IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1148
Eleventh Circuit Case No. 09-16375J

ESTATE OF MICHELLE EVETTE McCALL,
by and through co-personal representatives
EDWARD M. McCALL, II, MARGARITA F.
McCALL, and JASON WALLEY,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

AMICUS CURIAE BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONCISE STATEMENT OF THE IDENTITY OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Consistent with *Echarte*, The Legislative Record Demonstrates a Substantial Crisis and More Than Satisfies *Kluger*. 3

II. Additional Evidence Demonstrates the Reform's Effectiveness. 10

III. Plaintiffs Ask the Court to Disregard *Kluger* and Prevent the Legislature from Responding to Crises 11

CONCLUSION 13

CERTIFICATE OF SERVICE 15

CERTIFICATE OF COMPLIANCE 16

TABLE OF AUTHORITIES

Cases

Kluger v. White,
281 So. 2d 1 (Fla. 1973) 3, 11
N. Fla. Women's Health & Counseling Servs., Inc. v. State,
866 So. 2d 612 (Fla. 2003) 4
Tillman v. State,
934 So. 2d 1263 (Fla. 2006) 11
Univ. of Miami v. Echarte,
618 So. 2d 189 (Fla. 1993) 3, 4, 5

Laws of Florida

Ch. 2003-416, § 1(1-2), Laws of Fla. 3
Ch. 2003-416, § 1, Laws of Fla. 9
Ch. 88-1, Laws of Fla. 5

Other Authorities

Academic Task Force for Review of Insurance and Tort Reforms,
Final Recommendations (March 1, 1988) 5
Academic Task Force for Review of Insurance and Tort Systems,
Medical Malpractice Recommendations (Nov. 6, 1987) 5
Academic Task Force for Review of Insurance and Tort Systems,
Medical Malpractice Reform Alternatives (Oct. 2, 1987) 5
Academic Task Force for Review of the Insurance and Tort Systems,
Preliminary Fact-Finding Report on Medical Malpractice
(Aug. 14, 1987) 4
Fla. Office of Ins. Reg., *2010 Annual Report Medical Malpractice Financial Information Closed Claim Database and Rate Filings*
(Oct. 1, 2010) 10, 11
Governor's Select Task Force on Healthcare Professional Liability Insurance,
Final Report and Recommendations (Jan. 29, 2003) 6, 7, 8, 9
Michael S. Hull *et al.*, *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*,
36 Tex. Tech L. Rev. 169 (2005) 12

Florida Legislative Materials

Fla. H.R. Select Comm. on Medical Liability Ins., *Final Report* (March 2003) 8

Fla. S. Comm. on Health, Aging, and Long-Term Care, CS for SB 2-D (2003) Staff Analysis 8 (Aug. 12, 2003) 9

CONCISE STATEMENT OF THE IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THE CASE

The Florida Justice Reform Institute (FJRI) comprises concerned citizens, small-business owners, business leaders, doctors, lawyers, and others with a common goal of restoring predictability and personal responsibility to civil justice in Florida. FJRI members believe regulation should stem from policymakers and not through private, punitive litigation. Accordingly, they support the necessary and reasonable limits on noneconomic damages in medical malpractice awards.

SUMMARY OF ARGUMENT

Plaintiffs and their *amici curiae* insist there was no real crisis facing the Legislature. They are wrong. The Legislature faced a crisis of unprecedented magnitude, which was evidenced by a substantial legislative record. Because the Legislature's determinations were not clearly erroneous, they are entitled to this Court's deference.

This Court must reject Plaintiffs' invitation to disregard the flexibility *Kluger v. White* affords and to impose impossible conditions on the Legislature's authority to address crises facing the state. This Court must uphold the challenged statute.

ARGUMENT

This *amicus curiae* brief focuses on Plaintiffs' unsupportable claim that the crisis facing the Legislature was fabricated or exaggerated—or would have gone away on its own. Plaintiffs ask this Court not only to ignore established precedent and neuter the Legislature's ability to respond to changing circumstances, but also to turn a blind eye to perhaps the most substantial legislative and evidentiary record ever assembled. Rather than face that substantial record, Plaintiffs and their *amici curiae* offer speculation, policy objections, and the groundless argument that the Legislature "did not find an immediate or widespread danger to the availability of health care to Floridians." (App. Br. at 35.)[1]

I. CONSISTENT WITH *ECHARTE*, THE LEGISLATIVE RECORD DEMONSTRATES A SUBSTANTIAL CRISIS AND MORE THAN SATISFIES *KLUGER*.

The parties agree that the familiar *Kluger* test governs Plaintiffs' access-to-courts claim. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 194 (Fla. 1993) (legislative restrictions on damages are subject to *Kluger*).[2] And

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[1] The Legislature expressly found that "Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude [and that] this crisis threatens the quality and availability of health care for all Florida citizens." Ch. 2003-416, § 1(1-2), Laws of Fla.

[2] They disagree about the application of that test, with Plaintiffs incorrectly contending that *Kluger* imposes strict-scrutiny review. *Cf. Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) ("Upon careful consideration of the

the Parties acknowledge that in *Echarte*, this Court rejected a *Kluger* challenge to another noneconomic damages cap, after holding the legislature demonstrated an overpowering public necessity that was not clearly erroneous. *See* 618 So. 2d at 196-97. But Plaintiffs and their *amici curiae* hope to avoid *Echarte* by attacking the legislative proceedings, findings, and conclusions in this case. *Echarte,* however, cannot be so casually cast aside.

In 1986, confronted with a crisis in malpractice-insurance premiums and the risk that medical providers will go uninsured or underinsured, the Legislature established a task force to study the problem and recommend reforms. The task force concluded that malpractice premiums had risen due to a rapid increase in the frequency and amount of malpractice awards, together with a dramatic increase in defense costs. *See* Academic Task Force for Review of the Insurance and Tort Systems, *Preliminary Fact-Finding Report on Medical Malpractice* (Aug. 14, 1987) (available at State Library

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requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change [abolishing a cause of action]."); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 646 n.74 (Fla. 2003) ("*Echarte* is not a strict scrutiny case in the traditional sense. *Echarte* was analyzed under a standard of review developed by this Court to specifically address statutes that infringe on access to the courts. The inapplicability of *Echarte* to strict scrutiny is emphasized by the fact that *Echarte* has not been cited in a strict scrutiny case, nor have there been any cases from this Court specifically applying a strict scrutiny standard that adopt *Echarte*'s deferential language.") (Pariente, J., concurring) (citation omitted).

and Archives of Florida); *Medical Malpractice Reform Alternatives* (Oct. 2, 1987); *Medical Malpractice Recommendations* (Nov. 6, 1987) (available at State Library and Archives of Florida) and *Final Recommendations* (March 1, 1988) (available at State Library and Archives of Florida). The Legislature adopted the findings and recommendations of the task force and passed comprehensive reforms, including a cap on noneconomic damages if defendants had offered arbitration. *See generally* Ch. 88-1, Laws of Fla.

This Court upheld the cap against a *Kluger* challenge. Citing precedent from as early as 1936, the Court reaffirmed that legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. *Echarte*, 618 So. 2d at 196. Because the legislative record contained credible evidence to support the legislative findings, this Court had no trouble concluding that the legislation satisfied *Kluger*. *Id.*

Turning to this case, the legislative record from the Governor's Select Task Force on Health Care Professional Liability Insurance (the "Task Force"), the regular legislative session, and the four special sessions that followed, is much stronger than the record in *Echarte*. This record includes more than 1,600 sworn affidavits of medical providers, substantial additional sworn testimony, numerous public hearings, and illustrative empirical analyses.

After identifying a reemerging crisis relating to the availability and affordability of medical malpractice insurance, Governor Bush created the Task Force, appointing John C. Hitt, Ph.D., President of the University of Central Florida; Richard A. Beard, Trustee of the University of South Florida; Marshall Criser, Jr., President Emeritus of the University of Florida; Fred Gainous, President of Florida A&M University; and Donna E. Shalala, President of the University of Miami and former Secretary of the Department of Health and Human Services under President Clinton. *See* Governor's Select Task Force on Healthcare Professional Liability Insurance, *Final Report and Recommendations*, at 18 (Jan. 29, 2003), available at http://tinyurl.com/tfrtp ("TFR"). These were distinguished public servants, committed to a thorough, unbiased study of the problems facing Florida and to finding appropriate solutions.

After reviewing the history of medical malpractice problems and attempted solutions, the Task Force concluded that the State of Florida was again "facing a crisis in the availability and affordability of medical malpractice insurance" which was "causing a critical reduction in the quality of healthcare available in Florida." TFR at 56. Examples of testimony before the Task Force included the following: In Broward County alone, four hundred physicians left the state or retired early in the preceding year. *Id.* at

72. Obstetrical centers closed because of the soaring costs of liability insurance. *Id.* at 73. New residency graduates often could not practice in Florida because they were unable to obtain or afford the necessary insurance. *Id.* at 73-74. Fully eighty percent of Miami obstetricians carried no insurance and sheltered their assets as a result of soaring costs. *Id.* at 74. In the year prior to issuance of the Task Force report, Orlando lost twelve OB/GYNs—ten percent of the workforce. And twenty to twenty-five percent of those remaining worked without insurance. *Id.* The Task Force Report includes scores of additional examples, setting forth summaries of the testimony of Florida physicians who keenly felt the effects of the insurance crisis. *Id.* at 70-102.[3]

To address the crisis, the Task Force recommended wide-ranging legislative amendments. Among other things, it suggested regulatory changes for healthcare providers, numerous insurance reforms, and changes in alternative dispute resolution. *Id.* at 186-87, 322-23, 333-34. Most importantly, the Task Force concluded that limits on noneconomic damages

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[3] The Task Force also considered official data collected by the Florida Department of Insurance (now the Office of Insurance Regulation). *Id.* at 102. Those data revealed that fewer insurance companies were writing new malpractice policies or renewing existing policies in Florida and that those still providing insurance coverage had implemented new, restrictive eligibility criteria. *Id.*

were the *sine qua non* of successful reform and necessary to alleviate the identified problems. *Id.* at 193. Increases in the cost of malpractice insurance, which the Task Force feared would become unaffordable, were driven largely by limitless awards of noneconomic damages. *Id.* at 211-13. These unlimited awards were "a key factor (perhaps the most important factor) behind the unavailability and un-affordability of medical malpractice insurance in Florida." *Id.* at 220. The Task Force expressly found that, "without the inclusion or a cap on potential awards of non-economic damages in the [reform] package, no legislative reform plan can be successful in achieving a goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare." *Id.* at 193.

Notwithstanding the Task Force Report's substantiality, the Florida Legislature did not merely adopt its efforts. Instead, the Legislature carefully assessed the Task Force record, findings, and conclusions, and thereafter took many hours of additional testimony and input from all stakeholders.

Among the substantial Legislative record were examples of physicians who altered their practices, considered leaving their practices, or left their practices altogether—all because of the malpractice insurance crisis. *See* Fla. H.R. Select Comm. on Medical Liability Ins. (the "Select Committee"), *Final Report* (March 2003) (*available at* http://tinyurl.com/6eknhq). The staff

analysis that accompanied the final legislative product thus explained that some "hospitals are discontinuing services such as maternity services and trauma services because of the high cost of malpractice coverage for the specialists needed to provide these services." *See* Fla. S. Comm. on Health, Aging, and Long-Term Care, CS for SB 2-D (2003) Staff Analysis 8 (Aug. 12, 2003) (available at http://tinyurl.com/3muqz8g).

The Legislature went well beyond what *Echarte* required and expressly found that there was no alternative means of accomplishing the fix without a cap on noneconomic damages. Ch. 2003-416, § 1, Laws of Fla. It more than established the severity of the crisis, the overwhelming public necessity, and the absence of viable alternatives. Under *Echarte*, this Court may not reject these findings, which are "presumed correct and entitled to deference, unless clearly erroneous." Plainly, the findings were not clearly erroneous. And, perhaps most critically, both the Task Force and Legislature relied upon this Court's decision in *Echarte* to assess its legal responsibilities in crafting reforms that would resolve the crisis and preserve constitutional rights. TFR at 201-211; Ch. 2003-416, § 1, Laws of Fla. The Task Force, the Legislature, physicians and other providers, patients, and Florida's entire vulnerable healthcare system have relied on *Echarte* for nearly two decades, and this Court must not cast it aside now.

II. ADDITIONAL EVIDENCE DEMONSTRATES THE REFORM'S EFFECTIVENESS.

It has been more than eight years since the Legislature acted. During that time, the healthcare system that was in crisis has stabilized. In simple terms, the caps worked. A recent analysis conducted by the Florida Office of Insurance Regulation proves the wisdom of the Legislature's policy choices.[4] The 2003 bill required the Office of Insurance Regulation to prepare an annual report examining the medical-malpractice insurance market in Florida. The 2010 report first noted that prior to the 2003 reforms, "the [medical-malpractice insurance] market was experiencing double-digit rate increases, an availability crisis, and experienced one of the highest defense cost and containment expense ratios in the country." Fla. Office of Ins. Reg., *2010 Annual Report Medical Malpractice Financial Information Closed Claim Database and Rate Filings* 3 (Oct. 1, 2010) (available at http://www.floir.com/siteDocuments/MedicalMalReport10012010.pdf). The report concluded that Florida's malpractice-insurance market has stabilized and, on average, rates for companies writing physicians' and surgeons' malpractice insurance have decreased 8.2 %. The OIR concluded:

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[4] Not that the "wisdom" is important for purposes of this constitutional review. As this Court has said countless times: "[I]t is not this Court's function to substitute its judgment for that of the Legislature as to the wisdom

> It appears that the solvency of the medical malpractice insurers has been enhanced by the introduction of the [2003] legislative reforms. Further, it appears that the physicians malpractice premiums have generally decreased significantly since the reforms were implemented.

(*Id.* at 45.) Thus, the crisis has subsided, just as it did in California and Texas following their imposition of similar caps.

III. PLAINTIFFS ASK THE COURT TO DISREGARD *KLUGER* AND PREVENT THE LEGISLATURE FROM RESPONDING TO CRISES.

Kluger expressly reserved to the Legislature the right to respond to crises like this one, and it recognized the danger of precluding the Legislature from modifying causes of action. "Upon careful consideration of the requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change." *Kluger*, 281 So. 2d at 4. This Court sought only to preclude legislative destruction of a "traditional and long-standing cause of action upon mere legislative whim." *Id.* It did not intend to unreasonably tie the hands of future legislatures in responding to changing circumstances—or to preclude a calculated and thoughtful response to a crisis of unprecedented magnitude. Plaintiffs and their *amici curiae* nevertheless ask this Court to reject *Kluger* and place

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or policy of a particular statute." *Tillman v. State*, 934 So. 2d 1263, 1270 (Fla. 2006) (quoting *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001)).

impossible conditions on the Legislature's ability to respond to the State's needs. If this Court does so, its action will substantially harm all Floridians.

Putting aside future needs for Legislative action—in healthcare or any other context—adopting Plaintiffs' position would spark disaster by immediately returning Florida to the crisis the reform addressed. Indeed, in other states where courts have invalidated damages caps, that is exactly what happened:

> In 1999, the Supreme Court of Oregon struck down a cap on noneconomic damages that had been in place for twelve years. Within one year, the total number of claims payments increased 400% from $15 million to $60 million. Ohio had a similar experience. Health care costs gradually declined following tort reform in 1975. But costs rose sharply after a legal challenge was filed, and they remained at high levels after the cap was held unconstitutional.

Michael S. Hull *et al.*, *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 Tex. Tech L. Rev. 169 (2005) (notes omitted). Plaintiffs' position would not only return Florida to crisis, but it would also tie the hands of the Legislature to address it. Those who would be affected most by this next crisis would be the elderly and indigent, who rely on Medicaid or other assistance to pay for their care. Because of skyrocketing costs in Medicare, Florida passed a transformative Medicaid reform bill which will shift almost all Medicaid patients into a managed-care model. Provider reimbursements, already low, will go lower. By law, these

managed-care networks are required to have a complete network of physicians to provide comprehensive care, including specialty services in neurology, neurosurgery, and obstetrics. When malpractice insurance rates rise due to judicial reversal, these specialists will no longer agree to join the networks and provide specialty care. They simply will not be able to afford higher malpractice rates and lower reimbursements for their services.

CONCLUSION

This Court must remain faithful to *Echarte* and respect the Legislature's efforts to alleviate a crisis of unprecedented magnitude and to protect the availability and quality of healthcare in Florida. The Legislature's decision followed substantial study and debate, and its findings are not clearly erroneous. Invalidating the Legislature's work would require a departure from this Court's established precedent. Worse still, it would spell disaster for Florida's healthcare system.

Respectfully submitted,

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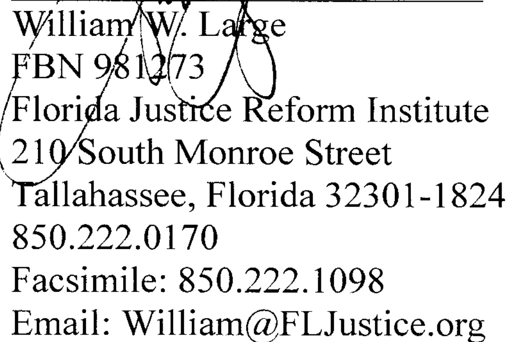
CERTIFICATE OF SERVICE

I certify that I served the foregoing brief by depositing copies in the United States Mail, postage prepaid, on September 27, 2011, to those listed on the attached Service List.



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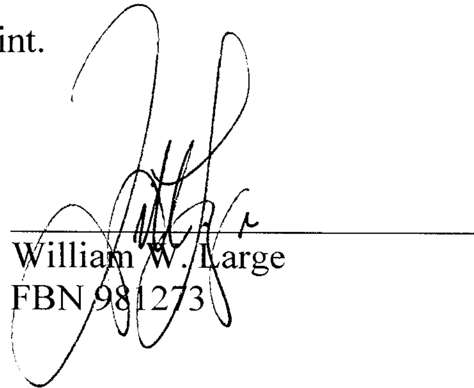
Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I certify that this brief complies with the rule's font requirements. The font used in this brief is Times New Roman 14 point.



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