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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

ALFREDO IVAN MURCIANO, M.D.,

Respondent.
_____/

CASE NO.: 1D23-0020
L.T. CASE NO.: 19-3662MPI

AMENDED BRIEF AMICUS CURIAE OF FLORIDA LEGAL FOUNDATION AND ROBERTO MARTINEZ IN SUPPORT OF ALFREDO IVAN MURCIANO, M.D.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Florida Legal Foundation, Inc. is a 501(c)(3) non-profit, non-partisan organization founded in 1992, reorganized in 2020, that exists to participate in matters of interest to the people of the State of Florida. Its areas of interest include the advancement of limited government, separation of powers, individual liberty, and the rule of law.

Frank A. Shepherd is the President of the Foundation. Mr. Shepherd has been a member of The Florida Bar for more than 50 years. He began his legal career as a trial and appellate lawyer. From January 1, 1999, to September 23, 2003, he was the Florida Senior Attorney for the Pacific Legal Foundation, specializing in cases involving federal and state constitutional issues. From September 23, 2003, to March 5, 2017, Mr. Shepherd served as a judge on the Florida Third District Court of Appeal, rising to the level of Chief Judge during the course of his service. After returning to private practice in 2017, Mr. Shepherd assisted Amicus Roberto Martínez in the legal research and drafting that led to the proposal by the 2017-18 Florida Constitution Revision Commission ("CRC") of Amendment 6 to the Florida Constitution, adopted by the people of the State of

Florida on November 6, 2018. Mr. Shepherd twice testified before the CRC in favor of the amendment.[1]

Roberto Martínez served as a member of the CRC. Mr. Martínez introduced and was the principal sponsor of Amendment 6. The amendment entitled "Judicial Interpretation of Statutes and Rules," now appears in the Florida Constitution as Article V, section 21.

Mr. Martínez has been a member of The Florida Bar since 1980. He is a practicing trial lawyer in Miami, Florida, as a shareholder of the law firm of Colson Hicks Eidson.[2] Mr. Martínez is a graduate of the University of Pennsylvania Wharton School of Business (B.S. and M.S.) and the Georgetown University Law Center (J.D.). His public and civic service has included the following: U.S. Attorney and Assistant U.S. Attorney for the Southern District of Florida; Chair of

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[1] *See* Proceedings of the Judicial Comm. of the Fla. Constitution Revision Comm'n, Tallahassee, Fla., (Nov. 2, 2017), https://thefloridachannel.org/videos/11217-constitution-revision-commission-judicial-committee/ (last visited on Oct. 3, 2023) at 6:10-54:26 [hereinafter Judicial Comm. Proceeding]; Proceedings of the Exec. Comm. of the Fla. Constitution Revision Comm'n, Tallahassee, Fla., (Feb. 2, 2018), https://thefloridachannel.org/videos/2-2-18-constitution-revision-commission-executive-committee/ (last visited on Oct. 3, 2023), at 1:16-35:26 [hereinafter Exec. Comm. Proceeding].

[2] https://colson.com/

the Federal Judicial Nominating Commission of the State of Florida; Chair of the Miami-Dade College District Board of Trustees; Vice Chair of the State Board of Education of Florida; Chair of Governor Charlie Crist's transition teams for Governor and Attorney General; General Counsel for Governor Jeb Bush's fist gubernatorial transition team; member of the State of Florida Taxation and Budget Reform Commission in 2007-08; and member of the CRC appointed by the Chief Justice of the Florida Supreme Court.[3]

Mr. Martínez and Mr. Shepherd respectfully submit that the CRC specifically considered the issue before the Court in this case and wish to provide their experience to the Court for its consideration.

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[3] The State of Florida Taxation and Budget Reform Commission and the Florida Constitution Revision Commission are established by Article XI, §§ 2 & 6, of the Florida Constitution, and meet every 20 years. The Constitution Revision Commission is a 37-member body comprised of the Attorney General of the state, fifteen members selected by the Governor, nine members each selected by the Speaker of the House and the President of the Senate, and three by the Chief Justice of the Florida Supreme Court. The Constitution Revision Commission has the power by majority vote to place proposed constitutional amendments directly on the ballot for voter consideration at the next general election after its call.

SUMMARY OF ARGUMENT

Article V, section 21 of the Florida Constitution was adopted by the people of the State of Florida to prohibit courts and Administrative Law Judges (ALJ) from deferring to an administrative agency's interpretation of a state statute or rule. The agency's effort in this case to impose its interpretation of section 409.9131(2) on the ALJ is specifically prohibited by Article V, section 21 of the Florida Constitution.

ARGUMENT

Article I, section 21 of the Florida Constitution Prohibits the Administrative Law Judge from Deferring to the Agency for Health Care Administration's Interpretation of Section 409.9131(2) of the Florida Statutes.

The dispositive issue on the merits of the petition in this case is whether an ALJ is required to comply with an order of the Agency for Health Care Administration (AHCA) that mandates an ALJ to make findings of fact and to issue an Amended Recommended Order based upon an interpretation of a statute by the agency that is contrary to the interpretation made by the ALJ on *de novo* review in his

Recommended Order.[4] These amici respectfully submit that the express purpose for the proposal and adoption of Article V, section 21 was to prohibit such an imposition.

In a comprehensive Recommended Order in this case, ALJ John G. Van Laningham interpreted section 409.9131(2) of the Florida Statutes and applied it to disqualify Morgan Jenkins, M.D., the peer reviewer in the underlying agency proceeding, on the basis that he was not in "active practice" in the State of Florida "within the past two years" as required by section 409.9131(2) of the Florida Statutes. R. 507. The ALJ's analysis comprised ten pages of his thirty-eight-page Recommended Order. R. 497-507. Reasoning that a statutorily compliant peer review is a condition precedent to bringing an action for recoupment of alleged overpayments, the ALJ recommended that AHCA should dismiss the case. R. 514.

The Agency disagreed with the ALJ's interpretation of the applicable statute and twice sought to remand the case to Judge Van Laningham to make findings of fact based upon its interpretation of

[4] This brief does not address whether the Court should exercise jurisdiction to consider the petition in this case or any other substantive or procedural issue raised by the parties.

section 409.9131(2) of the Florida Statutes. R. 573, 608. ALJ Van Laningham twice declined on the ground that to do so would violate Article V, section 21 of the Florida Constitution, which states that "an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule." R. 581-582, 649. Amici submit that the imposition sought to be placed on ALJ Van Laningham in this case was considered and is expressly prohibited by Article V, section 21.

Article V, section 21 was proposed by Mr. Martínez during his tenure as a Commissioner of the CRC. Mr. Martínez introduced the proposed amendment, and it received two co-sponsors: Bob Solari and Jose Felix Diaz.[5] It was adopted by the full CRC by a vote of 28-4, and then submitted to the voters with other proposed amendments as part of Revision 1 which was approved by the full CRC by a vote of 18-0.[6] The text of the proposal was straightforward. The purpose

[5] Mr. Solari served as a member of the Indian County Commission from 2016-2020; Mr. Diaz served as a member of the Florida House of Representatives from 2010-2017.

[6] *See* The Constitution Revision Comm'n 2017 CRC Session Vote on P 0006, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Proposals/Commissioner/2017/0006/Vote/CRCVote_p0006_

of the amendment was: "to require a state court or an administrative law judge to interpret a state statute or rule *de novo* in litigation between an administrative agency and a private party and not merely defer to the administrative agency's interpretation."[7]

The proposed amendment was referred to the Judicial and Executive Committees of the CRC, where both committees analyzed it. In their analyses, they recognized that the proposed amendment would abolish or eliminate deference by courts and administrative law judges to administrative agencies in the interpretation of the statutes and rules those agencies are charged to administer.[8] And

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_003.pdf (last visited Oct. 4, 2023); The Constitution Revision Comm'n 2017 CRC Session Vote on P 6001, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Proposals/Commissioner/2017/6001/Vote/CRCVote_p6001__004.pdf (last visited Oct. 4, 2023).

[7] *See* Proposal Text for P 0006 Filed By Commissioner Martínez, CRC – 2017, available at: http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Proposals/Commissioner/2017/0006/ProposalText/Filed/HTML.html (last visited Oct. 3, 2023).

[8] *See* Constitution Revision Comm'n Judicial Comm. Proposal Analysis, at 2 (Oct. 30, 2017), available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Proposals/Commissioner/2017/0006/Analyses/2017p0006.pre.ju.pdf (last visited Oct. 3, 2023), attached in appendix at App. 003-005; Constitution Revision Comm'n Executive Comm. Proposal

they recognized that the amendment would require courts to examine and determine, *on their own*, whether specific interpretations by the agency comply with the statute or rule in question.[9] According to the analyses, the proposal "require[d] any state court or administrative law judge to interpret a state statute or rule de novo (anew, without reference to any previous legal conclusion), independent of an agency's interpretation, in any litigation proceedings between a private party and an administrative agency."[10]

As its primary and principal sponsor, Mr. Martínez introduced and defended the proposed amendment in proceedings before the Judicial, Executive, and Style and Drafting Committees, and the full CRC. In support of its passage, Mr. Martínez expressed that the amendment was fundamental to the question of due process.[11] He made clear that the proposed amendment sought to overturn the

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Analysis, at 2 (Jan. 29, 2018), available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Proposals/Commissioner/2017/0006/Analyses/2017p0006.pre.ex.pdf (last visited Oct. 3, 2023), attached in appendix at App. 006-008.

[9] *See supra* note 8.

[10] *Id.*

[11] Judicial Comm. Proceeding, *supra* note 1, at 1:40:15-1:40:53.

deference doctrine which he viewed as undermining due process and the separation of the branches.[12] Mr. Martínez described the deference doctrine as putting a thumb on the scales of justice, tipping it on the side of the government.[13] The doctrine, he explained, had resulted in an accretion of power to the executive agencies and a detriment to individual liberties, and that the proposal was designed to restore the balance.[14]

Before the committees, Mr. Martínez also drew on his experience as a former federal prosecutor.[15] It was that experience that made him aware of the deference doctrine's federal counterpart, the *Chevron* Doctrine, in the first place and the compelling need to redress it.[16] He spoke candidly about using the doctrine to his advantage while serving as a federal prosecutor.[17] The doctrine allowed the federal agencies to have more of a say than a private litigant or the court itself with respect to the interpretation of law,

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[12] *Id.*
[13] Exec. Comm. Proceeding, *supra* note 1, at 34:06-34:51.
[14] Exec. Comm. Proceeding, *supra* note 1, at 1:48-2:21.
[15] Judicial Comm. Proceeding, *supra* note 1, at 1:38:29-1:40:15; Exec. Comm. Proceeding, *supra* note 1, at 32:15-33:26.
[16] *Id.*
[17] *Id.*

merely because they happened to have a government badge.[18] He recognized that this was an application of power that needed to be rectified.[19] And to rectify it at the state level, the proposed amendment would ensure that private litigants were given an equal playing field when litigating against an administrative agency over the *legal interpretation* of a rule or statute that an agency is charged to enforce.[20]

Mr. Martínez was explicit in his messaging before the CRC: administrative agencies should not be deferred to in litigation, whether in court or in an administrative hearing, when it comes to the interpretation of law. And while deference was prohibited under the proposed amendment, Mr. Martínez recognized that nothing in the proposed amendment forbids an agency from enforcing the law entrusted to it or presenting to the court or hearing officer its opinion or a court or hearing officer from considering the agency's opinion.[21]

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[18] *Id.*

[19] Exec. Comm. Proceeding, *supra* note 1, at 33:18-33:26.

[20] Proceedings of the Style and Drafting Comm. of the Fla. Constitution Revision Comm'n, Tallahassee, Fla., (March 19, 2018), https://thefloridachannel.org/videos/3-19-18-constitution-revision-commission-part-1/ (last visited Oct. 3, 2023), at 1:32:58-1:33:30.

[21] Exec. Comm. Proceeding, *supra* note 1, at 33:26-34:05.

Indeed, Mr. Martínez acknowledged that those agencies should be part of the process, *but it was for the state court or the officer hearing an administrative action pursuant to general law to interpret such statute or rule de novo.*[22]

Amici also attach in the appendix to this brief a copy of a PowerPoint presentation on Amendment 6, now Article V, section 21 of the Florida Constitution, in which Mr. Shepherd elucidated upon the purpose of Article V, section 21 and expressly addressed conduct of the type sought to be imposed by AHCA on the ALJ in this case. Mr. Shepherd, one of the signatories to this brief, at the request of Mr. Martínez, made this presentation to the CRC in session in Tallahassee, Florida on two separate occasions.[23] Mr. Martínez was familiar with Mr. Shepherd's views on this subject based on Mr. Shepherd's opinions authored while a Judge on the Third District Court of Appeal, including especially *Pedraza v. Reemployment Assistance Appeals Commission*, 208 So. 3d 1253 (Fla. 3d DCA 2017),

[22] *Id.*
[23] *See supra* note 1.

and requested his testimony to describe and explain the proposed amendment and answer questions from the members of the CRC.[24]

Testifying in favor of the adoption of proposed Amendment 6, Mr. Shepherd explained that agency deference is inconsistent with both the Due Process Clause and the Separation of Powers provision in the Florida Constitution.[25] App. 016-018, 022-024. Urging support for adoption of the proposal, Mr. Shepherd called the attention of the Commission to the problem of judicial deference to

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[24] Approximately a year later, Mr. Martinez and Mr. Shepherd, together with other colleagues, summarized the history and purpose of Article V, section 21 in a Florida Bar Journal article. *See* Fla. Bar Journal, *The Demise of Agency Deference: Florida Takes the Lead*, Vol. 9, No. 1, at 18 (Jan./Feb. 2020), available at: https://www.floridabar.org/the-florida-bar-journal/the-demise-of-agency-deference-florida-takes-the-lead/ (last visited Oct. 4, 2023).

[25] These provisions read as follows in the Florida Constitution:

> **SECTION 9. Due Process. -- No person shall be deprived of life, liberty or property without due process of law**, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself. Art. I, § 9, Fla. Const.

> **SECTION 3. Branches of Government --** The powers of the state government shall be divided into legislative, executive and judicial branches. **No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.** Art. II, § 3, Fla. Const.

the executive branch as it has been lucidly depicted by renowned Columbia University Law School Professor of Constitutional Law, Philip Hamburger:

> **It ordinarily would be outrageous for a judge in a case to defer to the views of one of the parties.** And it ordinarily would be inconceivable for judges to do this regularly by announcing ahead of time a rule under which judges should defer to the interpretation of one of the parties in their cases, let alone the most powerful of parties, the government.

Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016) (emphasis added). "Nonetheless," as Professor Hamburger states, "this is what the judges have done." *Id.*

Quite coincidentally, Mr. Shepherd also called the attention of the Commission to the especially perverse consequence of the application of the doctrine in the Department of Administrative Hearings setting, as eloquently articulated in an opinion issued by Judge John G. Van Laningham, the same ALJ who is assigned to this case. Judge Van Laningham wrote:

> Unlike the judiciary, ALJs are participants in the decision-making processes that lead to administrative interpretations of statutes and rules -- the very administrative interpretations to which courts defer. **The ALJ's duty is to provide the parties an independent and impartial analysis of the law with a view towards helping the agency make the correct decision. In fulfilling this duty, the ALJ should not defer to the**

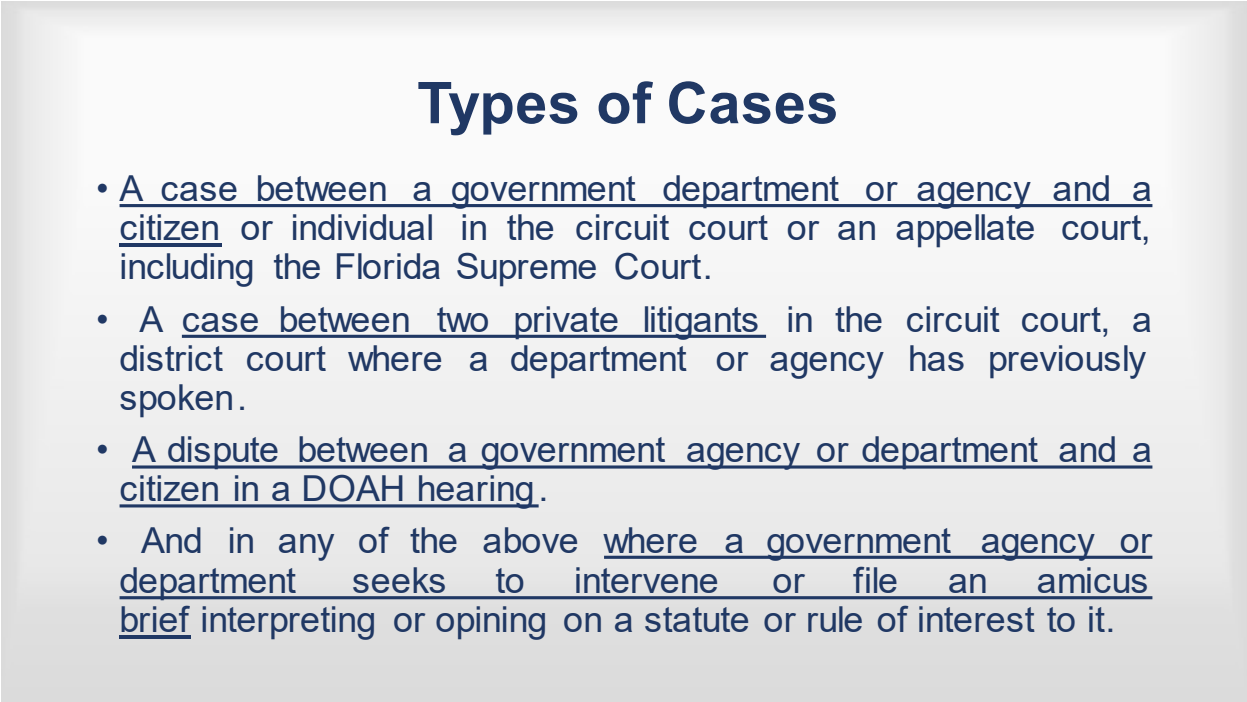
> **agency's interpretation of a statute or rule . . . [T]he agency's legal interpretations [should be] entitled to no more or less weight than those of the private party.**
>
> **Otherwise, whenever a private litigant is up against a state agency and the outcome depends upon the meaning of an ambiguous statute or rule administered by that agency, the agency's thumb would always be on the scale . . . and the non-agency party's interpretive arguments would never be heard by a judge who could be completely neutral in deciding such questions . . .**

The Pub. Health Trust of Miami-Dade Cnty., Fla. d/b/a Jackson South Comty. Hosp. v. Dep't of Health and Kendall Healthcare Group, Ltd., d/b/a Kendall Reg'l Med. Ctr., 2016 WL 1255758, at *28 (emphasis added).

Finally, Mr. Shepherd pointed out to the Commission that, if the amendment proposed by the Commission were approved by a vote of the citizens of the state,[26] the amendment would apply to precisely the type of case pending before this Court. Exhibiting Slide No. 4 to the Commission, Mr. Shepherd listed the types of cases to

[26] The Florida Constitution requires amendments to be approved by a 60% vote of the electors. Art. XI, § 5(e), Fla. Const. The Amendment was approved by the electorate by a vote of 61.6% to 38.4%. *See* Fla. Dep't of State - Election Results (myflorida.com), Nov. 6, 2018 General Election, Const. Amendments, https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE= (last visited Oct. 3, 2023).

which the problem of deference might appear and be subject to the new constitutional amendment as follows:



App. 012. The case before this court falls within the third listed category: "A dispute between a government agency or department and a citizen in a DOAH hearing."

In this case, Judge Van Laningham engaged in an exhaustive and painstakingly detailed analysis of section 409.9131(2) of the Florida Statutes to determine whether Dr. Jenkins, the peer reviewer selected by AHCA to perform the statutorily required peer review in this case, met the requirement that he be in "active practice within the past 2 years" as required by Florida law to be qualified to perform

the review. R. 497-507. In so doing, Judge Van Laningham focused on the definitions "active practice," "peer," and "peer review" in section 409.9131(2) of the statutes. *Id.* Those provisions read as follows:

> **(2) DEFINITIONS. —For purposes of this section, the term:**
>
> **(a) "Active practice" means a physician must have regularly provided medical care and treatment to patients within the past 2 years.**
>
> * * *
>
> (c) "Peer" means a Florida licensed physician who is, to the maximum extent possible, of the same specialty or subspecialty, licensed under the same chapter, and in active practice.
>
> (d) "Peer review" means an evaluation of the professional practices of a Medicaid physician provider by a peer or peers in order to assess the medical necessity, appropriateness, and quality of care provided, as such care is compared to that customarily furnished by the physician's peers and to recognized health care standards, and, in cases involving determination of medical necessity, to determine whether the documentation in the physician's records is adequate.

In a ten-page analysis, Judge Van Laningham found the phrase "active practice" as contained in the statute to be ambiguous and in the end concluded that under a proper interpretation of the phrase, Dr. Jenkins was not qualified to perform the requisite peer review. R.

497-507. In his first order declining remand, after addressing a procedural ground why he believed the Agency's remand was erroneous, he explained that the imposition sought to be placed by the Agency on him was contrary to Article V, section 21. R. 577. He wrote:

> Second, and more important, in the general election of 2018, voters approved "Amendment Six," which revised the Florida Constitution, effective January 8, 2019, to add article V, section 21 (hereafter, "Section 21"). This section directs that in "interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo." Section 21 unambiguously abrogates the deference doctrine, a judicially created rule which required a court to uphold and apply any agency interpretation of an ambiguous statute within the agency's jurisdiction provided the interpretation were not clearly erroneous, even if the court believed that the agency's interpretation was not the best one.
>
> **Under Section 21, the undersigned is prohibited from deferring to an agency interpretation that conflicts with his own, de novo interpretation of such statute. The constitutional prohibition against deference obviously forbids the undersigned from applying, implementing, or taking any action in furtherance of an agency interpretation that he has rejected, because giving effect to an agency interpretation, even under compulsion, is submission to another's opinion, which is the very definition of deference. Section 21 would be meaningless at**

> **the trial level if an agency were able to countermand its prohibition by ordering the ALJ on "remand" to ignore his or her de novo interpretation and instead defer to the agency interpretation.**

Id. (emphasis added).

Undersigned amici respectfully submit that Judge Van Laningham is correct. Article V, section 21 was added to the Florida Constitution to prohibit precisely this type of imposition by an executive branch agency. AHCA has no authority to impose on a court or an ALJ its interpretation of section 409.9131(2). While AHCA may eventually urge its interpretation at the appropriate time before an appellate court, the Florida Constitution prohibits the ALJ from accepting a mandate from AHCA to adopt its findings of fact or to issue an Amended Recommended Order based upon AHCA's interpretation of the statute that is contrary to the interpretation made by the ALJ upon a *de novo* review.

CONCLUSION

For the foregoing reasons, amici respectfully submit that AHCA lacks the authority to mandate its interpretation of section 409.9131(2) on the ALJ.

Date: November 28, 2023

Respectfully submitted,
/s/ Frank A. Shepherd

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was filed with the Clerk of the Courts using the Florida Courts E-Filing Portal and that a copy has been furnished by electronic mail and through the electronic filing system to counsel of record on November 28, 2023, as follows:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing document was generated by computer using Microsoft Word with Bookman Old Style 14-point font, a word count of 4,065 words, and otherwise complies with Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(B).

/s/ Frank A. Shepherd