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

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

Appellant,

vs.

Case No. 1D13-1355
L.T. No. 2013-CA-0073

ROBIN A. MYERS, D.C., et al.,

Appellees.

APPELLANT'S INITIAL BRIEF

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

PAMELA JO BONDI
ATTORNEY GENERAL

Timothy Osterhaus (FBN 133728)
Solicitor General
Allen Winsor (FBN 016295)
Chief Deputy Solicitor General
Rachel Nordby (FBN 056606)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)

C. Timothy Gray (FBN 602345)
Assistant General Counsel
J. Bruce Culpepper (FBN 898252)
Assistant General Counsel
Office of Insurance Regulation
Larson Building, Room 647-B
200 E. Gaines Street
Tallahassee, Florida 32399
(850) 413-2122
(850) 922-2543 (fax)

Counsel for Appellant

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a non-final order granting a temporary injunction. A. 1.[1] This Court has jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(B); 9.130(a)(3)(B).

Background on the No-Fault Law and the Challenged Amendments

This case presents a challenge to the Florida Motor Vehicle No-Fault Law. First enacted in 1971, "[t]he No-Fault Law is a comprehensive statutory scheme, the purpose of which is to provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits."[2] *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331-32 (Fla. 2007) (internal marks omitted). The law's objectives included "a lessening of the congestion of the court system, a reduction in concomitant delays in court calendars, a reduction of automobile insurance premiums and an assurance that persons injured in vehicular accidents would receive *some* economic aid." *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 16 (Fla. 1974) (emphasis added). The purpose was never to provide full, no-fault compensation for all injuries. Instead,

[1] This brief will refer to the Appendix as "A. [*tab*] at [*page or paragraph*]."

[2] Although many cases refer to an *insurance* requirement, motorists technically have a choice between purchasing insurance or providing some other equivalent security or self-insuring. *See* § 627.733(3), Fla. Stat. (2012). That distinction is not pertinent here.

the Legislature intended "to provide a minimum level of insurance benefits" even to those at fault for their own injury. *United Auto. Ins. Co. v. Rodriguez*, 808 So. 2d 82, 85 (Fla. 2002).

The "Personal Injury Protection" component, also known as PIP, "is an integral part of the no-fault statutory scheme," requiring automobile insurance policies to provide certain PIP benefits. *Flores v. Allstate Ins. Co*., 819 So. 2d 740, 744 (Fla. 2002); *see also* § 627.736(1), Fla. Stat. (2012). Those who carry the required insurance are afforded tort immunity to the extent of PIP benefits and, in some circumstances, to the extent of noneconomic damages. *See Lasky*, 296 So. 2d at 13-14; *see also* § 627.737, Fla. Stat. (2012). Thus, while the No-Fault law limits the traditional tort remedies in some instances, it "made PIP insurance compulsory and allowed recovery regardless of fault." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1077 (Fla. 2006). Because of this tradeoff, the Supreme Court has repeatedly upheld the No-Fault Law against access-to-courts challenges, concluding that the PIP system provides a reasonable alternative to traditional tort actions. *See Lasky*, 296 So. 2d at 13-14; *Chapman v. Dillon*, 415 So. 2d 12, 17 (Fla. 1982); *State Farm*, 932 So. 2d at 1077.

Over the years, the Legislature has amended the No-Fault law to protect its original intent and to respond to various problems, including fraud. In 2001, for

example, the Legislature adopted a fee schedule for certain reimbursement, finding that the Law's "intent has been frustrated at significant cost and harm to consumers by, among other things, fraud, medically inappropriate over-utilization of treatments and diagnostic services, [and] inflated charges." Ch. 2001-271, § 1, Laws of Fla. In doing so, the Legislature adopted the findings of a statewide grand jury report, which found rampant fraud throughout the system. *Id.* In 2012, again faced with reports of escalating fraud and abuse among those seeking PIP benefits,[3] the Legislature further amended PIP (the "Amendments"). Among other things, the Amendments added requirements for written crash reports, specified certain actions that constitute fraud, and generally required clinics seeking PIP payments to be licensed. Ch. 2012-197, §§ 1, 2, 4, 10, Laws of Fla.

At issue in this appeal are changes to Section 627.736(1), which details the insurance coverage necessary to satisfy PIP's security requirements. Ch. 2012-197, § 10, Laws of Fla. Under the new law, a PIP policy must provide medical benefits up to $10,000 for emergency medical conditions (as defined in Section 627.732(16)), and $2,500 for nonemergency medical conditions. *Id.* In addition, a new provision specifies that "a licensed massage therapist or licensed

[3] *See, e.g.*, Office of the Ins. Consumer Advocate, *Report on Fla. Motor Vehicle No-fault Insurance (Personal Injury Protection)* 4 (Dec. 2011), *available at* http://tinyurl.com/ccoz76g.

acupuncturist may not be reimbursed for medical benefits under this section." § 627.736(1)(a)(5), Fla. Stat. (2012). The limits for disability claims were unchanged.

Appellees' Claims and Course of Proceedings Below

On January 8, 2013, after the Amendments took effect, Appellees initiated the action below. A. 2.[4] The Plaintiffs were an acupuncturist, a chiropractor, and two massage therapists. *Id.* ¶¶ 23-26. Also listed as Plaintiffs were "John Doe," purportedly representing "all similarly situated citizens of Florida that are actively licensed healthcare providers" who provide services to injured motorists, and "Jane Doe," purportedly representing "all those citizens of Florida that are, were, or will be injured" in a car accident. *Id.* ¶¶ 27-28. The lone Defendant was Kevin M. McCarty, in his official capacity as Commissioner of the Florida Office of Insurance Regulation (the "Office"). *Id.* ¶ 33.

In their seven-count complaint, Appellees alleged assorted constitutional violations: They claimed the Amendments violated the single-subject rule; due process; separation of powers; equal protection; the right to be rewarded for industry; the right to work regardless of union membership; impairment of

[4] As explained in Section III(C), below, this is the third lawsuit Appellees or their counsel have filed challenging the new law. The first case, filed in state court, was voluntarily dismissed. The second case, filed in federal court, was involuntarily dismissed. The third case led to this appeal.

contracts; and the right of access to courts. *Id.* at 24-30. Shortly after initiating the action, Appellees filed a Motion for Temporary Injunction (the "Motion"), in which they asked for "a Temporary Injunction enjoining Defendant[] from enforcing the provisions of the 2012 PIP Act." A. 3 at 22. Appellees argued that without a temporary injunction they—as providers of massage, acupuncture, and chiropractic services—would be irreparably harmed by losing PIP-related business. *Id.* at 6-8. They presented one witness at the hearing, an acupuncturist, who testified that he was already out of business because of the Amendments. A. 4 at 63.

In response to the Motion, the Office argued that Appellees were not likely to succeed on the merits because the Amendments were constitutional. A. 5 at 5-18. The Office also argued that Appellees lacked standing to challenge the law. *Id.* at 3-6. And the Office argued that Appellees could not demonstrate irreparable harm because, among other things, they remained free to provide and seek compensation for their services. *Id.* at 19.

After a hearing, the trial court found portions of the Amendments inconsistent with the right of access to courts, and it granted the Motion "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." A. 1 at 6-7 (the "Order"). The Order was based solely on the access-to-courts claim; the court rejected Appellees' other constitutional claims. *Id.* at 2.

Although it granted the Motion in part, the Order included no specific direction regarding the enjoined conduct. It did not specify what the Office must do or not do. Nor did it make specific findings of fact. Nor did it require any bond. Nor did it suggest what impact (if any) it was to have on existing insurance policies providing coverage based on the enjoined law. The Office appealed.

With this appeal pending, the trial court granted Appellees' motion to vacate the automatic stay, explaining that its purpose in granting an injunction was not to protect Appellees from irreparable harm. A. 6 at 1-2. Instead, the court said, "the legal issue here, *and the focus of my injunction*, is the constitutional right of citizens to seek redress in the courts if they are wrongfully injured. The medical providers are means to that end." *Id.* at 1 (emphasis added).

The Office moved this Court to reinstate the automatic stay, and that motion remains pending.

SUMMARY OF ARGUMENT

The order on appeal—a temporary injunction prohibiting enforcement of recent revisions to Florida's Motor Vehicle No-Fault law—is flawed in many respects. First, orders granting temporary injunctions must strictly comply with Florida Rule of Civil Procedure 1.610. The order here does not: (i) it does not specify the particular conduct enjoined, instead simply stating that the motion for injunctive relief is granted "as to" certain sections of the law that the Office does not directly enforce; (ii) it includes no specific findings of fact supporting the four elements necessary for any temporary injunction; and (iii) it requires no bond, even though the court lacks authority to waive that requirement.

The court's legal errors extend beyond these facial defects. The court disregarded the strong presumption of constitutionality afforded all legislative enactments, declaring the law invalid while acknowledging that its validity was reasonably debatable. It misapplied the doctrine of standing, expressly acknowledging that it entered the injunction for the benefit of nonparties and allowing Appellees to pursue hypothetical nonparties' constitutional rights. And it misapplied the substantive law regarding access to courts, holding the amended No-Fault law deprived nonparties of their constitutional right to sue, even though

the Supreme Court has repeatedly upheld the No-Fault system on grounds not undermined by the recent amendments.

Finally, the court should not have granted relief because Appellees cannot establish the remaining elements necessary to sustain an injunction. There is no irreparable harm because Appellees' claims for payment could be presented later, if payment were denied. Appellees cannot show that the injunction would prevent their asserted harm, because any reduction of payment would flow from insurance policy terms (and insurer decisions)—not the Office's direct conduct. And Appellees cannot show that the balance of harms tips in their favor. Their harm, if any, followed their delay and missteps in bringing this action. Rather than serve the public interest, the injunction will harm it by injecting widespread confusion into the market, leaving insurers, policyholders, and the Office, uncertain as to the state of the law.

This Court should reverse.

STANDARD OF REVIEW

This Court ordinarily reviews temporary-injunction orders for an abuse of discretion. *Sancho v. Smith*, 830 So. 2d 856, 861 (Fla. 1st DCA 2002). But when, as here, the order is based on an issue of law, this Court's review is *de novo*. *Id.*

ARGUMENT

The Florida Legislature recently amended Florida's Motor Vehicle No-Fault Law, changing the scope of Personal Injury Protection coverage required by law. The Amendments adjusted the limit for nonemergency medical care, and they generally eliminated PIP coverage for massages and acupuncture services. A group of service providers sued the Office of Insurance Regulation, claiming the new law prevented them from earning a living because PIP insurers would no longer pay for certain services. They sought an order enjoining the Office from enforcing these provisions.

The trial court granted the temporary injunction, immediately injecting tremendous confusion and uncertainty into Florida's insurance market. The order is facially invalid and substantively flawed. It does not comply with the essential requirements of Rule 1.610, and it leaves the Office to speculate as to what it is supposed to do or not do to comply. In addition, the trial court recognized Appellees' standing, where none existed, and it misapplied settled principles

regarding access to courts. Finally, it erred in its evaluation of irreparable harm and the public interest. This Court should reverse.

I. THE TEMPORARY INJUNCTION ORDER IS FACIALLY DEFECTIVE.

"Because the entering of a temporary injunction is an extraordinary remedy, strict compliance with the provisions of rule 1.610 is required." *Yardley v. Albu*, 826 So. 2d 467, 470 (Fla. 5th DCA 2002). But the Order in this case disregards several indispensable requirements: It does not specify the acts restrained, it does not articulate any factual findings supporting it, and it does not require a bond.

A. The Temporary Injunction Is Invalid Because It Provides No Specific Direction.

All injunction orders "shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document." Fla. R. Civ. P. 1.610(c). An injunction is invalid if "the acts enjoined . . . are not specified with such reasonable definiteness and certainty that the defendants bound by the decree would know what they must refrain from doing without the matter being left to speculation and conjecture." *F. V. Inves., N. V. v. Sicma Corp*., 415 So. 2d 755, 755 (Fla. 3d DCA 1982). Here, the Order included no directions whatsoever, much less reasonably detailed ones.

Instead of specifying the acts restrained, the Order simply stated it was

granting the Motion "as to" certain provisions of the law. A. 1 at 7. To even begin to understand the Order's intended effect, therefore, one would have to examine the Motion. *Cf.* Fla. R. Civ. P. 1.610(c) (injunction must specify relief "without reference to a pleading or another document"). But even the Motion sought uncertain relief.

The Motion requested an injunction prohibiting the Office "from enforcing" the Act, A. 3 at 22, and the Order granted the Motion "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," A. 1 at 7. But critically, the Office does not directly enforce those provisions. Instead, those self-executing provisions specify the levels of coverage "an insurance policy complying with the security requirements of § 627.733 must provide." § 627.736(1), Fla. Stat.; *see also Allstate Ins. Co.*, 961 So. 2d at 332 ("Subsection (1) of the PIP statute outlines the coverage *that PIP insurers must provide* for medical, disability, and death benefits.") (emphasis added). And Section 627.733, in turn, requires that "[e]very owner or registrant of a motor vehicle . . . shall maintain security" as required by PIP, which includes carrying an insurance policy providing all required PIP coverage. So the thrust of the enjoined provisions is to establish the scope of

insurance coverage motorists must carry, without which Motorists not only violate Florida law but also lose their tort immunity. *See* §§ 627.733; 627.737, Fla. Stat.

That is not to say the Office has *no* authority relating to the challenged provisions. The Office must, for example, approve insurers' contract forms, which must comply with law, *see* § 627.410, Fla. Stat., and the Office has general authority to enforce the Insurance Code, *id*. § 624.307. But it is hopelessly unclear how the Office would comply with an order to stop "enforcing" the challenged provisions. Should the Office withdraw existing form approvals? Should it revoke insurers' licenses? Should it impose new requirements on insurers? And if so, how? The Order offers no answers and is therefore facially invalid. *See Pizio v. Babcock*, 76 So. 2d 654, 654 (Fla. 1954) ("The one against whom [an injunction] is directed should not be left in doubt about what he is to do.").

B. The Temporary Injunction Is Invalid Because It Includes No Specific Findings of Fact.

Next, a temporary injunction must be supported by specific factual findings. "Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction." *City of Jacksonville v. Naegele Outdoor Adver. Co.*, 634 So. 2d 750, 754 (Fla. 1st DCA

1994), *approved,* 659 So. 2d 1046 (Fla. 1995).[5] Far from offering specific findings, the trial court merely stated that "[i]t seems clear to me that the Plaintiffs have alleged and proven irreparable harm and inadequate legal remedy" and that "there appears to be no adverse consequence to the public interest in maintaining the status quo if the injunction is issued." A. 1 at 2. But the necessary findings "must do more than parrot each tine of the four-prong test." *Hadi v. Liberty Behavioral Health Corp*., 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (quoting *Santos v. Tampa Med. Supply*, 857 So. 2d 315, 316 (Fla. 2d DCA 2003)). The order "must contain more than conclusory legal aphorisms. . . . *Facts must be found*." *Naegele Outdoor,* 634 So. 2d at 753-54 (emphasis added). None was.

For example, the court offered no finding as to why the alleged injury was irreparable. *Cf. id*. at 754 ("An application for temporary injunction is insufficient if it fails to set forth clearly, definitely and unequivocally sufficient factual allegations to support the conclusion of irreparable damage . . . .") (marks omitted) (quoting *Swensen v. Lofton*, 457 So. 2d 1069, 1070 (Fla. 2d DCA 1984)).[6]

[5] The four necessary elements for a temporary injunction are settled. The movant must establish: (i) a 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 will serve the public interest. *Naegele Outdoor*, 634 So. 2d at 752.

[6] In evaluating the separate issue of standing, the court did find that "Plaintiffs, as health care providers for automobile accident victims, derive a substantial

Nor did the court offer factual findings to support its conclusion that an injunction would not harm the public interest. A. 1 at 2. Preliminarily, the Order does not (and cannot) preserve the status quo, because the Office does not directly enforce the challenged provision. *See supra*. "The status quo preserved by a temporary injunction is the last peaceable noncontested condition that preceded the controversy." *Bailey v. Christo*, 453 So. 2d 1134, 1137 (Fla. 1st DCA 1984). The status quo, then, included thousands of PIP policies providing benefits and limits consistent with the Amendments and consistent with the Office's policy-form approvals. Because the trial court cannot unilaterally amend existing PIP contracts between nonparty insurers and nonparty insureds, the Order does not constitute a return to the pre-Amendment status quo. But more to the point, the court made no fact-findings regarding the public interest, a failure that invalidates the Order.[7]

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percentage of their income through PIP insurance payments." A. 1 at 1-2. But it offered no explanation as to why any harm was irreparable—or why those providers could not recover from insurers if insurers denied claims based on an unconstitutional law. *See also* § III(A), *infra*.

[7] The Order's failure to specify public-interest findings is fatal, without regard to the actual public impact. Nonetheless, the Order clearly harms the public interest by injecting uncertainty into the market. As indicated by amici, "[a]mong other things, the circuit court's ruling creates substantial uncertainty among the [insurance association] members as to whether or not they should comply with valid law and their FLOIR-approved contracts with insureds which incorporate the provisions of the 2012 Amendments." Motion of Personal Ins. Fed. of Fla. & the Nat'l Ass'n of Mut. Ins. Cos., at 3, Apr. 9, 2013; *see also* Motion of Property Casualty Insurers Ass'n of Am., *et al*., at 3, Apr. 30, 2013 ("The trial court's order

Because the trial court made no clear and definite fact findings, the Order is facially defective and must be reversed. *See Waste Pro of Fla., Inc. v. Emerald Waste Servs., LLC*, 17 So. 3d 916, 916 (Fla. 1st DCA 2009) (reversing temporary injunction order "because of a lack of specific factual findings").

C. The Temporary Injunction Is Invalid Because It Requires No Bond.

The Order is not conditioned on a bond, despite Rule 1.610(b)'s unequivocal requirement that, absent exceptions inapplicable here, "[n]o temporary injunction shall be entered unless a bond is given." The Office is entitled to a bond as a matter of right to protect against costs and damages imposed by an unlawful injunction. *See Pinder v. Pinder*, 817 So. 2d 1104, 1105 (Fla. 2d DCA 2002) ("Under the compulsory language of the rule, the trial court has no discretion to dispense with the requirement of a bond."). The recoverable damages include, among other things, appellate attorney's fees, *see Merrett v. Nagel*, 564 So. 2d 229, 231 (Fla. 5th DCA 1990), which will not be insubstantial. The trial court should have required a bond sufficient to cover these damages. *Cf. Fla. High Sch. Activities Ass'n v. Mander*, 932 So. 2d 314, 316 (Fla. 2d DCA 2006) (nominal bond does not satisfy requirement).[8]

. . . has created a great deal of uncertainty for insurers in Florida.").

[8] The trial court stated in its later order lifting the automatic stay that it "will

* * *

Because of these facial defects, the Order cannot stand. This Court can therefore reverse without even turning to the merits of Appellees' claims. But if the Court reverses on facial defects alone, the trial court might repeat its other legal errors. In that instance, a second appeal would be necessary, judicial resources would be expended unnecessarily, and confusion and uncertainty would continue longer. Accordingly, this Court should address the trial court's substantive legal errors and reverse.

II. THIS COURT SHOULD ADDRESS APPELLEES' LIKELIHOOD OF SUCCESS ON THE MERITS AND REVERSE.

At the heart of the Order was the trial court's conclusion that the Amendments conflicted with the Florida Constitution. A. 1 at 1. Misapplying settled law, the court concluded that the Amendments violated nonparties' right of access to the courts. *Id.* This erroneous legal conclusion is subject to *de novo* review. *Scott v. Williams*, 107 So. 3d 379, 385 (Fla. 2013) (constitutionality of statute is legal issue reviewed *de novo*).[9]

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reserve as to the amount of bond, if any, that should be required," A. 6 at 2, but there remains no bond in place.

[9] On a motion for temporary injunction, a movant need only establish a substantial likelihood of success on the merits (along with the other factors). *See Naegele Outdoor,* 634 So. 2d at 752. Nonetheless, the trial court found more than a likelihood of success—it found that "the Act violates Article 1, Section 21 of the

A. The Trial Court Ignored the Strong Presumption of Constitutionality Afforded All Legislative Enactments.

For decades, the Florida Supreme Court has recognized that a court cannot invalidate a legislative enactment "unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law." *In re Apportionment, Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 805-06 (Fla. 1972) (quoting *City of Jacksonville v. Bowden*, 64 So. 769 (1914)). But despite this mandatory deference, the trial court declared the statute invalid while concluding its validity was a close call, about which "reasonable people may disagree."[10] If a reasonable judge would view the statute as valid, it cannot be that "under any rational view" the statute is "in positive conflict" with the Florida Constitution. Therefore, the trial court's acknowledgement that reasonable minds could disagree should have ended the inquiry. *Cf. Warren v.*

Florida Constitution." A. 1 at 1.

[10] The Order included this discussion:

> Is the no-fault law still a good deal? Is it still a reasonable alternative to the rights guaranteed to citizens under . . . the Florida State Constitution? The answer to those questions is probably, like beauty, in the eye of the beholder, and reasonable people may disagree. From my perspective, however, the revisions to the law make it no longer the "reasonable alternative" that the Supreme Court found it to be in *Lasky* and *Chapman*.

A. 1 at 6-7.

State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1096 (Fla. 2005) ("The fact that there may be differing views as to the reasonableness of the Legislature's action is simply not sufficient to void the legislation.").

The trial court's lack of deference was perhaps guided by its own policy concerns. The Order included the court's lamentations that elected representatives have "tinkered" with the "libertarian principles" of our economic system:

> They have, in some areas, replaced a pure free market approach with a government controlled system in order to address a perceived problem. The "No-Fault law" passed by the Florida Legislature in 1971, and as subsequently revised, is just one example of this experiment with socialism and the trend away from those libertarian principles of individual liberty and personal responsibility.

A. 1 at 3 (note omitted). But policy concerns notwithstanding, "[t]he Legislature may exercise any lawmaking power that is not forbidden by organic law." *Savage v. Bd. of Pub. Instruction*, 133 So. 341, 344 (1931). Therefore, rather than substitute its own legislative judgment, the court should have deferred to the Legislature's policy choice unless the Amendments' constitutional invalidity was proven beyond all reasonable doubt.

B. The Trial Court Misconstrued the Standing Inquiry.

Determining whether a party has standing is a pure question of law to be reviewed *de novo*. *See Baptist Hosp., Inc. v. Baker*, 84 So. 3d 1200, 1204 (Fla. 1st

DCA 2012). Although Appellees presented multiple constitutional theories in support of the Motion, A. 3 at 9-10, the trial court granted relief based only on the access-to-courts claim, A. 1 at 2 ("I find that the Plaintiffs have met their burden only as to this latter [access-to-courts] theory."). But critically, no Appellee asserted a violation of his or her own right of access to courts. Instead, Appellees alleged a blanket violation of the right of injured Floridians to seek redress in the courts. A. 2 at 29-30; A. 7 at 15-16 ("The 2012 revisions severely restrict or deny PIP insurance coverage for many persons injured as a result of motor vehicle collisions without allowing them earlier access to the court.").

"It is established 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); *accord Pringle v. Dykes*, 173 So. 904, 904 (Fla. 1937); *Alachua Cnty. v. Scharps*, 855 So. 2d 195, 200 (Fla. 1st DCA 2003). Nonetheless, the trial court found standing without finding any violation of Appellees' constitutional rights, instead relying solely on Appellees' purported harm from lost PIP-claim revenue. A. 1 at 1-2. That economic harm, the court concluded, constituted "an injury that is distinct from that of the public at large" and conferred standing. *Id*.

This misguided conclusion followed the trial court's suggestion that Appellees sought "to enforce a right vested in members of the public at large." *Id.* at 1. But this is not a case like *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), in which the public right at issue was beach access and the "special injury" rule applied. Nor is a taxpayer-standing case, in which the standing is based on the principle that "the taxpayer is necessarily affected and his burdens of taxation increased by any unlawful act . . . which may increase the burden to be borne by the taxpayers." *See Dep't of Admin. v. Horne*, 269 So. 2d 659, 662 (Fla. 1972) (quoting *Rickman v. Whitehurst*, 74 So. 205 (1917)). Rather, the access-to-courts claim here addresses the particular right of unnamed injured motorists to pursue legal claims against negligent tortfeasors—not any violation of "a right vested in members of the public." If some hypothetical nonparty claimants suffered access-to-courts violations, those would be their claims to pursue. *See, e.g.*, *Sancho v. Smith*, 830 So. 2d 856, 864 (Fla. 1st DCA 2002) ("Constitutional rights are personal.").

Contrary to the trial court's conclusion, a mere practical harm (like Appellees' alleged economic loss) does not confer standing. For example, this Court held Supervisors of Elections lacked standing to pursue others' equal-protection claims against a ballot regulation, even though the Supervisors alleged

they would suffer the practical harm of disrupted elections. *Sancho*, 830 So. 2d at 863-64. And in *Shands Teaching Hospital and Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986), a hospital lacked standing to bring an equal protection challenge against a law making men (but not women) liable for their spouses' medical bills. *Id*. at 646 n.1. The hospital had an unmistakable economic interest "in collecting its debts," and thus suffered a practical harm, but it had no sufficient interest in whether the law discriminated against men. *Sancho*, 830 So. 2d at 864 n.2. The parties' practical interests in those cases were no less than Appellees' practical interest in this case, but they did not confer legal standing to pursue nonparties' constitutional claims.

Next, Appellees cannot evade the standing requirement by joining the fictional Plaintiff "Jane Doe," who, according to the Complaint, "represents all those citizens of Florida that are, were, or will be injured as a result of a motor vehicle collision." A. 2 ¶ 28. Standing encompasses "the requirement that the claim be brought by or on behalf of one who is recognized in the law as a 'real party in interest,' that is the person in whom rests, by substantive law, the claim sought to be enforced." *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005).[11] Yet the real parties in interest—motorists whose ability to sue tortfeasors

[11] Courts have provided exceptions in some cases if the person bringing the

has been limited—remain missing from this case. Like the actual Appellees, the fictional Jane Doe lacks standing. *Cf. In re Forfeiture of Cessna 401 Aircraft, N8428F*, 431 So. 2d 674, 675 (Fla. 4th DCA 1983) (fictitious claimant lacked standing because it was "uncontradicted that there is no such person").[12]

Finally, there is another element of standing that Appellees cannot satisfy: "To have standing, a party must establish an injury that may be redressed by the requested relief." *Westport Recovery Corp. v. Midas*, 954 So. 2d 750, 752 (Fla. 4th DCA 2007)); *accord Baptist Hosp.*, 84 So. 3d at 1204 ("A case or controversy exists if a party alleges an actual or legal injury *that the relief sought will address*.") (emphasis added). Here, the Office does not directly enforce the challenged provisions, *see supra*, so the Order cannot redress the alleged harm. In that sense, the Office is not an appropriate defendant. *See Atwater v. City of Weston*, 64 So. 3d 701, 703 (Fla. 1st DCA 2011) ("The proper defendant in a

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claim seeks to protect the rights of those who are unable to sue on their own behalves. *See Sancho*, 830 So. 2d at 864. Here, Floridians whose access to courts is impaired can bring their own claims.

[12] Moreover, Appellees cannot sue on behalf of "all those citizens of Florida" without meeting the criteria for maintaining a class action. *See* Fla. R. Civ. P. 1.220(a) (enumerating requirements that must be met "[b]efore any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class").

lawsuit challenging a statute's constitutionality is the state official designated to enforce the statute."). But either way, Appellees lack standing.

C. The Amendments Do Not Violate Access To Courts.

Turning to the merits of the access-to-courts claim, the trial court again misapplied relevant legal principles. Under Florida's access-to-courts provision, the Legislature may not abolish a pre-1968 right of access to the courts without either providing a reasonable alternative *or* demonstrating an overpowering public necessity. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). In evaluating the *Kluger* test, the trial court misapplied the first prong (reasonable alternative) and wholly ignored the second, independent prong (overpowering public necessity).

Under *Lasky* and *Chapman*, the two principal cases the trial court cited, the Florida Supreme Court found the No-Fault Law provided a reasonable alternative to traditional tort remedies. *See Chapman v. Dillon*, 415 So. 2d 12, 17 (Fla. 1982); *Lasky v. State Farm Ins. Co*., 296 So. 2d 9, 15 (Fla. 1974). The Supreme Court's rationale in *Lasky* was uncomplicated:

> [T]he owner of a motor vehicle is required to maintain security (either by insurance or otherwise) for payment of the no-fault benefits, and has no tort immunity if he fails to meet this requirement. This provides a reasonable alternative to the traditional action in tort. In exchange for his previous right to damages for pain and suffering (in the limited class of cases where recovery of these elements of damage is barred by § 627.737), with recovery limited to those situations where he can prove that the other party was at fault, the injured party

> is assured of recovery of his major and salient economic losses from his own insurer.

296 So. 2d at 13-14.

After *Lasky*, the Legislature altered PIP's benefit structure, "substantially reduc[ing] the percentage of medical expenses and lost wages the insured may recover." *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1076 (Fla. 2006) . In a challenge to that amendment, plaintiffs argued—like Appellees argue here—that the No-Fault Law was no longer a reasonable alternative to tort. *Chapman*, 415 So. 2d at 16. The Supreme Court rejected that argument, finding that "the legislative changes . . . are reasonable attempts by the legislature to correct some of the practical problems which the no-fault law had posed." *Id.*

The Court was unconcerned with the fact that insureds would not recover all their losses under PIP: "[I]t was the fact that injured parties were assured prompt recovery of their major and salient economic losses, *not all of their economic losses*, which [the] Court found dispositive in *Lasky*." *Id.* at 17 (emphasis added); *accord State Farm*, 932 So. 2d at 1076 ("Although the changes meant that insureds would not necessarily recover all their economic losses, we explained that full recovery was not essential to the outcome in *Lasky* . . . ."); *see also Verdecia v. Am. Risk Assurance Co.*, 543 So. 2d 321, 322 (Fla. 3d DCA 1989) (PIP system is

reasonable alternative to tort because it provides no-fault recovery for "a reasonable portion" of damages). More succintly, the Court upheld the amendments in *Chapman*—despite their reduced benefits to PIP claimants—because the amendments "have not fundamentally changed this essential characteristic of the no-fault law." 415 So. 2d at 16.; *see also State Farm*, 932 So. 2d at 1076.

The Amendments at issue here, just as the amendments in *Chapman*, have not "fundamentally changed" the PIP scheme. Claimants may receive fewer massages and acupuncture visits, but they can hardly be said to have lost the ability to recover "their major and salient economic losses." *Chapman*, 415 So. 2d at 17. And as the Court recognized in *Chapman*, the access-to-courts provision does not preclude the Legislature from correcting "practical problems" the No-Fault law posed.

III. APPELLEES CANNOT DEMONSTRATE IRREPARABLE HARM, THAT THE INJUNCTION WOULD ADDRESS THEIR PURPORTED HARM, OR THAT THE EQUITIES WEIGH IN THEIR FAVOR.

Finally, even if the Order were not facially defective (it is), even if Appellees had standing (they do not), and even if the court's conclusions regarding the merits of the constitutional issue were correct (they were not), the entry of temporary injunctive relief would have still been improper for at least three

reasons: The Appellees have no irreparable harm, the Order would not address the purported harm if it did exist, and the balance of equities does not favor Appellees.

A. Appellees Do Not Face Irreparable Harm.

Notwithstanding the court's conclusory finding, Appellees will suffer no irreparable harm. Indeed, in its post-injunction order, the court acknowledged that it did not enter the Order to protect *Appellees* from any irreparable harm; the Order was designed to benefit others. In granting a motion to lift the automatic stay, the court explained:

> I wish to emphasize that the reason for so doing is not the potential harm to the Plaintiff medical providers (chiropractors, massage therapists and acupuncturists), who fear they will be forced out of business, and which appears to be the focus of their argument. I am sensitive to their situation and appreciate their concerns, but the legal issue here, and the focus of my injunction, is the constitutional right of citizens to seek redress in the courts if they are wrongfully injured. The medical providers are means to that end. *The reason for issuing the injunction was to protect this constitutional right and prevent the potential harm to citizens injured in automobile accidents who, under the present PIP statute, may not receive necessary medical care*.

A. 6 at 1-2 (emphasis added). This statement undermines any suggestion that the court acted to prevent harm to Appellees.

Moreover, even if Appellees had real harm, and even if lost PIP business were a cognizable constitutional injury, that harm is not irreparable. Counsel for Appellees asked the lone witness who testified at the Temporary Injunction

Hearing—Robyn Myers—whether he could "bill PIP" for certain services provided after the Amendments. Myers responded "I can bill it, but won't get paid on it." A. 4 at 68-69. Yet if Myers's impediment to payment from an insurer is an unconstitutional statute, he must demonstrate why he could not raise his constitutional claim in a suit against that insurer. In fact, past challengers have raised constitutional claims against the No-Fault Law in suits against insurance companies, rather than against the Office. *See, e.g.*, *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55 (Fla. 2000); *Chapman*, 415 So. 2d at 12; *Thompson v. Allstate Ins. Co.*, 539 So. 2d 6 (Fla. 3d DCA 1989).[13]

Similarly, to the extent the focus of the injunction "is the constitutional right of citizens to seek redress in the courts if they are wrongfully injured," A. 6 at 1, harm to those citizens is anything but irreparable. Those citizens could sue negligent tortfeasors for damages and, to the extent they face a defense based on an unconstitutional statute, could litigate the same constitutional issue Appellees prematurely pursue here.

[13] At any rate, when Myers testified that his business *had already closed* before the Amendments even became effective, A. 4 at 62, 63, he further betrayed his lack of irreparable harm. *See Genchi v. Lower Fla. Keys Hosp. Dist.*, 45 So. 3d 915, 919 (Fla. 3d DCA 2010) (no irreparable injury where the harm pre-dates the alleged violation).

B. Even If There Were Irreparable Harm, the Injunction Would Not Address It.

Appellees' claims of irreparable harm fail for an independent reason: The Order would not ultimately avoid the purported harm—lost PIP revenue. Appellees essentially seek compensation from insurers that is beyond what the law requires. Even if the effect of the Order were to order that compensation, that relief would be temporary. Appellees would have no permanent right to the compensation unless they ultimately prevailed in the case.

Although they claim to seek the pre-Amendment status quo, what they actually seek is a preliminary adjudication on the merits that they are entitled to payment from PIP providers. That is relief a temporary injunction cannot offer. *See City of Jacksonville v. Naegele Outdoor Advertising Co*., 634 So. 2d 750, 754 (Fla. 1st DCA 1994) (noting that temporary injunction cannot adjudicate material facts in controversy and reversing order that enjoined "accrual, as opposed to enforcement *pendente lite,*" of fines: "Whether appellees . . . are liable for penalties . . . depends on who prevails on the questions that comprise the merits of the lawsuit."), *approved,* 659 So. 2d 1046 (Fla. 1995).

Regardless, the Order does not require payment from insurers, who are not parties to this action. Enjoining enforcement of a statutory requirement that

motorists carry certain insurance coverage will not require payment to Appellees—temporary or otherwise—from insurers whose policies contain contractual limitations consistent with the challenged law. To obtain relief from insurers, Appellees must sue insurers. *Cf. Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579, 583 (Fla. 5th DCA 2003) ("A court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action."). The Order's remedy, therefore, is not appropriately targeted to the alleged harm.

C. The Balance of Equities Does Not Favor Appellees.

Last, in considering the balance of equities, this Court should weigh Appellees' timing and missteps in bringing their Motion. If Appellees suffered harm, their own delays are to blame. The Governor signed the challenged legislation on May 4, 2012, but Appellees waited until January 8, 2013—*after* the challenged provisions were effective—to initiate the case below. A. 2; Ch. 2012-197, § 10, at 14, § 18, at 37, Laws of Fla. (establishing effective date). Before filing this case, Plaintiffs filed an action in federal court, which included the claims asserted here as well as separate federal claims. *See Myers v. McCarty*, No. 12-cv-2660 (M.D. Fla.). The Court dismissed all federal claims with prejudice and deferred to the state courts for resolution of the state-law claims. *Id.* Doc. 23 at 7.

Before that case, Appellees' counsel filed a "substantially similar" suit in state court, styled *Mooneyham v. McCarty*, No. 2012-CA-003060 (Fla. 2d Cir.). *Id.* Doc. 19 at 2 n.1. As the federal court later recognized, they filed that case "only to dismiss [it] without prejudice for some reason unexplained in the record." *Id.* Doc. 23 at 6-7. Only then did they file the action below—their third attempt at relief.

On the other side of the ledger, the Order introduces great harm and uncertainty into the No-Fault system. Although it is unclear how or if the Order will affect the tens of thousands of existing policies (issues not presented in this appeal), there is little doubt that the uncertainty and confusion caused by the Order would disrupt the insurance market to the detriment of policyholders and insurers alike. *See* note 7, *supra*. The disruption and harm caused by the Order more than outweigh any harm to Appellees, which would be of their own making.

CONCLUSION

Because the Order is facially defective and based on erroneous legal conclusions, this Court should reverse.

Respectfully Submitted,

C. Timothy Gray (FBN 602345)
Assistant General Counsel
J. Bruce Culpepper (FBN 898252)
Assistant General Counsel
Office of Insurance Regulation
Larson Building, Room 647-B
200 E. Gaines Street
Tallahassee, Florida 32399
(850) 413-2122; (850) 922-2543
tim.gray@floir.com
bruce.culpepper@floir.com

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ *Allen Winsor*
Timothy Osterhaus (FBN 133728)
Solicitor General
Allen Winsor (FBN 016295)
Chief Deputy Solicitor General
Rachel Nordby (FBN 056606)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681; (850) 410-2672 (fax)
allen.winsor@myfloridalegal.com
rachel.nordby@myfloridalegal.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by electronic mail on the individuals listed below, this sixth day of May, 2013.

/s/ *Allen Winsor*
Allen Winsor

Luke Charles Lirot
2240 Belleair Road, Suite 190
Clearwater, Florida 33764
Luke2@lirotloaw.com
jimmy@lirotlaw.com

Adam S. Levine
11180 Gulf Boulevard, Suite 303
Clearwater, Florida 33767
aslevine@msn.com
alevine@law.stetson.edu

Theodore E. Karatinos
Holliday, Bomhoff & Karatinos, PL
18920 North Dale Mabry Highway,
Suite 101
Lutz, Florida 33548
tedkaratinos@hbklawfirm.com

Katherine E. Giddings
Nancy M. Wallace
Marcy L. Aldrich
Akerman Senterfitt
106 E. College Street, #1200
Tallahassee, Florida 32301
katherine.giddings@akerman.com
nancy.wallace@akerman.com
elisa.miller@akerman.com
martha.parramore@akerman.com
marcy.aldrich@akerman.com
debra.atkinson@akerman.com

Maria Elena Abate
Matthew C. Scarfone
Colodny, Fass, Talenfeld, Karlinsky,
Abate & Webb, PA
One Financial Plaza, 23rd Floor
100 SE Third Avenue
Fort Lauderdale, Florida 33394
mabate@cftlaw.com
mscarfone@cftlaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210.

/s/ *Allen Winsor*
Allen Winsor