



**IN THE FIRST DISTRICT COURT OF APPEAL  
FOR THE STATE OF FLORIDA**

KEVIN M. MCCARTY, in his official capacity  
as the Commissioner of the FLORIDA OFFICE  
OF INSURANCE REGULATION,  
Appellant,

vs.

ROBIN A. MYERS, A.P., GREGORY S.  
ZWIRN, D.C., SHERRY L. SMITH, L.M.T.,  
CARRIE C. DAMASKA, L.M.T., John Doe,  
and Jane Doe,  
Appellees.

Case No. 1D13-1355

L.T. No. 2013-CA-0073

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**AMICUS BRIEF OF THE  
FLORIDA STATE MASSAGE THERAPY ASSOCIATION**

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On Appeal from a Non-Final Order of the  
Second Judicial Circuit in Leon County, Florida

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/s/ Mark S. Sussman, Esq.  
Florida Bar Number 656828  
P.O. Box 640848  
Miami, Florida 33164  
(305) 652 – 4910 [Phone]  
[msussman@gmail.com](mailto:msussman@gmail.com) [Email]  
Counsel for Amicus Curiae

## TABLE OF CONTENTS

Table of Contents .....	2
Table of Citations.....	3
Amicus Curiae Identification And Statement Of Interest.....	5
Preliminary Statement.....	5
Summary of the Argument.....	9
Argument.....	9
<b><i>I.    Massage Therapy is a Valid, Effective, Established Therapeutic Modality for the Treatment of Traumatic Injuries Arising From Motor Vehicle Collisions.....</i></b>	<b>9</b>
<b><i>II.   The Temporary Injunction Should Be Affirmed Because Licensed Massage Therapists Are Suffering Irreparable Harm For Which They Possess No Legal Remedy.....</i></b>	<b>12</b>
<b><i>III.  The Temporary Injunction Should Be Affirmed Because this Temporary Injunction is in the Public Interest.....</i></b>	<b>15</b>
<b><i>IV.  The Temporary Injunction Should Be Affirmed Because the Plaintiffs/Appellees Are Likely to Prevail on the Merits.....</i></b>	<b>18</b>
Conclusion.....	21
Certificate of Service.....	23
Certificate of Compliance.....	24

**TABLE OF CITATIONS**

**Cases**

*Bailey v. Christo*, 453 So. 2d 1134 (Fla. 1st DCA 1984) .....15

*Board of Com’rs of State Institutions v. Tallahassee Bank & Trust Co.*,  
100 So. 2d 67 (Fla. 1st DCA 1958).....19

*Bowling v. National Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931).....15

*Chapman v. Dillon*, 415 So. 2d 12, 18 (Fla. 1982). .....18

*Daniel v. Williams*, 189 So. 2d 640 (Fla. 2nd DCA 1966).....19

*Kimball v. Florida Dept.of Health and Rehabilitative Services*,  
682 So. 2d 637 (Fla. Dist. Ct. App. 2Dist. 1996).....19

*Kluger v. White*, 281 So. 2d 1 (Fla. 1973).....18

*Lasky v. State Farm Insurance Co.*, 296 So. 2d 9 (Fla. 1974).....5, 18

*Lewis v. Peters*, 66 So. 2d 489 (Fla. 1953).....15

*Louisville & N.R. Co. v. Railroad Com’rs.*, 58 So. 543 (Fla. 1912).....19

*St. Johns Inv. Mgmt. Co. v. Albaneze*,  
22 So. 3d 728, 731 (Fla. 1st DCA 2009).....7

*SunTrust Banks, Inc., v. Cauthon & McGuigan, PLC.*,  
78 So. 3d 907, 711 (Fla. 1st DCA 2012).....7

*Tampa Sports Authority v. Johnston*, 914 So. 2d 1076 (Fla. 2nd DCA 2005)...14

*Watson v. Centro Espanol De Tampa*, 30 So. 2d 288 (Fla. 1947).....19

**Constitutions**

U.S. Constitution, Amendment XIV.....12

Florida Constitution, Article 1, Section 9.....	12
Florida Constitution, Article 1, Section 21.....	6, 7

**Statutes**

§456 Fla. Stat. (2012).....	10
§480 Fla. Stat. (2012).....	7, 10
§627.730 Fla. Stat. (2012).....	5
§627.736 Fla. Stat. (2012).....	5

**Laws of Florida**

Ch. 2012-197, Laws of Fla.....	8
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**Other Authorities**

Carragee, EJ. <i>Persistent Low Back Pain</i> , N Engl. J. Med. 352: 1891-1898 (2005).....	11
Preyde, M. <i>Effectiveness of massage therapy for subacute low-back pain: a randomized controlled trial</i> . Can. Med. Assoc. J. 162; 13: 1815 – 1820 (2000).....	11
Sherman, KJ, Cherkin DC, Hawkes, RJ, Migloretti, D, Deyo RA. <i>Randomized Trial of Therapeutic Massage for Chronic Neck Pain</i> . Clin. J. Pain. 25(3): 233-238 (2009).....	12
Verhagen, AP, Scholten-Peeters GG, van Wingaarden S, de Bie, rob, Bierma-Zeinstra SM. <i>Conservative treatementsfor whiplash</i> . The Cochrane Library, 02/17/2010. ....	11

## **AMICUS CURIAE IDENTIFICATION AND STATEMENT OF INTEREST**

The Florida State Massage Therapy Association (FSMTA) was established on June 14, 1939 and is composed of 19 chapters throughout Florida representing approximately 6,000 actively licensed massage therapists practicing in Florida. FSMTA's objective is to promote public awareness of massage therapy in Florida through education and professionalism while also serving to unify the massage therapy profession and to create, represent, and promote standards of excellence in massage therapy and healthcare. FSMTA's express interest in this appeal arises from the Florida Legislature's unconstitutionally singling out massage therapists, as well as chiropractors and acupuncturists, from other healthcare providers, and, by action of law, interfering with their rights to receive compensation for the provision of their professional services.

### **PRELIMINARY STATEMENT**

In 1971, to reduce significant judicial volume, the Legislature exchanged Florida No-Fault Personal Injury Protection (PIP) Insurance for a limitation on access to the courts for cases involving personal injury cases resulting. persons injured in motor vehicle accidents would be required to have a permanent physical injury to obtain access to the courts. See §627.730 Fla. Stat. (2012), §627.736(1) Fla. Stat. (2012), *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9 (Fla. 1974), and

*Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328 (Fla. 2007). PIP was designed to: 1) rapidly provide efficient and unfettered access to compensation for healthcare benefits for motor vehicle collision victims; 2) provide limited compensation for lost work; and 3) provide a death benefit. *Id.*

Since originally enacted, the Legislature modified PIP. *Id.* However, after PIP insurance carriers reported that numerous increases in PIP insurance premiums were related to fraud and abuse within the system, the Florida Legislature dramatically revised PIP coverage in 2012. These changes were referred to by Appellant's counsel as a "paradigm shift in PIP . . . from an unlimited situation to receive \$10,000 dollars worth of treatment, to a limited situation of where PIP is only going to treat those persons that have an emergency medical condition." See Tab 7 Appellants' Record, page 37. This paradigm shift absolutely prohibited all massage therapy and acupuncture treatments, and it severely limited chiropractic therapy, without first providing medical justification. *Id.* at 13-15.

Despite this paradigm shift, the Legislature, in violation of the Florida Constitution, Art. 1, Sec. 21, failed to restore an injured victim's access to the courts because injured victims generally require a "permanent dysfunction" before gaining access to the courts. *Id.* at 40.

This appeal arises from a non-final order granting a temporary injunction after the trial court "considered the evidence, the written and oral arguments of

counsel and the authorities cited,” and held, “that the motion [for temporary injunction] should be granted in part because the...[2012 revisions to Florida No-Fault] violate Article I, Section 21 of the Florida Constitution (Access to Courts).”

Temporary injunctions require a trial court to “determine that the petition or pleadings demonstrate a *prima facie*, clear legal right to the relief requested.

*SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012) quoting *St. Johns Inv. Mgmt. Co. v. Albanese*, 22 So. 3d 728, 731 (Fla. 1st DCA 2009). It was stated:

To demonstrate a *prima facie* case for temporary injunction, the petitioner must establish four factors: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) that a temporary injunction would serve the public interest. *Id.*

As detailed below, the FSMTA’s constituency, massage therapists, will suffer and are presently suffering irreparable harm for which they possess no legal remedy. Without any evidence or suggestion of fraud prevention, and in the absence of any peer-reviewed, published medical literature contesting the validity or benefit of massage therapy, the 2012 PIP Act revised Personal Injury Protection coverage in Florida by absolutely prohibiting all massage therapy: “Medical benefits do not include massage as defined in s. 480.033...regardless of the person, entity, or licensee providing massage...and a licensed massage therapist...may not

be reimbursed for medical benefits under this section.” §10(1)(a)(5), Chapter 2012-197 Laws of Florida.

Specifically because of the absolute lack of evidence related to efficacy, cost, or fraud allegedly due to massage therapy, the public interest requires that the Temporary Injunction be affirmed to protect the health, safety, and well being of all Floridians injured as a result of a motor vehicle collision. This is particularly true because the medical literature and other evidence actually support the benefits of massage therapy to those injured in motor vehicle collisions. See Appellees’ Brief, Tab 2, Page 15.

“Dr. Crespo, a medical doctor, said that massage is the most beneficial treatment available for people in an auto accident...the 2012 PIP Act severely limits medically necessary and scientifically proven medical treatment.” *Id.*

Importantly, Licensed Massage Therapists, (LMTs), belong in this case not only because they fall under the coverage being excluded for John Doe, but also because LMTs are consumers and responsible for purchasing PIP coverage and thus also become Jane Doe plaintiffs themselves.

There are absolutely no Legislative findings, neither in the two hearings related to this matter, nor in the multitude of documents filed with regard to this Appeal, which present any data contesting the efficiency and utility of massage

therapy for treating injuries arising from any type of trauma, including that resulting from motor vehicle collisions.

Accordingly, the Temporary Injunction should be affirmed because the Plaintiffs/Appellees are likely to prevail on the merits.

### **SUMMARY OF THE ARGUMENT**

The Temporary Injunction prohibiting PIP insurance carriers from denying massage therapy should be affirmed because: 1) Massage Therapy is a valid, effective, established therapeutic modality for the treatment of traumatic injuries arising from motor vehicle collisions; 2) as a result of the Legislature's action, Licensed Massage Therapists are suffering irreparable harm for which they possess no legal remedy; 3) because this Temporary Injunction is in the Public Interest; and 4) because the Plaintiffs/Appellees are likely to prevail on the merits.

### **ARGUMENT**

#### ***I. Massage Therapy is a Valid, Effective, Established Therapeutic Modality for the Treatment of Traumatic Injuries Arising From Motor Vehicle Collisions.***

The Temporary Injunction should be affirmed because it is unreasonable, arbitrary, and capricious for the Legislature to prohibit massage therapy as a therapeutic modality for individuals injured as a result of motor vehicle trauma

when there were no legislative findings related to massage therapy. While not prohibiting elective massage or therapeutic massage for any other injury, the Legislature, without supporting evidence, determined that traumatic injuries arising from motor vehicle accidents are so sufficiently different from any other traumatic injury that massage therapy would not be efficacious and should not be compensable.

The Legislature failed to obtain any information from the Florida Department of Health, (FDOH), which is already charged with licensing and regulating the practice of massage therapists. Florida Statutes §§480 and 456. As of June 1, 2013, the FDOH reported 37,293 actively licensed massage therapists in the state. The FDOH promulgates clear educational requirements for initial licensure and for maintenance of licensure. Surely the FDOH would neither license nor regulate an ineffective profession. Here, too, the Legislature failed to reprimand the FDOH for inadequate supervision of massage therapists, or even attempt to revoke their statutory regulation.

There exists a legion of scientific and anecdotal support for the effectiveness of massage therapy in treating the kind of injuries common to motor vehicle collisions.

For example, while motor vehicle accident victims suffer a wide variety of injuries, one of the most common injuries relates to low back pain. In one

randomized, controlled, placebo controlled study evaluating the efficacy of massage therapy by trained therapists for low back pain, massage therapy was proven beneficial for its palliative and healing effect. Preyde, M. *Effectiveness of massage therapy for subacute low-back pain: a randomized controlled trial*. Can. Med. Assoc. J. 162; 13: 1815 – 1820 (2000).

Further, there are a large number of observational studies that offer supporting evidence that massage therapy is effective and beneficial for treating soft tissue injuries common to motor vehicle collisions. Verhagen, AP, Scholten-Peeters GG, van Wingaarden S, de Bie, rob, Bierma-Zeinstra SM. *Conservative treatments for whiplash*. The Cochrane Library, 02/17/2010.

There exists decades of medical literature replete with case studies and research data supporting the efficacy of massage therapy for a variety of ailments – the same ailments most common to motor vehicle accident victims. For example, in a recent review of persistent low back pain, the New England Journal of Medicine reported that massage therapy “moderately decreased levels of pain and improved function when compared with sham treatment...and there was some improvement for up to one year after a full 10 week-course of massage.” Carragee, EJ. *Persistent Low Back Pain*, N Engl. J. Med. 352: 1891-1898 (2005).

Additionally, when comparing massage therapy to no treatment for chronic neck pain, massage therapy was demonstrated to be safe and to provide short term

clinical benefits. Sherman, KJ, Cherkin DC, Hawkes, RJ, Migloretti, D, Deyo RA. *Randomized Trial of Therapeutic Massage for Chronic Neck Pain*. Clin. J. Pain. 25(3): 233-238 (2009).

Given the absence of data demonstrating harm associated with massage therapy provided by LMTs and the data supporting its use for injured persons, the Legislature's absolute prohibition of all massage therapy was arbitrary and capricious, and the Order for Temporary Injunction should be affirmed.

***II. The Temporary Injunction Should Be Affirmed Because Licensed Massage Therapists Are Suffering Irreparable Harm For Which They Possess No Legal Remedy.***

LMTs will suffer irreparable harm unless the Order for Temporary Injunction is affirmed. The 2012 PIP Act manifests a clear and present danger to LMTs' reputations as well as their businesses and livelihoods, resulting in irreparable harm that vastly exceeds any monetary compensation. The most egregious form of the irreparable harm caused by the 2012 PIP Act is found in the loss of the LMTs' constitutional rights and freedoms, including, but not limited to: 1) the right to due process of law, 2) the right to equal protection of the law, 3) the right to earn a living and enjoy the fruits of one's labors, and 4) the ownership and use of private property without undue governmental interference. U.S. Constitution, Amendment XIV; Florida Constitution, Article 1, Section 9.

Because of the absolute prohibition against compensation for any massage therapy, LMTs will suffer irreparable harm in the absence of the Temporary Injunction. See Appellees' Appendix, Tab 3a-3c. LMTs almost universally report that they are either being directly or indirectly forced out of business because PIP insurance carriers no longer have to compensate them for injuries that arose during a motor vehicle collision. *Id.* LMTs also report that their ongoing clients are too afraid that they will receive a tremendous bill for services not covered by insurance, and, as a result, the clients prematurely discontinue valuable, needed care. *Id.*

LMTs report that the 2012 PIP Act destroyed their referral base both for new referrals and for pre-existing ones. See Appellees' Appendix Tabs 3a-3c. In addition to the loss of the therapist-client relationship and the lost referrals, LMTs also report a significant diminution in their professional reputations. *Id.* The loss of customers, loss of business goodwill and the threats to a business' vitality all represent irreparable harm. LMTs fear not just the loss of business, but they also fear of the loss of business goodwill and the loss of the ability to continue to engage in a lawful enterprise and enjoy the fruits of one's labors without undue governmental interference and attack. Fear of enforcement has already resulted in a loss of employee morale and customer confidence. *Id.*

LMTs are also suffering dramatic economic harm. As a direct result of the irreparable harm detailed above, many LMTs report that their economic losses are rendering them unable to repay their student loans. *Id.* Plaintiffs/Appellees averred that each “began losing business and suffering economic damages as well as non-economic damages in the form of loss of good will in their healthcare provider-client relationships after the 2012 PIP Act was enacted.” Complaint ¶5. Further, Plaintiffs averred that they, “are presently experiencing irreparable harm suffered by the elimination or drastic restriction from being able to provide healthcare to those injured as a result of motor vehicle collisions.” Complaint ¶7.

In the absence of this Temporary Injunction, LMTs may not mitigate their damages. LMTs possess no adequate remedy at law because there is no plain, certain, prompt, speedy, sufficient, complete, practical, or efficient way to attain the ends of justice without *immediately* enjoining the enforcement of this challenged legislation. No amount of monetary damages may adequately compensate them for the irreparable harms they are now suffering including the loss or deprivation of their constitutional rights. Complaint ¶8. The loss of any constitutional right or freedom, in and of itself, constitutes irreparable harm. See *Tampa Sports Authority v. Johnston*, 914 So.2d 1076 (Fla. 2d DCA 2005).

### ***III. The Temporary Injunction Should Be Affirmed Because this Temporary Injunction is in the Public Interest.***

The Temporary Injunction should be affirmed and the *status quo* maintained until this case reaches trial to effectively protect the health, safety, and well being of all Floridians. The status quo preserved by this temporary injunction is the last, peaceable, non-contested condition that preceded the controversy. *Bowling v. National Convoy & Trucking Co.*, 135 So. 541 (Fla. 1931). One critical purpose of temporary injunctions is to prevent injury so that a party will not be forced to seek redress for damages after they have occurred. See *Lewis v. Peters*, 66 So.2d 489 (Fla. 1953), and also *Bailey v. Christo*, 453 So.2d 1134 (Fla. 1st DCA 1984).

The last “peaceable, non-contested condition” that preceded this controversy was that LMTs were operating lawfully and enjoying their rights to engage in the lawful provision of medical treatment to clients with PIP coverage, enjoying both their business and property rights and the fruits of their industry. While it may be reasonable for the Legislature to make an effort to protect the businesses under its purview, here it was unreasonable to legislate the provision of healthcare without any legislative findings to support its action.

Although Appellants’ counsel argued that the Legislature could determine that massage therapy was not effective, (see Appellants Appendix Tab 7, Page 49, “that the legislature could have believed that the healing arts of acupuncture and

massage therapy would not be effective treatments”)<sup>1</sup> , no supporting healthcare data was ever made part of the Legislative Record.

The 2012 PIP Act dramatically altered the manner in which every person injured during a motor vehicle collision is evaluated and treated without providing any peer-reviewed or best-practices medical evidence that either the current system is medically flawed or that the new, improved system will benefit patients. Maintaining the *status quo* by temporary injunction allows the continued protection of the health, safety, and well being of all Floridians injured in a motor vehicle collision in the same manner that has developed over decades, thus continuing to promote the unfettered access to such care given in exchange for limiting Floridians’ access to the courts.

Maintenance of the *status quo* also means that LMTs will be allowed to continue with their lawful medical and business practices, pursuant to the licenses already granted them by the State of Florida – the very State causing them irreparable harm and seeking to terminate or severely limit their ability to work or earn a living.

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<sup>1</sup> In fairness, Appellants counsel argued that the Legislature could determine that massage therapy would not be effective treatment for an emergency medical condition after having already argued that PIP was only going to be available to pay for emergency medical conditions. However, Counsel’s argument appears to confuse what the 2012 PIP Act really says – that the Legislature not only made PIP available for patients with emergency medical conditions, but also limited the benefit amount to 25% for patients without emergency medical conditions. Essentially, the Legislature prohibited massage therapy for everyone – with or without an emergency medical condition.

The granting of this Preliminary Injunction and maintaining the *status quo* does not result in a disservice to the public interest; rather the public interest is best served by the Preliminary Injunction by protecting the rights and privileges afforded by the Florida Constitution and by protecting the health, safety, and wellbeing of Florida's citizens. Although the Legislature's intent to prevent insurance fraud was laudable, no data was presented that prohibiting all LMTs from compensation for their work would actually reduce PIP insurance fraud.

The Legislature provided no data to suggest or prove that eliminating all massage therapy care for motor vehicle accident victims, but not for any other injury victims, would improve the health, safety and wellbeing of its citizens. Equally, no data was provided to suggest or prove that the massage therapy care currently being provided by LMTs, licensed by the State of Florida, to motor vehicle accident victims endangered their health, safety, or wellbeing. Here, the preliminary injunction is necessary to allow motor vehicle accident victims access to the care they are already receiving and presumably benefiting from. Why else would they continue to receive treatment?

While there may be insurance fraud occurring in the realm of PIP coverage, without further proof, there is no basis for singling out massage therapy (as well as chiropractics and acupuncture) to attempt to resolve this problem.

***IV. The Temporary Injunction Should Be Affirmed Because the Plaintiffs/Appellees Are Likely to Prevail on the Merits.***

Plaintiffs/Appellees will likely succeed on the merits of their claim. The court held that Appellees demonstrated a *prima facie*, clear legal right to relief based upon the severe restrictions now required for PIP coverage without any improved access to the courts. See Appellants Appendix Tab 1. Focusing on the argument that the 2012 PIP Act revisions no longer constituted a reasonable alternative to access to the courts as discussed in *Lasky, Chapman, and Kluger, supra.*, the court ordered stricken the provisions of the Act prohibiting massage and acupuncture therapy and those requiring a determination of an emergency medical condition. See Appellants' Tab 4. Note that the largest PIP insurance carrier is complying with this Order. See Appellees' Tab 1.

On its face, the 2012 PIP Act provisions are arbitrary and capricious and represent an unlawful exercise of Florida's police power because there exists no substantial relationship to the protection of the public health and welfare. On its face, the 2012 PIP Act violates both the single subject rule for state statutes and the separation of powers doctrine 1) by blending criminal, civil, and administrative penalties; 2) by imposing inconsistent and unnecessary regulations conflicting with existing statutes and regulations; and 3) by impermissibly limiting damages that an injured party may obtain. Unfortunately, the 2012 PIP Act provisions are specifically and narrowly tailored to protect certain private businesses, PIP

insurance carriers, to the detriment of other private businesses, in this case massage therapists, and Florida's citizens at large.

An injunctive remedy is an appropriate remedy, upon the proper showing of injury, to restrain the enforcement of an invalid law. *Daniel v. Williams*, 189 So. 2d 640 (Fla. Dist. Ct. App. 2d Dist. 1966); *Board of Com'rs of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. Dist. Ct. App. 1st Dist. 1958). The injury may consist of the infringement of a property right. See *Louisville & N.R. Co. v. Railroad Com'rs*, 63 Fla. 491, 58 So. 543 (1912). It may also exist in interfering with the right to earn a livelihood and continue practicing one's employment. *Watson v. Centro Espanol De Tampa*, 158 Fla. 796, 30 So. 2d 288 (1947). Persons who are the subject of harassment by overzealous, improper, or the bad-faith use of valid statutes may be afforded the protection of injunctive relief. *Kimball v. Florida Dept. of Health and Rehabilitative Services*, 682 So. 2d 637 (Fla. Dist. Ct. App. 2d Dist. 1996).

Enforcement of the 2012 PIP Act manifests all the components of an invalid law because it abrogates LMTs' rights to due process and equal protection and because operation of this law will absolutely prohibit the LMTs from continuing to provide massage therapy solely to victims of motor vehicle accidents. It remains unclear how, in the absence of any data, the Legislature can prohibit massage

therapy only for traumatic injuries resulting from motor vehicle collisions but not from any other cause.

Although the court based entry of the Order for Temporary Injunction on an access to the courts argument, the Plaintiffs/Appellees also argued several other grounds that will ultimately require evaluation. Notably, the Plaintiff/Appellees also argued that the 2012 PIP Act was facially unconstitutional because: 1) It violated the “single subject rule” required by the Florida Constitution; 2) it contained a variety of restrictions and limitations that violate the separation of powers doctrine; 3) in the absence of either a compelling governmental interest or rational basis, it violated massage therapists’ rights to due process of law; 4) it constituted an improper taking where, once granted, professional licensure becomes a vested property right; 5) it violated a massage therapist’s equal protection, also in the absence of a compelling governmental interest or rational basis; 6) it was based on unsupported, unpublished statistical assumptions that were not the product of proper research methodology; 7) it unduly limits the rights of both medical professionals and consumers; and, most importantly, 8) it totally voids the sufficient alternative relied upon by the courts to allow the original no-fault PIP insurance scheme to limit Floridians’ access to the courts.

Finally, enforcement of the 2012 PIP Act represents an invalid taking because once the state licenses a healthcare provider, that provider possesses a

property right in his license. The 2012 PIP Act impermissibly denies or limits those already possessing active massage therapy licenses from the ability to earn a living or provide healthcare to those in need. Plaintiffs are substantially likely to succeed on the merits because the 2012 PIP Act clearly violates the single subject rule, is arbitrary and capricious, denies due process by imposing strict liability for innocent business activities, represents an unlawful exercise of the state's police power because there exists no substantial relationship to the protection of the public health and welfare or any legitimate governmental objective, denies due process by imposing inconsistent and unnecessary regulations conflicting with existent state statutes and by imposing strict liability, and because the 2012 PIP Act appears specifically designed to protect the PIP insurance industry while compromising the rights and protections afforded to Floridians by the Constitution of the State of Florida.

### **CONCLUSION**

The Order for Temporary Injunction should be affirmed because, in addition to impermissibly prohibiting access to the courts, the 2012 PIP Act also impermissibly prohibits licensed health care professionals from providing medically necessary and reasonable care. In this case, the Plaintiffs/Appellees established that they suffered irreparable harm without injunctive relief, that they possessed no adequate legal remedy, that there was a substantial likelihood that

they would succeed on the merits, and that an injunction is in the public interest. See Order Granting Temporary Injunction. As demonstrated above, Licensed Massage Therapists suffered irreparable harm without injunctive relief, they possess no adequate legal remedy, and they possess a substantial likelihood of prevailing in the underlying litigation. It is also patently true that prohibiting appropriate massage therapy is not in the public's best interest. For these reasons, the FSMTA, as Amicus Curiae, respectfully submits that this Honorable Court must affirm the Order for Temporary Injunction.

**Respectfully Submitted this 14<sup>th</sup> Day of June**

/s/ Mark S. Sussman, Esq.  
Florida Bar Number 656828

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic service on this day to:

Counsel for the Appellants:

C. Timothy Gray	tim.gray@flair.com
J. Bruce Culpepper	bruce.culpepper@flair.com
Pamela Jo Bondi	pam.bondi@myfloridalegal.com
Allen Winsor	allen.winsor@myfloridalegal.com
Rachel Nordby	rachel.nordby@myfloridalegal.com

Counsel for the Appellees:

Adam S. Levine	aslevine@msn.com
Luke Lirot	Luke2@lirotlaw.com
	jimmy@lirotlaw.com

Amici:

Theodore E. Karatinos	tedkaratinos@hbklawfirm.com
Katherine E. Giddings	katherine.giddings@akerman.com
Nancy M. Wallace	nancy.wallace@akerman.com
Marcy L. Aldrich	marcy.aldrich@akerman.com
Martha Parramore	martha.parramore@akerman.com
Debra Atkinson	debra.atkinson@akerman.com
Matthew C. Scarfone	mscarfone@cftlaw.com
Maria Elena Abate	mabate@cftlaw.com
Jessie L. Harrell	jharrell@appellate-firm.com, filings@appellate-firm.com
Bryan S. Gowdy	bgowdy@appellate-firm.com

**Respectfully Submitted this 13<sup>th</sup> Day of June**

/s/ Mark S. Sussman, Esq.  
Florida Bar Number 656828  
P.O. Box 640848  
Miami, Florida 33164  
(305) 652 – 4910 [Phone]  
[msussman@gmail.com](mailto:msussman@gmail.com) [Email]  
Counsel for Amicus Curiae

**CERTIFICATE OF COMPLAINT**

I hereby certify that this brief is printed in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210(a)(2).

/s/ Mark S. Sussman, Esq.  
Florida Bar Number 656828  
P.O. Box 640848  
Miami, Florida 33164  
(305) 652 – 4910 [Phone]  
[msussman@gmail.com](mailto:msussman@gmail.com) [Email]  
Counsel for Amicus Curiae