IN THE SUPREME COURT OF FLORIDA

Case No. SC13-2543

ROBIN A. MYERS, A.P., an individual person and Acupuncture Physician, GREGORY S. ZWIRN, D.C., an individual person and Chiropractic Physician, SHERRY L. SMITH, L.M.T., an individual person and Licensed Massage Therapist, CARRIE C. DAMASKA, L.M.T., an individual person and Licensed Massage Therapist, JOHN DOE, on behalf of all similarly situated health care providers, and JANE DOE, on behalf of all those individuals injured by motor vehicle collisions,

APPELLANTS/PETITONERS,

v.

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

APPELLEE/RESPONDENT.

APPELLANTS'/PETITIONERS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

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APPELLANTS'/PETITIONERS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

I. INTRODUCTION

On December 23, 2013, the Appellants/Petitioners, Robin A. Myers, A.P. (an acupuncture physician), Gregory S. Zwirn, D.C. (a chiropractic physician), and Sherry L. Smith, L.M.T., and Carrie C. Damaska, L.M.T. (licensed massage therapists), a representative party, "John Doe," and representative party , "Jane Doe," filed a Notice of Appeal in the First District Court of Appeal, seeking this Court to review of an Order reversing a Temporary Injunction issued by the Leon County Circuit Court, issued by the District Court on October 23, 2013, and a subsequent Order denying a Motion for Rehearing and Motion for Rehearing En Banc, issued on November 25, 2013.

On January 14, 2014, this Court issued an Order to Show Cause, and, pursuant to the language of said Order, Appellants/Petitioners would herein request that the Notice of Appeal be treated as a Notice to Invoke the Discretionary Jurisdiction of this Court, review being sought pursuant to Rule 9.030(2)(A)(iv), Florida Rules of Appellate Procedure. This section allows parties to seek the discretionary jurisdiction of this Court to review decisions of district courts of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same issue of law." As will

be shown below, such a request is justified.

II. THIS COURT HAS JURISDICTION UNDER RULE 9.030(2)(A)(iv)

A review of the Appellants' "Notice of Appeal" would show that no assertion was made "that the underlying decision of the district court of appeal declares invalid a state statute or provision of the state constitution." The Notice appends both the decision of the First District Court of Appeals reversing the Temporary Injunction, as well as the subsequent Order denying Appellants' Motion for Rehearing and Rehearing En Banc. The central issue was whether or not the Plaintiffs had standing to assert their challenges to the 2012 PIP Act in the pursuit of a declaratory judgment.

As stated above, the Supreme Court of Florida has jurisdiction to hear this appeal based on Rule 9.030 (a)(2)(A)(iv), of the Florida Rules of Appellate Procedure, in that the First District Court of Appeals reversal, on the basis of standing, expressly and directly conflicts decisions of other district courts of appeal and this Court, as set forth below.

III. POINTS AND AUTHORITIES SHOWING CONFLICT WITH OTHER DISTRICT COURTS OF APPEAL AND THIS COURT

On October 23, 2013, the First DCA reversed the trial court's entry of a temporary injunction preventing the unfair and unconstitutional impact of the

relevant provisions of the 2012 PIP Act. This action was filed by the Appellees below, healthcare professionals asserting a variety of claims based on the destruction of their practices brought about through the implementation of certain portions of Chapter 2012- 197, Laws of Florida (the "2012 PIP Act"). The operative complaint alleged violations of the "single subject" rule; due process violations; violation of the separation of powers doctrine; violations of the Appellees' "equal protection" rights to be able to provide, and be compensated for, medical treatment provided to auto injury victims; challenges based on "the right to work," and, focusing on the history of how the entire PIP framework came into existence, a challenge was based on the assertion that the delicate balance between the loss of "the right of access to courts" in exchange for the legislative "trade-off" of providing swift access to benefits for healthcare and other much needed remedies for those inured in auto crashes was completely thrown "out of balance," and thus unconstitutional.

The primary purpose in filing the action was to prevent affected healthcare professionals from being irreparably harmed through either the complete exclusion from providing PIP medical treatment, in the context of acupuncture physicians and licensed massage therapists, or, in the context of chiropractic physicians, limiting their ability to provide treatment by 75%, absent the determination of the

subjective and undefined "emergency medical condition."

These causes of action challenging the constitutionality of the 2012 PIP Act were asserted by the Appellees in their own right, as well as in the context of representative plaintiffs, "John Doe" and "Jane Doe." The trial court found that there was sufficient standing established by the Appellees, and determined that the dramatic reduction in benefits that supported the "balancing" rendered the new framework inconsistent with the constitutional right of access to courts as set forth in Art. I, § 21, Fla. Const.

The First DCA Opinion correctly noted that the Appellees, plaintiffs below, included Robin A. Myers, A.P. (an acupuncture physician), Gregory S. Zwirn, D.C. (a chiropractic physician), and Sherry L. Smith, L.M.T., and Carrie C. Damaska, L.M.T. (licensed massage therapists). Nonetheless, the First DCA Opinion took issue with the inclusion of "John Doe" as a "plaintiff," a representative party, who, ***in addition to the named Plaintiffs***, was included to pursue a facial constitutional challenge on behalf of "all similarly situated citizens of Florida that are actively licensed healthcare providers licensed by Florida pursuant to the Florida Statutes, and/or own businesses providing healthcare services in Florida, and/or provide healthcare services to patients injured as a result of motor vehicle collisions in Florida." This description of characteristics

designed to describe "John Doe," was also an accurate description of the named individual Appellees.

The First DCA Opinion was also critical of the inclusion of "Jane Doe," a representative party, who, ***in addition to the named Plaintiffs***, was named to pursue a facial constitutional challenge on behalf of "all those citizens of Florida that are, were, or will be injured as a result of a motor vehicle collision that were also required to purchase $10,000 . . . of PIP insurance coverage but may actually only receive no or $2,500 . . . in benefits."

Undeniably, the named Appellees below were also shown to be citizens of Florida that, as a result of the threatened imposition of the challenged provisions of the 2012 PIP Act, would not only suffer irreparable harm from the loss or limitations of their healthcare practices, but were also were placed in the position where they, like "Jane Doe," would be forced to pay for $10,000 of "no-fault" insurance, but be limited to only $2,500 in coverage, absent the necessity of showing the undefined "emergency medical condition." These facial challenges, while being extended to "John Doe" and "Jane Doe," were also asserted on behalf of the ***individual*** named Appellees. Notwithstanding that no one had been injured (or could have been when the suit was originally filed), the challenges were based on the clear ***facial*** deprivations imposed by the challenged legislation on both

those giving and receiving medical care under PIP.

In order to understand the standing issue, and how the First DCA Opinion directly conflicts decisions of other district courts of appeal and this Court, a basic knowledge of Florida PIP law is critical. Personal Injury Protection (PIP) insurance represents one facet of the Florida No-Fault Law and was designed to: 1) provide efficient, rapid, unfettered access to medical benefits for injured victims of a motor vehicle accidents; 2) provide limited compensation for lost work; and 3) provide a death benefit. 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).

The First DCA Opinion identified the gist of those portions of the 2012 PIP Act that were asserted as the most egregious:

> "To be eligible for PIP medical benefits under the new law, persons injured in a motor vehicle accident must seek initial services and care from specified providers within fourteen days after the motor vehicle accident. § 627.736(1)(a), Fla. Stat. (2013). Medical benefits up to $10,000 are available for 'emergency medical conditions' diagnosed by specified providers, and up to $2,500 for non-emergency medical conditions. § 627.736(1)(a)3.-4., Fla. Stat. (2013). In addition, the law specifically excludes licensed massage therapists and licensed acupuncturists from being reimbursed for medical benefits. § 627.736(1)(a)5., Fla. Stat. (2013). Although chiropractors are authorized to provide treatment to PIP insureds, they cannot make

> the determination that a patient has suffered an emergency medical condition. § 627.736(1)(a)1.-3., Fla. Stat. (2013). Plaintiffs alleged that the new law significantly limits the type and format of chiropractic treatment of persons covered by PIP insurance." (Decision at p. 4).

The First DCA Opinion properly identified that the trial court granted the motion for temporary injunction based only on the access-to-courts claim, observing, "The judge determined that the Appellees are entitled to injunctive relief 'as to those sections of the law which require a finding of emergency medical condition as a prerequisite for payment of PIP benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists.'

The First DCA Opinion stated:

> "The judge characterized these plaintiffs as 'seeking to enforce a right vested in members of the public at large,' such that they 'must allege and establish some special injury different in kind from the injury suffered by members of the public.' The court found that the Provider Plaintiffs, 'as health care providers for automobile accident victims, derive a substantial percentage of their income through PIP insurance payments,' which the 2012 PIP Act prohibits or severely limits, giving them "a sufficient interest in the outcome of the case, as well as an injury that is distinct from the public at large." (Decision at p. 6).

Opining that, "Standing presents 'a threshold inquiry' that must be made at the commencement of the case (citing *Olen Props. Corp. v. Moss,* 981 So. 2d 515,

517 (Fla. 4th DCA 2008))..." and stating that, "We have de novo review of the issue of whether Appellees have standing, which is a pure question of law. *Baptist Hosp., Inc. v. Baker,* 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012)," the First DCA Opinion went through an analysis of various "standing" cases, and concluded, that Appellees' below lacked standing to defend an injunction granted on an isolated constitutional issue that affected every driver in the State of Florida. As will be shown below, the First DCA Opinion simply can not be reconciled with other District Courts of Appeal or this Court's decisions when it comes to standing to pursue a declaratory judgment, particularly in the context of a declaratory action seeking to determine the validity or construction of legislation.

This conflict is established by the fact that the First DCA Opinion ignored "that a party seeking adjudication of the courts on the constitutionality of statutes is required to show that *his* constitutional rights have been ***abrogated or threatened*** by the provisions of the challenged act." *Hillsborough Inv. Co, v. Wilcox*, 13 So. 2d 448, 453 (Fla. 1943) (emphasis added). ***Every*** Plaintiff below had their "constitutional rights... ***abrogated or threatened***" by the fact that the existence of the provisions of PIP itself was based on the "trade-off" giving up "access to the courts" in exchange for the unfettered $10,000 in remedies provided ***before*** the adoption of the 2012 PIP Act.

The requirement that ***all*** Florida drivers would have to pay for coverage, 1) that no longer included ***any*** access to massage therapy and acupuncture, and 2) required the showing of an undefined "emergency medical condition" simply to get what had theretofore been "the benefit of the bargain" was ***itself*** the manifest injury providing standing. The legislative deprivation of this pre-existing, delicately balanced "trade-off" was itself the injury that gave Appellees standing, and, regardless of the criticism directed at any "representative plaintiff," *a la* "John Doe" or "Jane Doe," the named individual Appellees themselves had "the adverse interest necessary for standing on the sole claim presented in this appeal." The "Provider Plaintiffs" did assert a violation of *their* constitutional right of access to courts sufficient to satisfy standing under any of the applicable considerations, thus showing that the First DCA Opinion conflicted with their own case of *Alachua County v. Scharps,* 855 So. 2d 195, 200 (Fla. 1st DCA 2003).

The conflict created by the First DCA Opinion is that they transformed what was an action seeking a declaratory judgment into a situation where they demanded, "a showing of an actual denial of access to courts in a specific factual context," without which, "the Provider Plaintiffs lack standing to assert this claim." To demand "injured motorists whose ability to sue tortfeasors has been impermissibly limited" would be to eviscerate the basic concept of seeking

injunctive relief for a facially unconstitutional piece of legislation. There was nothing "hypothetical" about Appellees' claim, it was simply clear to the Appellees that the changes brought about by the challenged provisions of the 2012 PIP Act rendered the legislation facially unconstitutional. Even the trial court recognized that you don't need an injured motorist to determine that, in the unique area of PIP, the 2012 PIP Act was a manifest constitutional violation, citing *Lasky* v. *State Farm Insurance, Co.,* 296 So. 2d 9 (Fla. 1974), and *Chapman* v. *Dillon,* 415 So. 2d 12, 19 (Fla. 1982), and finding the 2012 PIP Act, "violates article I, section 21 of our constitution by absolutely denying access to the courts to vindicate a prior existing common law right to recover intangible damages for nonpermanent injuries...without supplying any viable alternative," because the revisions eviscerate the viable alternative that PIP once was. *Id.*

The most egregious example of conflict is manifest in the fact that the Appellees pursued a declaratory judgment, which included all the necessary allegations establishing jurisdiction under this statutory remedy. Sec. 86.021, Florida Statutes, provides standing to any person whose rights, status, or other legal or equitable or legal relations are affected by a statute to obtain a declaration of their rights thereunder. Florida does not adhere to the "rigid" doctrine of standing used in the federal system. See *Department of Revenue v. Kuhnlein*, 646

So.2d 717, 720 (Fla.1994). Rather, the general requirement for standing in Florida posits that "every case must involve a real controversy as to the issue or issues presented," so that "the parties must not be requesting an advisory opinion." *Id.* at 720-21. In a seminal 1952 decision, this Court set out the Florida rule:

> "Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers propounded from curiosity. These elements are necessary as being judicial in nature and therefore within the constitutional powers of the courts." *May v. Holley*, 59 So.2d 636, 639 (Fla.1952); *Martinez v. Scanlan*, 582 So.2d 1167 (Fla.1991).
>
> "The Declaratory Judgments Act is 'substantive and remedial,' with a purpose 'to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations,' and the Act is 'to be liberally administered and construed.' § 86.101, Fla. Stat. (1997). Individuals can challenge the validity of a statute in a declaratory action. § 86.021, Fla. Stat. (1997)." *Reinish v. Clark*, 765 So.2d 197, 202-203(1st DCA, 2000).

Additionally, the First DCA Opinion conflicts directly with the time tested theories on standing articulated in *State ex rel. Clarkson v. Phillip*, 70

Fla. 340, 70 So. 367, 369 (1915), since the 2012 PIP Act clearly was "of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties." The Appellees satisfied standing on all these bases, and the conflict created by the First DCA's Opinion is clear:

> "One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, or unless the unconstitutional feature renders the entire act void or renders the portion complained of inoperative.... The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties." *Id.*

The "injury" caused by the manifest loss of the common law right described by the trial court did not require the wreckage of any automobiles, it involved the rights of Appellees' to invoke the Declaratory Judgment Act, dealing directly with those aspects of the PIP Act that directly affected the Appellees' rights or duties.

Chapter 86, Florida Statutes, specifically describes the concept of declaratory judgments, and, in pertinent part, directly supports the Appellees' below pursuit of such a declaration as it pertained to the challenged provisions of the 2012 PIP Act:

> **86.011 - Jurisdiction of trial court.**—The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on

the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

(1) Of any immunity, power, privilege, or right; or

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

86.021 - Power to construe.—Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

Based on the abandonment of this critical doctrine by the First DCA, the Opinion below conflicts with ***every*** decision embracing a proper reflection of the standing provided an "affected party" under the Declaratory Judgment statute to determine the validity or construction of legislation: *Ervin v. Capital Weekly Post, Inc.*, 97 So.2d 464 (Fla. 1957); *Adams v. Gunter,* 238 So.2d 238 So.2d 825 (Fla. 1970); *Heinlein v. Metropolitan*

Dade County, 239 So.2d 635 (Fla. 3rd DCA 1970); *Combs v. City of Naples*, 834 So.2d 195 (Fla. 2nd DCA 2002); and *Olive v. Maas*, 811 So.2d 644 (Fla. 2002)("Florida Courts have repeatedly stated that the declaratory judgment statute should be liberally construed.")

IV. CONCLUSION

Based on the foregoing points and authorities, it is clear that the First District Court's Opinion directly conflicts with this Court's decisions and with numerous decisions of other District Courts of Appeal dealing with the "liberal" standing provided by the Declaratory Judgment statute, especially when seeking to determine the validity or construction of legislation. Appellants/Petitioners respectfully submit that this Court should exercise its discretion and accept jurisdiction to resolve these conflicts.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished in accordance with Florida Rule of Judicial Administration 2.516 to individuals listed below on this 29th day of January, 2014.

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