See §766.301(1), Fla. Stat.; Samples at 25. The compensation provided under the Plan is not intended to equate to "damages" that one could receive in a tort action. Likewise, the parental award authorized in Section

766.31(1)(b)1., Florida Statutes, is not intended to serve as damages to make parents whole as is an award in a tort action. Instead, the Plan uses state funds to provide a lifetime of compensation to the catastrophically injured child and to provide a limited parental award to the parents or legal guardians of such injured child. See §766.31, Fla. Stat.

Here, the Petitioners erroneously argue that the Fifth District erred in distinguishing the instant case from St. Mary's based on its finding that Section 766.31(1)(b)1., Florida Statutes, does not equate to noneconomic damages. Although the Fifth District is correct that the parental award is not intended to constitute noneconomic damages, the Fifth District distinguished this case and St. Mary's based on the fact that the parental award is but one benefit authorized in a no-fault compensation scheme intended to be an alternative remedy to a common law tort action. The Fifth District specifically states:

> As NICA correctly notes, the statute at issue in *St. Mary's Hospital* dealt with fault-based damages, not a no-fault compensation scheme as provided for in section 766.31(1)(b)1. *See* §766.301(2), Fla. Stat. ("It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation."). It seems apparent from the language of the statute that the parental award in section 766.31(1)(b)1. is primarily intended to compensate parents for the added burdens and costs of providing care for a child with permanent and severe neurological injuries, not as damages to make parents whole for the loss of consortium negligently caused, as in a traditional tort action. [Footnote omitted.] [Emphasis added.]

Samples at 25. The statute at issue in St. Mary's operated to limit the amount of fault damages that could be awarded in a malpractice lawsuit instead of authorizing an entirely new alternative compensation scheme as in the NICA Plan. While both statutes were enacted as part of Chapter 88-1, Laws of Florida, as part of the legislative reforms to address the medical malpractice insurance crises, their function in addressing such crises is different.

Although Petitioners, in an attempt to apply the St. Mary's holding, argue that the parental award must be noneconomic damages because several other provisions of the statute specifically compensate the parents for the added economic burden of caring for a child with a birth-related neurological injury as set forth in Section 766.31, Florida Statutes. Such argument is without merit.

Petitioners argue that there is a provision in the NICA Statute for "compensating parents for their loss in income if they opt to provide residential or custodial care in their home." Section 766.31(1)(a), Florida Statutes, provides for an award of compensation to the child for "actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel." These benefits are intended to address the medical needs of the injured

child. The "Family Residential or Custodial Care" provision was added in 2002 and operates to provide parents with a choice for them to provide care to their child at the direction of a physician, in lieu of NICA paying for professional care at the rate established in Section 766.302(10), Florida Statutes. This 2002 Act is not compensation to the parents for lost income. There is nothing in this record that would support a contrary finding. As such, this Court constrained to presume such fact. See North Ridge General Hospital, Inc. v. City of Oakland Park, 374 So. 2d 461, 464-65 (Fla. 1979) ("[I]f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts.").

The Petitioners also argue that the NICA Plan itself refers to the parental award as "noneconomic damages" based on a sentence contained in the actuarial provisions in Section 766.314(9), Florida Statutes, which states, in part:

> (9)(a) Within 60 days after a claim is filed, the association shall estimate the present value of the total cost of the claim, including the estimated amount to be paid to the claimant, the claimant's attorney, the attorney's fees of the association incident to the claim, and any other expenses that are reasonably anticipated to be incurred by the association in connection with the adjudication and payment of the claim. For purposes of this estimate, the association should include the maximum benefits for noneconomic damages. [Emphasis added.]

This section does not establish that the parental award authorized in Section 766.31(1)(b)1., Florida Statutes, constitutes noneconomic damages. Both the

NICA Statute and its legislative history demonstrate that the parental award is not noneconomic damages.[3]

The Fifth District also correctly distinguishes the instant case from St. Mary's by acknowledging that the classifications in the statutes at issue in each case are different. See Samples at 25; §§766.31(1)(b)1., 766.202(1), Fla. Stat. In St. Mary's, Section 766.202(1), Florida Statutes, defined "claimant" as "any person

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[3] Chapter 88-1, Laws of Florida, was enacted during a special session of the Florida Legislature in February 1988. Then, during the 1988 regular session, the Legislature passed CS/CS/HB 819 as a "glitch bill" which "reenact[ed] the provisions of Ch. 88-1, Laws of Florida, with amendments addressing technical flaws and issues which, because of time constraints, were not resolved in conference." See Fla. H.R. Comm. on Regulatory Reform (as revised by the Comm. on Approp.) CS for CS for HB 819 (1988), Staff Analysis & Economic Impact Statement (rev. April 14, 1988) (on file with the Fla. State Archives). The companion bill to HB 819 was SB 879. Id. The parental award is described in the staff analysis for SB 879 as:

> 4. Birth-Related Neurological Injury Plan (Sections 60-75, Ch. 88-1, Laws of Florida)
>
> ***
>
> Compensation is limited to net economic losses. Noneconomic damages for pain and suffering, loss of enjoyment of life and the like are not awarded. However, the parents or legal guardians of a child who has sustained a birth-related neurological injury shall receive an award not to exceed $100,000 payable in a lump sum or by periodic payments. . . . [Emphasis added.]

See Fla. S. Comm. on Approp. for CS for SB 879 (1988) Staff Analysis 2 (May 28, 1988)(on file with Fla. State Archives), p.5; [R: Attachment I, Ex. 2].

having a cause of action for damages based on personal injury or wrongful death arising from medical negligence." The number of potential claimants in a wrongful death action will vary depending on how many children or other claimants exist. See Samples at 25. In contrast, with respect to the classification of "parents" in Section 766.31(1)(b)1., Florida Statutes, "the NICA award will be made jointly to, or split between, at most, only two people."[4] Id. Thus, the classification of "parents" in the NICA Statute is "well-defined and narrowly drawn when compared to the classification of "claimants" in St. Mary's" which provides for an unknown number of potential claimants. Id.

Further, while the compensation available in Section 766.31(1)(b)1., Florida Statutes, is limited, the statute does not limit benefits previously available under the Plan as the statute did in St. Mary's. Rather, Section 766.31(1)(b)1., Florida Statutes, authorizes an award up to $100,000 for parents of the injured NICA Child. The award authorized in the NICA Plan is not a damage "cap" and is not

[4] Although the classification includes parents or legal guardians, the Fifth District and the Samples acknowledge that normally the award will be split between, at the most, two people, even if legal guardians are involved. See Samples at 25; Petitioners' Initial Brief on the Merits at 9. In fact, parents are not necessarily required to file the claim. See §766.302(5), Fla. Stat. ("Such a claim may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, personal representative, or other legal representative thereof.").

comparable to the issue of the cap on noneconomic damages addressed in St. Mary's. The Fifth District correctly found the two cases distinguishable.

2. Section 766.31(1)(b)1, satisfies the rational basis test.

Even if it is assumed, for the sake of argument, that, as the Petitioners allege, there is disparate treatment under the rational basis test, Section 766.31(1)(b)1., Florida Statutes, is constitutional and does not violate equal protection rights. See Samples at 27, 31.

All parties agree that the rational basis test is the applicable test in this case. The rational basis test is explained as follows:

> . . . whether there is rational basis for the classification made by the legislature; that is, does the classification bear some rational relationship to a legitimate state purpose. *E.g. In re Estate of Greenberg*, 390 So. 2d 40 (Fla. 1980), [remainder of citation omitted]. The burden is on the party challenging the statute to show there is no conceivable factual predicate rationally able to support the classification being attacked. *Florida High School Activity Assoc., Inc. v. Thomas*, 434 So. 2d 306 (Fla. 1983). That the statute results in some inequality will not invalidate it; the statute must be so disparate in its effect as to be wholly arbitrary. *E.g. Greenberg*, 390 So. 2d at 42. It is not the court's function to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal. *Khoury v. Carvel Homes South, Inc.*, 403 So. 2d 1043, 1045 (Fla. 1st DCA 1981). [Emphasis added.]

See Loxahatchee River Environmental Control District v. School Bd. of Palm Beach County, 496 So. 2d 930, 938 (Fla. 4th DCA 1986); see also Grant v. State, 770 So. 2d 655, 660 (Fla. 2000).

The Legislature "has wide discretion in creating statutory classifications, and there is a presumption in favor of validity." State v. Leicht, 402 So. 2d 1153, 1154 (Fla. 1981). The Florida Supreme Court explains this presumption as follows:

> If any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts. The deference due to the legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made. [Emphasis added.]

See North Ridge General Hospital, at 464-65(quoting Lewis v. Mathis, 345 So. 2d 1066, 1068 (Fla. 1977)); Zapo v. Gilreath, 779 So. 2d 651, 655-56 (Fla. 5th DCA 2001). Further, the Legislature is given more leeway in creating classifications in economic and social welfare statutes, such as the NICA Statute. See Woods v. Holy Cross Hospital, 591 F.2d 1164, 1174 (Fla. 5th Cir. 1979); Strohm v. Hertz Corp./Hertz Claim Management, 685 So. 2d 37 (Fla. 1st DCA 1996).

Under the rational basis test, a classification "may be [legitimately] based upon rational speculation unsupported by evidence or empirical data." See Tiedemann v. Dep't of Management Services, 862 So. 2d 845, 846-47 (Fla. 4th

DCA 2003)(citing Heller v. Doe, 509 U.S. 312, 320 (1993)); Florida Hometown Democracy, Inc. at 676; McElrath at 839. The rational basis for the governmental objective also may be identified by statements of intent from legislative reports and journals, inferences by reference to similar legislation or actions taken by the legislative body, or from legal arguments before the court. See Sasso v. Ram Prop. Mgmt., 431 So. 2d 204, 216 (Fla. 1983); Coy v. Fla. Birth-Related Neurological Injury Compensation Ass'n, 595 So. 2d 943 (Fla. 1992) (relying on the Academic Task Force Reports discussed infra); Galen of Fla., Inc. v. Braniff, 696 So. 2d 308, 310 (Fla. 1997).

As the challenging party, the Petitioners must show that "there is no conceivable factual predicate rationally able to support the classification being attacked." See Loxahatchee River Environmental Control District at 938 (citing Florida High School Activity Assoc., Inc. v. Thomas, 434 So. 2d 306 (Fla. 1983)); Tiedemann, supra. "Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained." Thomas at 308. The Petitioners have failed to meet their burden and the challenged statute must stand.

As noted by the Fifth District, limiting the parental award authorized in Section 766.31(1)(b)1., Florida Statutes, to an award to the parents in the aggregate in an amount not to exceed $100,000, is rationally related to the legitimate state

objective of keeping the Plan actuarially sound, which "is important to achieving the other goals of the program." See Samples at 26. The NICA Statute, on its face, evidences that there is a rational basis between limiting the amount of compensation available under the Plan, including the award authorized in Section 766.31(1)(b)1., Florida Statutes, to assist in ensuring that the Plan is and remains actuarially sound so that compensation may be provided over the life of the covered child; and to continue to accept new claims which, in turn, assists in addressing high medical malpractice insurance rates by remaining operative and accepting new claims. The Legislature specifically acknowledges that its intent was to "provide a limited system of compensation. . . ." See §766.301(1)(d), Fla. Stat.; see also Fluet v. Fla. Birth-Related Neuro. Injury Comp. Ass'n, 788 So. 2d 1010, 1011 (Fla. 2d DCA 2001); see also Attachment I, Ex. 4, p. 30 (stating: "The Task Force endorses this separate treatment for birth related neurological injuries for two reasons: first, because claims costs in this area have been particularly high, and, second, because a no-fault system in this limited area is feasible and would involve manageable costs.")(emphasis added). The Legislature was concerned with keeping the NICA Plan actuarially sound as is evidenced by the various provisions included in the NICA Statute relating to oversight and the process for increasing assessments, if need be, to ensure the NICA Plan remains actuarially

sound. See §§766.314, 766.315, Fla. Stat. Limiting the compensation available under the Plan set forth in Section 766.31, Florida Statutes, including the award to the parents, is rationally related to the legitimate state objectives of the Plan. The Petitioners assert that keeping the Plan actuarially sound is not a legitimate state objective that the Fifth District may look at, because keeping the Plan actuarially sound is not rationally related to the stated goals of the Plan to: (1) provide compensation to a limited class of catastrophically injured children whose injuries result in unusually high costs of care; and (2) assist in alleviating the medical malpractice insurance crisis to ensure continued availability of obstetrical care in Florida. §766.301, Fla. Stat.

The Petitioners' argument is fundamentally flawed in that if the Plan is not actuarially sound, then the Plan cannot continue to function, at which time all the stated goals of the Plan would be thwarted.[5] The Fifth District in Samples

[5] The NICA Statute provides that: "in the event that the total of all current estimates [of the Plan] equals 80 percent of the funds on hand and the funds that will become available to the association within the next 12 months . . . the association shall not accept any new claims without express authority from the Legislature. . . ." See §766.314(9)(c), Fla. Stat. Further, "[i]f any person is precluded from asserting a claim against the association because of paragraph [766.314(9)(c)], the plan shall not constitute the exclusive remedy for such person, his or her personal representative, parents, dependents, or next of kin." Thus, if the Plan were to ultimately become actuarially unsound, the intended goals of the NICA Plan to provide limited compensation in an effort to assist in reducing

reviewed Section 766.31(1)(b)1., Florida Statutes, in relation to the Plan as a whole and, in keeping with well established case law applying the rational basis test and in agreement with NICA, stated, in part:

> . . . maintaining actuarial soundness is an express goal of the program and is important to achieving the other goals of the program.
>
> Limiting parental compensation to $100,000, as required under section 766.31(1)(b)1., instead of judicially authorizing up to $200,000, is rationally related to actuarial soundness-the less money NICA is required to pay the easier it will be for the Plan to remain actuarially sound. . . .[6]

See Samples at 26.

The Petitioners erroneously rely, in part, on this Court's reasoning in St. Mary's where this Court stated:

> If we were to accept St. Mary's contention that the Legislature intended to limit noneconomic damages to $250,000 per incident in the aggregate, then the death of a wife who leaves only a surviving spouse to claim the $250,000 is not equal to the death of a wife who leaves a surviving spouse and four minor children, resulting in five claimants to divide $250,000. We fail to see how this classification bears any rational relationship to the Legislature's stated goal of

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medical malpractice insurance rates so as to ensure continued quality health care in Florida, would go by the wayside.

[6] The Petitioners' reference in the Initial Brief to one of the goals of the NICA Plan being the provision of "fair compensation" is a mischaracterization of the Plan's goals. The term "fair compensation" is found in the legislative intent for Chapter 88-1, Laws of Florida, referencing awards of noneconomic damages in civil actions, not under the NICA Statute. See the preamble to Ch. 88-1, Laws of Florida (1988). The specific intent of the Plan is to provide "a limited system of compensation irrespective of fault." See §766.301(1)(d), Fla. Stat.

> alleviating the financial crisis in the medical liability industry. Such a categorization offends the fundamental notion of equal justice under the law and can only be described as purely arbitrary and unrelated to any state interest. [Citation omitted.] [Emphasis added.]

Id. at 972. This Court's reasoning in St. Mary's is inapplicable to the NICA Plan, and Section 766.31(1)(b)1., Florida Statutes. The specific legislative intent and goals for the NICA Plan as set forth in Section 766.301, Florida Statutes, are as follows:

> (1) The Legislature makes the following findings:
> (a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians.
> (b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by the current medical malpractice problems.
> (c) Because obstetric services are essential, it is incumbent upon the Legislature to provide **a plan designed to result in the stabilization and reduction of malpractice insurance premiums** for providers of such services in Florida.
> (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.
> (2) It is the intent of the Legislature **to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation**. This plan shall only apply to birth-related neurological injuries. [Emphasis added.]

See also Coy, supra; Fluet, supra. The Plan designed by the Legislature is a substitute for a civil action for damages or arbitration within such a civil action where economic and noneconomic damages are available. Limiting the amount of the parental award is consistent with the Plan's intent to provide a limited system of compensation and is consistent with the need to maintain the actuarial soundness of the Plan. See Ch. 2003-416, Laws of Fla., §1 ¶ 18; R: Attachment I, Ex. 7, pp. 307-08 (finding that "[e]xperts acknowledge that NICA, a second-generation level reform of the insurance liability issue, functions as intended according to empirical evidence. It was, however, never intended to be a cure to insurance rates, but rather, was intended to maintain lower insurance premiums. Based upon its intended purpose . . . ."). Thus, in holding there is a rational basis, the Fifth District properly considered the stated legislative goals for the Plan and held that the actuarial soundness of the Plan is also a stated goal which in turn leads to the accomplishment of the other goals. Based on the record, Section 766.31(1)(b)1., Florida Statutes, authorization of an aggregate award to the parents in an amount not to exceed $100,000, is a legitimate state objective directly related to the stated goals in the legislative intent for the Plan.

Because the Legislature is dealing with public funds, it has the discretion to place limitations on the extent to which it will authorize payment of those public

funds. NICA administers state funds. See Coy at 945; see also Florida Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 633 So. 2d 1103, 1105 (Fla. 3d DCA 1994) (noting NICA administers public funds); §766.315(5)(e), Fla. Stat. NICA possesses sovereign immunity, which has been waived by the Legislature only to "assure payment of compensation as provided in Section 766.31, Florida Statutes." See §766.303(3), Fla. Stat. The Legislature, within its discretion to appropriate public funds, authorized a parental award not to exceed $100,000 for the parents or legal guardians, regardless of whether there are one or two parents or legal guardians involved. See e.g., Jaar v. University of Miami, 474 So. 2d 239, 245 (Fla. 3d DCA 1985) ("The Legislative purpose in enacting sovereign immunity statutes is to protect the public from 'profligate encroachments on the public treasury.'") (citing Spangler v. Fla. State Turnpike Authority, 106 So. 2d 421 (Fla. 1958)); Jetton v. Jacksonville Electric Authority, 399 So. 2d 396, 399 (Fla. 1st DCA 1981); see also Campbell v. City of Coral Springs, 538 So. 2d 1373, 1375 (Fla. 4th DCA 1989) (addressing the immunity provisions in Section 768.28(9), the Court held, "[w]e also find no merit in appellant's claim that the statute is unconstitutional as a denial of equal protection. The legislature has the discretion to place limits and conditions upon the scope of the sovereign immunity waiver."); American Home Assur. Co. v. National Railroad Passenger Corp., 908

So. 2d 459 (Fla. 2005) (acknowledging that one of the policy considerations for sovereign immunity is protection of the public treasury.). Thus, the limitation of the parental award of $100,000, regardless of whether there is one parent or two parents involved, is well within the discretion of the Florida Legislature and does not offend the dictates of the equal protection clause.

Lastly, for a classification to be violative of the equal protection clause under the rational basis test, the different treatments between the similarly situated persons must be so disparate so as to render the difference wholly arbitrary. See In re Greenberg's Estate at 42. The compensation available has been acknowledged as being limited and is mainly focused on payment of actual medical expenses for the life of the child which, as acknowledged by the Legislature, is unusually high. See §766.301(2), Fla. Stat.; see also Fluet at 1011. As part of the compensation, all the parents and legal guardians are entitled to the parental award which is not to exceed $100,000 in the aggregate. Such award is simply an appropriation and limited waiver of sovereign immunity by the Legislature of an award not to exceed a certain amount. Unlike a tort action, to be entitled to such award, the parents are not required to prove fault or prove entitlement to certain damages. Instead, if the child suffered a qualifying incident (i.e., a "birth-related neurological injury" as that term is defined in the Plan) and a participating physician provided obstetrical

services during the operative time frame, then the claim is compensable under the Plan and the parents are automatically entitled to receive a parental award not to exceed $100,000, in the aggregate. Entitlement to the parental award is simply based on falling within the class of "parents or legal guardians" of a child with a qualifying injury. Any difference in treatment when only one parent is involved in a claim is not intentional nor is it so disparate so as to render the classification wholly arbitrary.

In social legislation such as the NICA Act and in cases where the public treasury is involved, there is more leeway provided under the dictates of equal protection. A class will not be determined to be invalid if it results incidentally in some inequality or that it is not drawn with mathematical precisions will not result in its invalidity. The classification of parents or legal guardians, in the aggregate, in Section 766.31(1)(b)1., Florida Statutes, is not arbitrary and is rationally related to legitimate state interests in continuing the Plan both to address the medical malpractice insurance rates to provide continued obstetric care in Florida and to continue to the pay the benefits authorized under the Plan. As found by the Fifth District, any incidental discriminatory affect to the Petitioners or any NICA parent is "minimal, unintentional and not arbitrary." See Samples at 27. As such, Section 766.31(1)(b)1., Florida Statutes, does not violate the equal protection clause.

### B. Unconstitutional Vagueness and C. Access to Courts

This case is before this Court based on the limited certified question of great public importance. In their Initial Brief on the Merits, the Petitioners improperly argue the additional issues of whether the Fifth District erred in determining that Section 766.31(1)(b)1., Florida Statutes, is not unconstitutionally vague and holding that the NICA Statute does not violate access to courts. NICA respectfully submits that resolution of those issues is neither necessary nor warranted as: (1) the Fifth District squarely decided all issues raised by the Petitioners, and Petitioners did not present any jurisdictional arguments to this Court requesting review of the Fifth District's ruling on any issue other than the certified question of great public importance regarding equal protection; (2) the Mandate has issued from the Fifth District Court of Appeal; and (3) the Petitioners have accepted the NICA Award made by the ALJ subject to determination on appeal of whether they are entitled to another $100,000. While NICA recognizes that this Court may choose to exercise its discretion to address these other issues raised by the Petitioners, NICA respectfully requests that this Court limit its review to the certified question.

If, however, this Court is inclined to address additional issues raised by the Petitioners in the Initial Brief, NICA adopts as its argument the Fifth District's

analysis set forth in the opinion holding that Section 766.31(1)(b)1., Florida Statutes, is not void for vagueness and that Section 766.31(1)(b)1., Florida Statutes, and the NICA Plan, as a whole, do not violate the right to access to courts. NICA will be prepared to make such arguments at the Oral Argument in this case, as necessary.

**D. Section 766.31(1)(b)1., Florida Statutes, is not Ambiguous.**

In hopes that this Court will do as it did in St. Mary's and avoid the equal protection issue by interpreting Section 766.31(1)(b)1, Florida Statutes, as authorizing an award in an amount not to exceed $100,000 to each parent, Petitioners attempt to persuade this Court to find an ambiguity in Section 766.31(1)(b)1., Florida Statutes. Such "ambiguity" is not there. As found by the Fifth District, Section 766.31(1)( b)1., Florida Statutes, is not ambiguous and to interpret the section as requested by the Samples would require this Court to impermissibly rewrite the NICA Statute.

The Fifth District correctly held that:

> Here, the plain language of section 766.31(1)(b)1., clearly and unambiguously provides "an award to the parents . . . which award shall not exceed $100,000." This language cannot be reasonably interpreted to provide multiple awards of $100,000 to each parent of a qualifying child.

Samples at 22.

In so holding, the Fifth District pointed out that the Petitioners are improperly relying on the application of the rules of statutory construction to create an ambiguity, rather than resolve one. Samples at 22. It is well settled that the rules of statutory construction may not be applied unless there is an ambiguity on the face of the statute. See GTC, Inv. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007).[7] [8]

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[7] The Petitioners erroneously assert that the Fifth District's holding regarding the fact that Section 766.31(1)(b)1., Florida Statutes, is unambiguous is based in part of its finding that the statute plainly authorizes no-fault compensation, not fault-based damages, is misplaced. The Fifth District determined the statute to be unambiguous based on the plain language of the statute. Samples at 21-22. The statements by the Fifth District referred to by the Petitioners are merely in rebuttal to the Petitioners' argument that "the statute is ambiguous because it does not clearly explain how a singular award to two parents replaces the common law right of each parent to recover individual damages for filial consortium." Samples at 22. The Fifth District rejected this argument noting that compensation under the Plan is no-fault compensation and that the Samples' reliance on the rule of statutory construction that statutes enacted in derogation of the common law must be strictly construed and must be clear on the extent of abrogation is not applicable because the language of the statute is plain. Thus, there is no need to resort to the rules of statutory construction. Samples at 22. The Fifth District further found that Section 766.303(2), Florida Statutes, clearly specifies the extent of the abrogation. Samples at 22-23.

[8] The Petitioners cite to Fla. Dep't of Envt'l Protection v. Contractpoint Florida Parks, LLC, 986 So. 2d 1260 (Fla. 2008) for the proposition that Section 766.31(1)(b)1., Florida Statutes, must be read in pari materia with the NICA Statute to ascertain legislative intent. That case, however, only requires the statute to be read in pari materia if the plain reading of the statute is in conflict with other provisions of the law. See Contractpoint at 1265-66. Section 766.31(1)(b)1., Florida Statutes, is not in conflict with any other provision of the NICA Statute. The legislative intent is clear that Section 766.31(1)(b)1., Florida Statutes, authorizes an award to the "parents" in an amount not to exceed $100,000." Such

The statutory history for this section supports the Fifth District's decision. See Rollins v. Pizzarelli, 761 So. 2d 294, 299 (Fla. 2000) (using legislative history to support the Court's interpretation of the statute); Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999). The provision at issue was first enacted during the special session in 1988, as part of Chapter 88-1, Laws of Florida (1988). At that time, Section 766.31(1)(b), provided, in pertinent part:

> (b) Periodic payments of an award to the parent or legal guardian of the infant found to have sustained a birth-related neurological injury, which award shall not exceed $100,000. . . . [Emphasis added.]

During the 1989 regular legislative session, Section 766.31(1)(b),[9] Florida Statutes, was amended as follows:

> (b) Periodic payments of an award to the parents ~~parent~~ or legal guardians ~~guardian~~ of the infant found to have sustained a birth-related neurological injury, which award shall not exceed $100,000. . . .

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intent is consistent with the Legislative intent of providing a limited compensation scheme for the provision of limited compensation for a limited class of catastrophically injured children to assist in addressing the medical malpractice insurance crises.

The Petitioners' continued argument that the parental award constitutes non-economic damages is really irrelevant because it is the nature of the Plan as a whole as providing a compensation scheme to serve as an exclusive remedy in lieu of common law tort action that is the focus, not whether the parental award constitutes noneconomic damages.

[9] Subsequently, Section 766.31(1)(b), Florida Statutes, was amended to add a death benefit and renumbered as Section 766.31(1)(b)1. and 2., with subsection 1. addressing the award to parents or legal guardians and subsection 2. addressing the death benefit.

See §5, Ch. 89-186, Laws of Florida (1989); R: Attachment I, Ex. 1]. The stated reason for the amendment was "to clarify the fact that the maximum award of $100,000 is for both parents or legal guardians and is not intended to award up to $100,000 for each parent or legal guardian. . . ." (Emphasis added.) See Fla. H.R. Comm. on Ins., CS for CS for HB 339 (1989) Final Staff Analysis & Economic Impact Statement (June 30, 1989) (on file with Fla. State Archives), p. 3; R: Attachment I, Ex. 2]. Both the plain language and the legislative intent support the consistent interpretation that Section 766.31(1)(b)1., Florida Statutes, authorizes one parental award in an amount not to exceed $100,000 total, regardless if there are one or two parents involved in the claim.

Since the plain language and legislative history clearly show that the Legislature intended to authorize one award combined to the parents, to read Section 766.31(1)(b)1., Florida Statutes, as authorizing an award to each parent in an amount not to exceed $100,000 would result in this Court impermissibly abrogating legislative power by modifying the express terms of the statute. See Holly v. Auld at 219 ("[C]ourts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power."). The Court is not at liberty to interpret Section

766.31(1)(b)1., Florida Statutes, in such a manner as such an interpretation would directly conflict with the legislative intent. See St. Mary's at 972 (stating that the Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent.") (Emphasis added.)

The Court is not at liberty to read Section 766.31(1)(b)1., Florida Statutes, as suggested by the Petitioners, to expand the stated legislative intent as to do so would extend into the Legislature's exclusive authority to appropriate state funds.

## CONCLUSION

Based on the foregoing, NICA respectfully requests that the Court answer the certified question in the negative and affirm the Fifth District Court of Appeal's decision. If this Court holds to the contrary, then NICA respectfully requests that the Court specifically make its holding prospective to ensure that the Plan remains actuarially sound.

Respectfully submitted this 3rd day of January, 2011.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail delivery to the following parties this 3rd day of January, 2011:

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## CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this ANSWER BRIEF has been typed using the 14 point Times New Roman font as required by Rules 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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