IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL

CASE NO. 89,962

RE: REQUIREMENT FOR ADEQUATE PUBLIC EDUCATION FUNDING

ANSWER BRIEF OF CITIZENS FOR BUDGET FAIRNESS IN OPPOSITION TO INITIATIVE PETITION

ORIGINAL PROCEEDING

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The Coalition argues that the proposed amendment would affect only the Legislature, and that it would have no impact upon the Legislature beyond setting a parameter within which the Legislature must operate. In fact, it is the nature of that parameter which substantially alters multiple functions of government, as described in detail in Citizens' Initial Brief. The Coalition's assertion that the proposal merely sets a base level for funding is incorrect. It sets a quota, which is defined as a proportional share. It is the proportional nature of the mandate which makes it inherently multi-functional. A proportional mandate automatically affects multiple functions by see-sawing every expenditure for the mandated purpose against every other expenditure. The fact that the minimum percentage is within historic levels is irrelevant to the alteration of functions. Whether or not the Legislature or other affected agencies choose to exercise their discretion is irrelevant to the fact that such discretion has been significantly altered.

The Coalition argues that any impact upon multiple government functions is hypothetical because the Legislature can choose to fund in the same proportions. The same argument could have been made with respect to the proposed amendments in *Tax* Limitation, Laws Related *to Discrimination,* and *Fine v.* Firestone, all cases in which this Court declared the provisions invalid as

having multiple subjects. The issue in those cases was the alteration of the affected agencies' power to exercise functions, not whether they might to choose to exercise them. The *Limited Casinos* case, cited by the Coalition, is not a analogous because the examples mentioned in that case were truly speculative.

The *Funding for Criminal Justice* and *Fee on Everglades Sugar Production* cases are distinguishable from the case at bar because the proposed amendments in those cases did affect only one Legislative function, and affected no other agencies. In addition, neither of those cases imposed a proportional restriction in which the earmarked amount was permanently leveraged against all other uses,

II

The use of the term "adequate" in the title is not only dispensable, but inappropriate. The Coalition itself states that the subject of the proposed amendment is "the appropriation of a minimal percentage of the state budget to public education." There is a significant difference between a requirement for "adequate funding" and a requirement for a specific minimum percentage. The title indicates that the only thing required by the proposed amendment is adequate funding. In addition to being inaccurate, the title incorrectly implies that the Constitution does not currently require adequate funding.

The title actually states the sponsors' objective evaluation of the amendment's effect rather than its actual effect. This is the type of "political rhetoric" that the Court has denounced.

The first two sentences of the ballot summary are misleading, and the third sentence is a completely inaccurate reflection of the amendment's actual effect on a material matter,

The first two sentences of the summary are worded **so as to appear to be** statements of current law, which they are not. There is nothing in the summary to alert the voter to the fact that they are actually statements of what the proposed amendment would do.

The statement in the second sentence that the 40% figure is based upon education's share before state lotteries began is not a description of the amendment's effect, but of the sponsor's political motivation. In addition to being prohibited political rhetoric, inclusion of a statement proporting to be based upon extrinsic fact should not be permitted in a ballot summary since there is no forum in which to verify its accuracy.

The third sentence in the summary states that the 40% mandate may be suspended by the Legislature by a 2/3 *vote* of each house of the Legislature. The actual text of the amendment requires approval by 2/3 of the *membership* of each house. The Constitution defines a vote of a house of the Legislature as a percentage of those casting votes, and a vote of the membership as being a vote of all members of the body. Consequently, the ballot summary tells the voter that the 40% mandate can be lifted by half the number of votes in each house as is actually required by the proposed amendment. This discrepancy alone is sufficient to invalidate the initiative petition.

ARGUMENT

I

THE PETITION VIOLATES THE SINGLE-SUBJECT LIMITATION OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION

The Coalition argues that its purpose is to define adequacy of educational funding as a minimal percentage of the state budget, and that this is the single subject of the amendment. The assertion does little to assist in the evaluation of the single-subject requirement of Article VI, Section 3 of the Florida Constitution. It is possible to craft a "single subject" broad enough to encompass almost every initiative proposal, as can be illustrated with each of the proposals that have been declared in violation of the single-subject restriction.1 If Article XI, Section 3 of the Florida Constitution required no more than the articulation of a broad enough phrase to encompass all of the provisions of a proposed amendment, it would have little meaning.

This Court has emphasized more than once that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement," *Adviso y Opinion to the Attorney General – Restricts Laws Related to*

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[1] **E.g.,** *Advisory Opinion to the Attorney General Re: Tax Limitation,* **644 So. 2d 486 (Fla. 1994) [voter approval of constitutional revenue measures];. [voter approval of new taxes];** *Adviso y Opinion to the Attorney General Re: Property Rights,* **644 So.** *2d* **486** *(Fla.* **1994). [right to full compensation for government caused property damage];** *In Re: Advisory Opinion to the Attorney General Save our Everglades, 636* **So, 2d 1336 (Fla. 1994) [requiring sugar industry to fund Everglades restoration];** *In Re: Advisory Opinion to the Attorney General ▪ Restricts Laws Related to Discrimination, 632 So.* **2d 1018 (Fla. 1994) [prohibiting laws granting rights to homosexuals];** *Evans v. Firestone, 457* **So. 2d 1351 (Fla. 1984) [limitations on plaintiffs' rights in civil actions];** *Fine v. Firestone, 448 So.* **2d 984 (Fla. 1984) [revenue raising limitation]**

Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994); *Evans v. Firestone, 457 So.* 2d 1351, 1353. Instead, the Court has announced specific criteria for determining whether or not a proposed amendment meets the single-subject test. The parties are in agreement that an essential element of that criteria is whether the amendment substantially affects a function of more than one branch of government, multiple functions of a single branch, or a function performed by multiple levels of government. *See Coalition Initial Brief,* p.15. It is with respect to the application of this criteria that the parties are in dispute.

In its Initial Brief, Citizens cited specific multiple functions of government upon which the proposed amendment has an immediate and substantial impact. Included were multiple functions of the Legislature, the veto function of the Governor, the independence and prerogatives of the Board of Education, the functions of virtually every other state agency that is dependent upon legislative appropriations, and the financing functions of local government. The Coalition counters that the amendment would affect only the Legislature, and that it would have no impact upon the Legislature beyond setting a parameter within which the Legislature must operate. In fact, it is the nature of that parameter which substantially alters multiple functions of government.

The Coalition argues that the proposal merely sets a base level for funding and that this level is within levels historically appropriated for public education in the state. The amendment does far more than merely set a base level. It sets a quota. (A quota is defined as "a proportional share." *Webster's Third New*

International Dictionary [1983]. It is the proportional nature of the mandate which gives it an inherently multi-functional effect. As noted in Citizens' Initial Brief, the Legislature currently has almost unlimited appropriations discretion. Just last year, this Court noted that, "the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools." *Coalition for Adequacy and Fairness in School Funding v. Chiles,* 680 So. 2d 400, 408 (Fla. 1996). The proposed amendment would impose a major limitation upon that discretion. The Legislature's power to allocate funds among purposes of its choice would be limited to a little more than half of all state expenditures. The limitation would alter such discretion with respect to a number of separate legislative functions discussed in Citizens' Initial Brief. In addition, because the amendment would place the Legislature in a strict *proportional* straight jacket, it would necessarily and permanently affect the functions of every other agency which relies upon Legislative appropriations.

It may be that even a base dollar level would be found to have a multi-functional impact if the amount were large enough, However, the Court need not address that question in this case because a proportional share necessarily has a multi-functional effect at any level. If the Constitution simply mandated that a minimum dollar amount be earmarked for a particular purpose, the Legislature could fund the amount with a new tax and perhaps not affect other agencies or functions. A proportional mandate, however, automatically affects multiple

functions by see-sawing every expenditure for the mandated purpose against every other expenditure. Even if a new revenue source were established, 40% of every new dollar spent from such source would have to go to education.

The fact that the minimum percentage is within historic levels is irrelevant to the alteration of *functions.* The Legislature currently has the power to make unrestricted changes in the proportion of appropriations allocated to educational and non-educational purposes. While the appropriation to education might be in the 40% range one year, the Legislature has the discretion to reduce it to lower percentages in future years based upon its judgment of relative need and available funds. The proposed amendment would change that drastically. The Legislature would be mandated to appropriate 40% of all appropriations to education every year even if there is a significant reduction in funding needs for education and a concurrent increase in other needs. The Governor's veto discretion, discussed in Citizens Initial Brief, is similarly altered.

The provision allows the Legislature to suspend its applicability on a year-by-year basis upon a finding of "compelling public necessity" to do so. There is no guideline as to what would qualify as a compelling public necessity, but the proviso does nothing to mitigate the impact upon various legislative functions. Whatever its meaning, it surely doesn't mean the Legislature can disregard the provision simply because it perceives the relative needs of the state to have changed, or there would be no need for the amendment. Furthermore, the

suspension requires a two-thirds vote of the entire membership of both houses which itself would be a substantial alteration of functions.

The Coalition argues that any suggested impact upon multiple governmental functions is purely hypothetical because the Legislature can choose to fund in the same proportions. In support of the argument, the Coalition cites *Advisory Opinion to the Attorney General Re: Limited Casinos, 644 So.* 2d 71 (Fla. 1994). The *Limited Casinos* case is not analogous. The examples mentioned in that case were truly hypothetical. They would come to pass only with the occurrence of uncertain future events, and even then were only speculative. For example, it was argued that the amendment "might cut off a judicial remedy for those citizens whose property might be adversely affected," and similar possibilities. *Id.* at 73. The impact of the current amendment, on the other hand, would not be remote and speculative. It would strike immediately and profoundly at the most significant discretionary functions of the Legislature and Governor and the funding prerogatives of both educational and non-educational agencies.

Based upon the Coalition's reasoning, the effects of the amendments invalidated in *Tax Limitation, supra, Restricts Laws Related to Discrimination, supra,* and *Fine v. Firestone, supra,* were also hypothetical. In *Tax Limitation* the Court stated:

> This initiative not only substantially alters the functions of the executive and legislative branches of state government, it also has a very distinct and substantial affect on each local governmental

> entity. The ability to enact zoning laws, to require development plans, to have comprehensive plans for a community, to have uniform ingress and egress along major thoroughfares, to protect the public from diseased animals or diseased plants, to control and manage water rights, and to control or manage storm-water drainage and flood waters, all would be substantially affected by this provision.

Id. at 494. Just as the Legislature could choose to keep funding proportions at the same levels after an enactment of the current amendment, the governmental agencies referred to by the Court above could have chosen not to have exercised any of the functions discussed. Nevertheless, the Court declared the proposed amendment in the above case invalid due to multiple subjects. The decision was based upon the reduction of the governmental agencies' discretion to exercise their then existing functions. Similarly, the affected functions in *Laws Related to* Discrimination could have been said to be hypothetical since governmental units might never have chosen to exercise the restricted functions, and in *Fine v. Firestone* the governmental bodies could have chosen not to raise revenue above the caps. Again, however, the issue in those cases, as in the case at bar, was the alteration of the affected agencies' power to exercise those functions.

The Coalition compares the petition in the case at bar to those in *Adviso y Opinion to the Attorney General Re: Funding for Criminal Justice,* 639 So. 2d 972 (Fla. 1994) and *Adviso y Opinion to the Attorney General – Fee on Everglades Sugar Production,* 681 So. 2d 1124 (Fla. 1996). The Coalition contends that the provision in *Funding for Criminal Justice* mandated the raising of taxes, established a trust

fund, and required that funds be spent in excess of the current levels. This, they contend, had wider impact than the current provision.

As noted in Citizens' Initial Brief, the *Funding for* Criminal *Justice* provision did not actually mandate the raising of taxes or require any increase in the expenditure of funds. It authorized the Legislature to tax "up to one percent" "as provided by law." The trust fund was made "subject to appropriation by the legislature." Thus, while the amendment created a trust fund, it left discretion entirely with the Legislature to tax or not tax, and to fund or not fund the trust as the Legislature deemed appropriate. In addition, the provision did not affect appropriation to any other agencies because, to the extent that the Legislature did choose to appropriate funds into the trust, such funds would be derived from a new revenue source.

The provision in Fee on Everglades Sugar Production imposed a new tax on raw sugar earmarked for a specific use. It only affected one legislative function, the discretionary use of the revenue created by the new tax, and it affected no other agency since, like *Funding for Criminal* Justice, a new funding source was created.

Most importantly, neither of the above two proposals, nor any other previously reviewed by this Court, imposed a proportional restriction in which the earmarked amount was permanently leveraged against all other uses.

This Court has noted that of the four methods for amending the Florida Constitution, legislative, revision commission, constitutional convention, and

initiative petition, only the petition method is restricted to a single-subject. One of the reasons, the Court stated, is that on an initiative petition unlike the three deliberative bodies, there is no opportunity for public input and debate in the drafting of a proposal. *Fine v. Firestone,* supra; *Advisory Opinion to the Attorney Genera2 — Save Our Everglades,* 636 So. 2d 1336 (1994). Unlike the three deliberative bodies, the voter about to cast a ballot on a petition amendment does not have the opportunity to consider all of the ramifications of a proposal's effect on multiple government functions, or the long term implications of enacting such a proposal,

The current proposal is an excellent case in point. It if were held valid, one can envision a series of subsequent proposals mandating minimum percentages of appropriations for criminal justice, the environment, children and the elderly, and so on, Each slice would further reduce the non-mandated slice of the pie until there is virtually no discretion left in the allocation of state funding.

The Coalition notes that a separate article devoted to education has been included in all six Florida constitutions. Three of those constitutions have required the Legislature to make "adequate" or "ample" provision for education. *See Coalition for Adequacy and Fairness in School Funding* v. *Chiles,* supra at 405. It is noteworthy that, despite the fact that all six constitutions were drafted by bodies having the power to include multiple subjects, and that the current constitution was twice reviewed by revision commissions having such power, no

definition of adequacy has ever been included and no minimum level of funding has ever been mandated. The drafters of those constitutions, having had the opportunity for deliberation and debate in the drafting process not available to the voter through the initiative process, apparently reached the conclusion that any benefit of such mandate would be outweighed by the reduction in legislative and executive flexibility.

The Coalition contends that the proposed amendment does not involve logrolling because voters are not required to accept something unpalatable or unrelated in order to get something else they desire. The flaw in this contention lies in the Coalition's insistence that the proposal "merely sets a base level for funding." Coalition Initial *Brief,* p. 15. As noted above, the proposal does much more than set a minimum funding *level.* For the first time, it inserts in the constitution a proportional mandate. Voters who desire an increase in educational funding, like the members of Citizens, must accept a major functional alteration of Florida Government in order to get it.

II
THE BALLOT TITLE AND SUMMARY VIOLATE THE PROVISIONS OF SECTION 101.161, FLORIDA STATUTES.

The Coalition states that the term "adequate" is "indispensable" in the title, The term is not only dispensable, it is inappropriate. The Coalition itself states that the single subject of the proposed amendment is "the appropriation of a minimal percentage of the state budget to public education." Coalition Initial *Brief,* p. 7. As noted in Citizens' Initial Brief, there is a significant difference between a requirement for "adequate funding" and a requirement for a specific minimum percentage of appropriations. The title conveys the clear impression that the proposal simply requires "adequate" funding. Indeed, that is precisely what the title says: "Requirement for Adequate Public Education Funding." The clear implication is that the Constitution does not currently require adequate funding for public education, when it does so require and has so required in every constitution since 1868.

While the title and summary are to be read together to determine whether they properly inform the voter, *Advisory Opinion to the Attorney General Re: Limited Casinos, supra,* the title itself cannot be affirmatively misleading. In particular, it cannot suggest that the amendment does something which it does not do. Thus, in *In Re: Advisory Opinion to the Attorney General -- Save Our Everglades, supra,* the Court held that the title "Save Our Everglades" was defective because it implied that the Everglades is lost, or in danger of being lost

and must be saved, when the purpose of the amendment was only to restore it to its previous condition.

More particularly, a title and summary cannot imply that an amendment does something new which the Constitution already does or vice-versa. The Court invalidated the ballot provision in *Advisory Opinion to the Attorney General Re: Casino Authorization, Taxation and Regulation, 656 So.* 2d 466 (Fla. 1995), because the first line of the summary effectively did just what the current title does. The line read, in pertinent part: "This amendment prohibits casinos unless approved by the voters * * *." The Court found the line misleading because it suggested that the amendment was necessary to prohibit casinos in the state, thus creating "the false impression that casinos are now allowed in Florida." Id. at 469. The title of the current initiative creates the false impression that adequate funding is not now required by the constitution.

The Court in *Casino Authorization* also found that the above language was "the type of 'political rhetoric' that was denounced by this Court in *[Save Our Everglades]." Id.* In drafting the title "Save Our Everglades," the sponsors used the title to advance their subjective evaluation of the impact of the amendment rather than the actual purpose or subject. The sponsors of the current amendment do the same. The Coalition itself states that the single subject of the amendment is a minimum percentage of funding. Some persons would consider 40% inadequate and others would consider it more than adequate. Members of Citizens consider it inherently inaccurate because no one,

regardless or their subjective criteria, can know what will be adequate in years to come. The drafters of the title have deprived Citizens, and all those who disagree that 40% represents adequate funding, of an even playing field by adopting their subjective evaluation as the title.

The overriding problem with both the title and the summary is reflected in the Coalitions' own statement of the amendment's purpose:

> The proposed * * * amendment seeks, as its sole subject, to define adequacy under Article IX, Section 1 of the Florida Constitution, for funding purposes as the appropriation of a minimal percentage of the state budget to public education. This minimal percentage is the single subject of the amendment.

Coalition Initial Brief, p. 7. With the addition of the amount of the percentage, the above statement would have been a clear and accurate summary of the proposal. Unfortunately, the drafters of the title and summary were not as straightforward with the voters as the drafter of the Coalition brief is with this Court. Neither the title nor the summary communicates the above purpose in the "clear and unambiguous" language required by Section 101.161 and the decisions of this Court.

With little discussion, the Coalition makes the conclusory statement that the summary "simply states the chief purpose of the proposed amendment in a way that is informative, but neutrally so." *Coalition Initial Brief,* p. 7. A sentence-by-sentence analysis of the summary shows that it is neither informative nor neutral. The first line reads:

> Adequate provision for funding public education each fiscal year requires appropriation of at least a minimum percentage of total appropriations under Article III, not including lottery or federal funds.

If the sentence is intended to inform the voter that the proposed amendment requires a minimum percentage of total appropriations be earmarked for education, it fails to do so, at least with the clarity required by Section 101.161. The sentence can certainly be read (and appears to state) that Article III currently requires such a minimum percentage. Of course, neither Article III nor any other provision of the Constitution so requires. The statement is, at worst, affirmatively misleading and, at best, deceptively ambiguous.

The second sentence reads:

> That minimum percentage (40%) is based upon education's percentage of appropriations, excluding federal funds, for 1986-87 before state lotteries began.

Again, the reference to 40% appears to be a statement of current law. Nothing in the structure of the sentence, or elsewhere in the title or summary, alerts the voter to the fact that this is what the proposed *amendment* will do.

The statement that the 40% figure is based upon education's share before state lotteries began is not a description of the proposed amendment's effect. It is a statement of the sponsor's political motivation. This presents two problems. First, it is political rhetoric such as was condemned in *Save Our Everglades* and *Casino Authorization*. Second, any inclusion in a ballot summary of a statement purporting to be based upon extrinsic fact is problematic. The voter is entitled to

assume that the statement as accurate or it wouldn't be on the ballot. But who is to verify its accuracy? If there is disagreement as to the accuracy, who is to be the arbiter? Neither time nor the Constitution permit this Court to engage in an evidentiary hearing to make such a determination, Undoubtedly, this was a consideration when the Court held that the ballot summary must state "the legal effect of the amendment, and no more." ***Evans v. Firestone,*** *supra* at 1355.

The reference in the second sentence to the fact that the provision is based upon the period before the lottery began is pure political rhetoric. It is designed to explain the sponsor's political motivation, not the effect of the proposed amendment.

The third sentence in the summary states:

> May be suspended in any fiscal year by a bill adopted by 2/3 vote of each legislative house.

This sentence does not accurately reflect the effect of the amendment. The summary states that the 40% requirement can be waived by 2/3 vote of each house. The actual text of the proposed amendment, however, requires "a vote of approval of two thirds of the ***membership*** of each house," The Constitution defines the two phrases and they have significantly different meanings:

> Section 12. Rules of construction.- Unless qualified in the text the following rules of construction shall apply to this constitution.
>
> * * * * *
>
> (e) Vote or other action of a legislative house or other governmental body means the vote or

> action of a majority or other specified percentage of those members voting on a matter. "Of the membership" means "of all members thereof ."

The summary tells the voter something quite different than what the amendment would actually do. The amendment would require approval of 2/3 of the full membership of each house, while the summary says it only requires 2/3 of those voting.

The difference is important. The Constitution requires the presence of 50% of the membership of each house to constitute a quorum. Fla. Const., Art. III, § 4(2); Hence, a two-thirds vote of the Senate would require only 14 votes as opposed to the 27 votes necessary for two-thirds of the membership of the Senate. A two-thirds vote of the House could be obtained with only 40 votes compared to the 80 necessary for two-thirds of the membership. In short, the ballot summary indicates that only half as many votes are needed to suspend operation of the 40% mandate as are actually required by the text of the proposed amendment.[2]

If the initiative were valid in all other respects, this discrepancy alone would require striking it from the ballot. The suspension provision is a material part of the proposed amendment, cited by the Coalition as an "emergency override" which is designed to "insulate Florida's governmental structure from 'cataclysm."' Coalition *Initial Brief*, p. 9. The ballot summary cannot be permitted

[2] This argument was not included in Citizen's Initial Brief. The undersigned notified counsel for the Coalition on April 13 of the intention to include this argument, and faxed a copy at 10:30 a.m. on April 14 in order to afford sufficient time for a response.

to mislead the voters as to the actual legislative vote necessary to effectuate the override.

CONCLUSION

The proposed constitutional amendment should be declared invalid on the grounds that it includes more than one subject and the ballot summary is defective.

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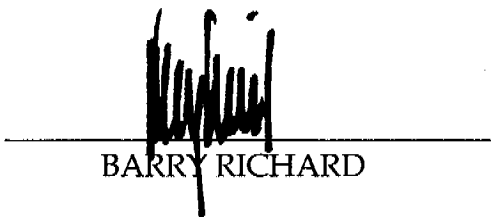
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery this 14th day of April, 1997 to Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301 and William Sundberg, Rumberger, Kirk & Caldwell, 106 E. College Avenue, Suite 700, Tallahassee, Florida 10507, and by U. S. Mail to John Mills, Post Office 2099, Gainesville, Florida 32602.



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