IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1148

ESTATE OF MICHELLE EVETTE McCALL, by and through co-personal representatives EDWARD M. McCALL, II, et al.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON REVIEW OF CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(Lower Tribunal Case No. 07-00508CV-C-MCR/EMT)

AMICUS CURIAE BRIEF OF CORAL GABLES HOSPITAL, DELRAY MEDICAL CENTER, GOOD SAMARITAN MEDICAL CENTER, HIALEAH HOSPITAL, NORTH SHORE MEDICAL CENTER, NORTH SHORE MEDICAL CENTER–FMC CAMPUS, PALM BEACH GARDENS MEDICAL CENTER, PALMETTO GENERAL HOSPITAL, ST. MARY'S MEDICAL CENTER AND WEST BOCA MEDICAL CENTER (THE "HOSPITALS") ON BEHALF OF THE UNITED STATES OF AMERICA

WHITE & CASE LLP
Raoul G. Cantero
David P. Draigh
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, FL 33131
Counsel for Amici Curiae
Coral Gables Hospital, et al.

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IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

Amici are Florida hospitals committed to providing the highest level of care to their communities, including the uninsured. The Hospitals have a strong interest in the outcome of this case because they believe that the challenged legislation has led to a higher level of comprehensive and affordable medical services to a wider segment of the population. The Hospitals appear as *amici curiae* to urge this Court to answer the Eleventh Circuit's second and fourth certified questions as follows: (1) that section 766.118 of the Florida Statutes, enacted as part of Chapter 2003-416 of the Laws of Florida ("the 2003 Act"), does not violate the right of access to the courts under Article I, Section 21 of the Florida Constitution; and (2) that section 766.118 does not violate the principle of separation of powers under Article II, Section 3 and Article V, Section 1 of the Florida Constitution.

SUMMARY OF ARGUMENT

In 2002, responding to a crisis in Florida's medical malpractice insurance market, the Legislature initiated a comprehensive factfinding mission to identify causes and develop solutions. Legislative committees held meetings and hearings across the state, heard dozens of witnesses, and considered reams of information. After months of study, the Legislature made at least 18 separate factual findings, concluding that (1) to ensure the availability of quality healthcare, there was an overwhelming public necessity to impose a cap on noneconomic damages in

malpractice cases; and (2) no alternative means existed to accomplish that goal. The 2003 Act is a comprehensive reform, enacting or amending dozens of statutes, including section 766.118, which sets a cap on noneconomic damages.

The Hospitals address the second and fourth certified questions, showing that section 766.118 does not violate (1) the right of access to the courts; or (2) the separation of powers. This Court has powerful traditions of deference to the Legislature on questions of policy and factfinding, and the extensive factfinding that occurred here is precisely the process to which this Court has always shown great deference. Relying on *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), Plaintiffs argue that section 766.118 unconstitutionally derogates the common law because it abolishes a common-law right and violates the right of access to the courts. But section 766.118 does not abolish *any* rights. It does not limit economic damages at all; it only limits subjective, noneconomic damages. *Kluger* does not hold that *any* restriction on common-law rights violates the right of access to the courts. *Kluger* overturned a statute limiting auto-accident property damages only because the Legislature had not undertaken any factfinding. And this Court, applying *Kluger*, has repeatedly upheld statutory limitations on common-law rights—including limitations on noneconomic damages in medical malpractice actions—where, as here, those statutes are based on legislative factual and policy determinations.

ARGUMENT

I. THE STATUTORY CAP ON NONECONOMIC DAMAGES DOES NOT VIOLATE THE RIGHT OF ACCESS TO THE COURTS

The second certified question asks: "Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the right of access to the courts under Article I, Section 21 of the Florida Constitution?" This Court should answer, "no."

A. This Court Has a Long Tradition of Deference to the Legislature as the Ultimate Arbiter of Florida Public Policy

Plaintiffs argue (br. at 29-32) that Article I, Section 21 has roots in the Magna Carta, and that free access to the courts has been enshrined in the Florida Constitution "[f]rom its first iteration." Equally fundamental to Florida law, however, is the principle that the Legislature sets Florida public policy in matters of public welfare, which derives from the Florida Constitution's "'strict' separation of powers." *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994). In 1908, for example, this Court held that the "legislative will should be enforced by the courts to secure orderly government and in deference to the Legislature, whose action is presumed to be within its powers, and whose lawmaking discretion within its powers is not reviewable by the courts." *State v. Atl. Coast Line R. Co.*, 47 So. 969, 975 (Fla. 1908); *see also City of Jacksonville v. Bowden*, 64 So. 769, 772 (Fla. 1914) ("courts have no veto power, and do not assume to regulate state policy").

In the decades since, this Court has repeatedly reiterated and applied these principles. **1953**: "In deference to the Legislat[ure], we have no authority to ignore

that statute. . . . If the statute is unwise, the remedy is to repeal by legislative enactment and not by judicial decree, because we disagree with it." *Thomas v. State*, 65 So. 2d 866, 870 (Fla. 1953). **1960**: "[D]ue deference is given to the legislative judgment and every presumption is indulged in favor of the validity of the legislative enactment in question." *Shelton v. Reader*, 121 So. 2d 145, 151 (Fla. 1960). **1976**: "[T]his Court, in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of the government. . . . The propriety and wisdom of legislation are exclusively matters for legislative determination." *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976). Indeed, this Court recently made clear that the "courts should *never* second-guess the Legislature about the policy decisions contained within a challenged statute." *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Group, Inc.*, 967 So. 2d 794, 802 (Fla. 2007) (emphasis supplied).

Also fundamental to Florida law is that courts must defer to legislative policy decisions even if a court considers them unwise. As this Court held in *In re Apportionment Law, Senate Joint Resolution No. 1305*, 263 So. 2d 797, 806 (Fla. 1972), the "propriety and wisdom of legislation are exclusively matters for legislative determination." Florida law is clear that, "in reviewing the issue before us, the [judges] emphatically are not examining whether the public policy decision made by the other branches is wise or unwise, desirable or undesirable." *Bush v.*

Holmes, 919 So. 2d 392, 398 (Fla. 2006). And the legislature may "experiment" when determining a policy response to problems. In *Messer v. Lang*, 176 So. 548, 552 (Fla. 1937), for example, the Court observed that the "facts show that something needed to be done and the experiment attempted was within the ambit of legislative power. This is the test of judicial interpretation rather than what the judge would have supported if he had been" a legislator.

B. This Court Also Has a Long Tradition of Deference to Legislative Findings of Fact

A corollary to this Court's deference to the Legislature on public policy is its deference to legislative factfinding. The Court has recognized that the Legislature is better qualified to conduct broad factfinding, because the judiciary can only decide individual cases. In *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980), this Court held that, "[b]ecause the issue with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding [but was] more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoints of all interested institutions and disciplines can be presented and synthesized."

Thus, the Court has consistently deferred to "legislative ascertainments and determinations of facts," which "are entitled to such weight as to require clear allegation and proof showing the contrary before the courts would be justified in

overturning them." *Miami Home Milk Producers Ass'n v. Milk Control Bd.*, 169 So. 541, 800 (Fla. 1936). This deference, too, can be traced through the decades. **1960**: Courts abide by legislative findings and declarations of policy unless they are "clearly erroneous, arbitrary or wholly unwarranted." *Moore v. Thompson*, 126 So. 2d 543, 549 (Fla. 1960). **1979**: "When the validity of a law depends on the existence of certain facts necessary to be determined by the legislature, the courts will presume that the requisite facts were established to that body's satisfaction." *Fla. State Bd. of Architecture v. Wasserman*, 377 So. 2d 653, 657 (Fla. 1979). **2004**: "[U]nder our deferential standard of review we must defer to the Legislature's evaluation of the relevant scientific evidence." *Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 790 (Fla. 2004). Indeed, the "Legislature has the final word on declarations on public policy. . . . Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) (citations omitted).

C. The Policy Determinations and Factfinding Behind the Enactment of Section 766.118 Are Entitled to This Court's Deference

Under the principles stated above—and this Court's precedent applying them to uphold statutes based on legislative fact and policy determinations—there is no question that section 766.118 is a valid exercise of legislative power. Before enacting section 766.118 as part of the 2003 Act, the Legislature comprehensively

investigated the crisis in Florida's medical malpractice insurance market, evaluating the strengths and weaknesses of many policy solutions. That investigation began in 2002, when the Speaker of the House created the House Select Committee on Medical Liability Insurance (the "Committee") "to focus House efforts on the availability and access to health care services for our citizens while trying to find acceptable solutions to the problems associated with insurance coverage for service providers."[1] From November 2002 to March 2003, the Committee held ten meetings, in Tallahassee, Miami, Fort Lauderdale, Tampa and Orlando, "to examine every aspect of this problem with the underlying resolve that the primary goal is to find ways to preserve and protect access to quality health care services in all specialties throughout Florida." Committee Report at 3. The Committee heard from 26 witnesses, among them academics, insurance regulators, insurance executives, trial lawyer association representatives, and physicians.[2]

The Committee also considered the findings of the Governor's Select Task Force on Healthcare Professional Liability Insurance, which also comprehensively reviewed the malpractice insurance crisis and potential solutions. A stated purpose

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[1] Report of the House Select Comm. on Med. Liab. Ins. (Mar. 2003) (the "Committee Report"), at 3, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2147&Session=2003&DocumentType=General Publications&FileName=2103.pdf.

[2] Committee Report, Appendix VIII, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2147&Session=2003&DocumentType=General Publications&FileName=2104.pdf.

of the Committee's hearings was to "magnify many of the issues contained within the report issued by the Governor's Task Force." Committee Report at 4. It was also the Committee's purpose to "identify each of the substantive issues, collect as much information as possible, gather opposing points of view, and compile a Select Committee Report which can be used by the House as it develops and discusses specific legislation for consideration by Members." *Id*.

In March 2003, after many hearings, the Committee submitted an 82-page report surveying a wide variety of proposed solutions to the malpractice crisis, among them monetary caps on noneconomic damages. Committee Report at 60-62. In July and August, Senate and House committees considered the 2003 Act, which passed on August 13. The 2003 Act—a comprehensive bill that enacts or amends dozens of statutory sections—contained 18 factual findings, including:

> [T]he overwhelming public necessities of making quality health care available to the citizens of this state, of ensuring that physicians continue to practice in Florida, and of ensuring that those physicians have the opportunity to purchase affordable professional liability insurance cannot be met unless a cap on noneconomic damages is imposed.

2003 Act, § 1(14). The Legislature also found that there was "no alternative measure of accomplishing such result without imposing even greater limits upon the ability of persons to recover damages for medical malpractice." *Id.*, § 1(16).

The legislative process behind the 2003 Act is precisely the kind to which this Court routinely defers, particularly because the judiciary cannot make such a

broad investigation in a specific case. *See, e.g., Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980) (declining to resolve the complex policy issue before the Court because it was "more suitably addressed in the legislative forum"); *Kush v. Lloyd*, 616 So. 2d 415, 421-22 (Fla. 1992) (upholding a medical malpractice statute of repose that "represents a legislative determination that there must be an outer limit beyond which medical malpractice suits may not be instituted"; the Court "is not authorized to second-guess the legislature's judgment"); *Carr v. Broward Cnty.*, 541 So. 2d 92, 95 (Fla. 1989) (describing the legislative findings in the preamble to a statute of repose limiting medical malpractice actions, and upholding the statute where it was "properly grounded on an announced public necessity").

Section 766.118 is particularly robust because it was part of a much broader statutory scheme that included dozens of other provisions. Indeed, in similar circumstances, this Court has upheld a legislative cap on noneconomic damages. *See Echarte*, 618 So. 2d at 197 (noting that, "in determining whether no alternative means exists to meet the public necessity of ending the medical malpractice crisis, the plan as a whole, rather than focusing on one specific part of the plan, must be considered," and upholding a cap on noneconomic damages).

This Court's deference is particularly appropriate here, where section 766.118 does not eliminate a cause of action, and puts no limit on *economic* damages. Section 766.118 only puts an upper limit on subjective, *noneconomic*

damages available in medical malpractice actions. *See Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1097 (Fla. 2005) (upholding a provision requiring medical providers to submit claims for payment within 30 days of service, and observing that the requirement modifies but "does not abolish" the providers' access to the courts). Indeed, the decision to cap only noneconomic damages was a deliberate policy choice, based on the Legislature's factfinding. The Task Force had previously found that the "unpredictability engendered by a system of virtually unbridled jury discretion" to award unlimited noneconomic damages was one of the causes of high malpractice insurance premiums in Florida.[3] The Legislature agreed, finding that noneconomic damages "have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss" and that "the high cost of medical malpractice claims can be substantially alleviated by imposing a limitation on noneconomic damages." 2003 Act, §§ 1(7, 15).

D. ***Kluger*** **Does Not Compel a Contrary Result**

Plaintiffs base their argument that section 766.118 violates equal access to the courts on *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), in which this Court held that, to abolish a common-law action without providing a reasonable alternative,

[3] Governor's Select Task Force on Healthcare Professional Liab. Ins. (Jan. 29, 2003) at 214, *available at* http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf.

the Legislature must "show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity," and invalidated a statute limiting the right to seek auto-accident property damages.

Other *amici* may argue that *Kluger* swept too far in limiting legislative power, and the Hospitals agree that *Kluger* does not invalidate section 766.118. *Kluger* is entirely consistent with this Court's jurisprudence that the courts owe deference to legislative factfinding and policy determinations. *Kluger* holds that deference is the rule *unless* the Legislature has abdicated its factfinding and policy-determining obligations. *Kluger* only refused to allow the Legislature to "destroy a traditional and long-standing cause of action upon *mere legislative whim*." *Kluger*, 281 So. 2d at 4 (emphasis supplied). Comparing the property-damage statute on review to the Legislature's elimination of the right of action for alienation of affection because that action had "become an instrument of extortion," *Kluger* found that the "Legislature has not presented such a case in relation to the abolition of the right to sue an automotive tortfeasor for property damage." *Id.* at 4-5. That is *not* the case here, where section 766.118 limits only *noneconomic* damages and is backed by extensive findings from a lengthy period of careful study.

Moreover, under this Court's post-*Kluger* decisions, courts must continue to defer to legislative determinations such as section 766.118. For example, in *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985), this Court receded

from an earlier decision holding that a statute violated equal access to the courts, holding that a statute of repose was not such a violation because the Legislature "reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product." This Court applied *Kluger* in *Carr v. Broward County*, 541 So. 2d 92, 95 (Fla. 1989), upholding a seven-year statute of repose on medical malpractice actions. The Court noted that the Fourth DCA "recognized the principles of *Kluger* and"—after quoting the Legislature's preamble to the statute—"properly applied them in determining that the legislature had found an overriding public necessity." *Id.*

This Court's decision in *Echarte,* 618 So. 2d 189, is even more instructive. In *Echarte*, which also applied *Kluger*, this Court upheld a cap on noneconomic damages, finding that the Legislature's "preamble [to the statute] clearly states [its] conclusion that the current medical malpractice insurance crisis constitutes an 'overpowering public necessity.' Moreover. the Legislature made a specific factual finding that '[m]edical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased unavailability of malpractice insurance.'" *Id.* at 196. And in *Warren*, 899 So. 2d at 1097, this Court rejected a challenge to a statute requiring that medical providers submit statements to insurers within 30 days of service, holding that "[w]e do not find that *Kluger* is

offended by the thirty-day requirement because [it] does not abolish medical providers' access to the courts. Rather, we agree with the Fifth District that the statute imposes a reasonable condition precedent to filing a claim for certain insurance benefits."

Plaintiffs rely on *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 620 (Fla. 2003), but that case addressed whether a statute violated the constitutional right of privacy; it had nothing to do with access to the courts. Moreover, like *Kluger*, *North Florida* shows only that the courts will not defer to legislative findings when none exist. The Court found that the legislative record was "scant," and that the only "findings" were in a bill prepared by a "drafting service." *Id.* at 628-29. The Court also found that "[n]either committee [considering the challenged legislation] was charged with fact-finding, and neither committee made a formal effort to gather evidence and render findings of fact," but only "conducted a brief public hearing." *Id*. at 629.[4]

Finally, Plaintiffs argue (br. at 36) that, in light of *Kluger* and *Smith*, "*[s]tare decisis* mandates that the 2003 cap be invalidated on the same grounds." But *stare decisis* mandates that this Court adhere to *Pullum* and *Carr* and *Warren* and *Echarte*, as well as the decades of authority holding that the courts should defer to

[4] Plaintiffs also cite *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987), but in that case this Court found that "the trial judge below did not rely on—nor have appellees urged before this Court—that the cap [on tort damages] is based on a legislative showing of 'an overpowering public necessity.'"

legislative factfinding and policy determinations where the Legislature undertook an exhaustive and careful study of the issues and proposed solutions.

II. THE STATUTORY CAP ON NONECONOMIC DAMAGES DOES NOT VIOLATE SEPARATION OF POWERS

This Court also should answer "no" to the Eleventh Circuit's fourth certified question: "Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the separation of powers guaranteed by Article II, Section 3 and Article V, Section 1 of the Florida Constitution?" Plaintiffs' sole argument is that section 766.118 encroaches on the power of the judiciary, "operating as an impermissible legislative remittitur" (br. at 49). But their only authority for that proposition—the Hospitals are aware of none—are cases articulating the general principle of separation of powers. Plaintiffs cite a pair of Illinois Supreme Court cases (br. at 48), finding that statutory caps violate separation of powers, and similar *dictum* from a Washington Supreme Court case. However, as the United States shows in its brief, Illinois is an outlier and seven other state supreme courts have ruled the other way. As shown above, controlling authority compels the conclusion that the Legislature was acting well within its power when it passed the 2003 Act, including section 766.118, and that courts should defer to such actions.

CONCLUSION

For the reasons stated above and in the briefs of Defendant/Appellee and the other *amici*, this Court should answer "no" to the second and fourth certified questions: (1) that section 766.118 does not violate equal access to the courts; and (2) that section 766.118 does not violate separation of powers.

Respectfully submitted,

WHITE & CASE LLP

/s/ Raoul G. Cantero
Raoul G. Cantero
Florida Bar No. 552356
David P. Draigh
Florida Bar No. 624268
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, FL 33131
(305) 995-5290
(305) 358-5744 (facsimile)
rcantero@whitecase.com
ddraigh@whitecase.com

Counsel for Amici Curiae
Coral Gables Hospital, et al.

CERTIFICATE OF SERVICE

I certify that on September 27, 2011, a copy of the brief was served by U.P.S. and facsimile upon:

Henry T. Courtney
Sara Courtney-Baigorri
Courtney Law Firm
110 Merrick Way, Suite 3A
Coral Gables, Florida 33134
Counsel for Appellants

Robert S. Peck
Valerie M. Nannery
Center for Constitutional Litigation, P.C.
777 6th Street, N.W. Suite 520
Washington, DC 20001
Counsel for Appellants

Stephen S. Poche
The Law Office of Stephen S. Poche, P.A.
1270 N. Eglin Parkway, Suite C0-14
Shalimar, Florida 32579
Counsel for Appellants

Daniel J. Lenerz
Thomas M. Bondy
Civil Division Room 7234
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Counsel for Appellee

Pamela Adele Moine
U.S. Attorney's Office
21 East Garden Street, Suite 400
Pensacola, FL 32502
Counsel for Appellee

Joel Stephen Perwin
Joel S. Perwin, P.A.
169 East Flagler Street, Suite 1422
Miami, FL 33131
Counsel for the Florida Justice Association, et al.

Herman J. Russomanno
Robert J. Borrello
Herman J. Russomanno, III
Russomanno & Borrello, P.A.
150 West Flagler Street
Museum Tower, Penthouse 2800
Miami, FL 33130
Counsel for American Bar Association

Stephen Zack
American Bar Association
321 North Clark Street
Chicago, Illinois 60654
Counsel for American Bar Association

Lincoln J. Connolly
Rossman Baumberger
44 West Flagler Street
23rd Floor - Courthouse Tower
Miami, FL 33130
Counsel for the Florida Consumer Action Network & Floridians for Patient Protection

John S. Mills
Andrew D. Manko
The Mills Firm, P.A.
203 North Gadsden Street, Suite 1A
Tallahassee, FL 32301
Counsel for Professor Neil Vidmar, et al.

Mark Hicks
Dinah Stein
Hicks Porter Ebenfeld & Stein, P.A.
799 Brickell Plaza, Suite 900
Miami, Florida 33131
Counsel for the Florida Medical Association

Chris Nuland
Law Office of Christopher L. Nuland, P.A.
1000 Riverside Avenue, Suite 115
Jacksonville, Florida 32204
Counsel for The Florida Chapter of the American College of Physicians, et al.

William W. Large
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, Florida 32301
Counsel for the Florida Justice Reform Institute

Arthur J. England, Jr.
Christopher B. Carbot
Greenberg Traurig, P.A.
333 Avenue of the Americas
(Southeast Second Avenue), Suite 4400
Miami, Florida 33131
Counsel for the Florida Hospital Association

Louis F. Hubener III
Office the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
Counsel for the State of Florida

Pamela Jo Bondi
Diane G. DeWolf
Office of the Solicitor General
The Capitol, PL-01
Tallahassee, FL 32399
Counsel for the State of Florida

George N. Meros, Jr.
Allen Winsor
Gray Robinson PA
301 S. Bronough Street, Suite 600
Tallahassee, Florida 32301
Counsel for the Florida College of Emergency Physicians and the Florida Orthopaedic Society

Cynthia Tunicliff
Pennington Moore Wilkinson Bell & Dunbar
215 South Monroe Street, 2nd floor
Tallahassee, Florida 32301
Counsel for The Safety Net Hospital Alliance of Florida

George Christian
Christian & Co.
400 W. 15th Street, Suite 400
Austin, Texas 78701
Counsel for the Texas Civil Justice League

Fred J. Hiestand
2001 P. Street, Suite 110
Sacramento, California 95811
Counsel for The Civil Justice Association of California

Michael L. Rosen
Shook Hardy & Bacon L.L.P.
100 N. Tampa Street, Suite 2900
Tampa, FL 33602-5810
Counsel for the American Medical Association et al.

/s/ Raoul G. Cantero
Raoul G. Cantero

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.

/s/ Raoul G. Cantero
Raoul G. Cantero