

IN THE
SUPREME COURT OF FLORIDA
Case No. 89,962

ADVISORY OPINION TO THE
ATTORNEY GENERAL
RE: REQUIREMENT FOR ADEQUATE
PUBLIC EDUCATION FUNDING

REPLY BRIEF OF THE COALITION
TO RECLAIM EDUCATION'S SHARE
SPONSORS OF THE INITIATIVE

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SUMMARY OF ARGUMENT

Education holds a unique place in Florida history and the Florida Constitution. As a fundamental duty of state government, the extension of the requirement for adequate provision for education to include a minimal funding level is consistent with the policy of the Constitution and a logical extension of the opinion of this Court in Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So. 2d 400 (Fla. 1996), which recognized the importance of education funding.

The proposed amendment meets the single subject test as it has a single unified purpose and only a minimal impact on any function of state government. Opponents suggest the impact on the Legislature is substantial. While the proposal sets a standard for legislative appropriations, the impact is minimal because the level is historically consistent with education spending and the proposal includes a phase-in to avoid precipitous impact. Further, the proposal avoids any legislative impact in the areas of taxation, defining the purposes of appropriations, or controlling expenditures. Consequently, the instant proposal has less impact than the previously approved Criminal Justice Funding initiative which mandated a tax, required additional expenditures, created a trust fund, and directed funds expended.

While Opponents suggest that the instant proposal would result in a precipitous change in violation of the single subject rule, the proposal is in fact an incremental and historically supported change. Truly catastrophic change might be precipitated in the

absence of a textual standard, where an educational system deteriorates so much that it has to be found inadequate. Such **was** the case in Ohio where their supreme court found the entire funding system unconstitutionally inadequate in March of 1997. Similar to recent education funding in Florida, education funding levels in Ohio have dropped from 45% to 35% of the state budget since 1975.

Opponents also argue severe impacts on various agencies from funding shortages. Any future funding implications on these agencies are purely speculative. Speculation is not an acceptable means of invalidating an otherwise constitutionally valid proposal by citizens. The proposal must substantially affect multiple functions. Opponents suggest an impact on the gubernatorial veto power which is simply nonexistent. The proposal carefully narrows any impact to appropriations - a legislative function. There is no impact whatsoever on the executive which remains free to exercise the veto power unimpaired by the text of this proposal.

Opponents suggest that the title and summary mislead the public by indicating that Article IX "**does** not currently require adequate funding for education, which is untrue." That statement is obviously a misreading of the current Constitution since no such right is described in the text and, in fact, that is the purpose of the instant amendment. As presented, the title and summary are clear and thorough, easily meeting the requirement that they clearly and accurately set forth "**the** general rule to be applied and [inform] the voters of the chief purpose of the proposal so that an informed decision is possible." Advisory Opinion to the

Attorney General Re Tax Limitation (Tax Limitation II), 673 So. 2d 864, 868 (Fla. 1996) .

ARGUMENT

I. THE EDUCATION FUNDING INITIATIVE PRESENTS A SINGLE, UNIFIED QUESTION TO THE VOTERS AND COMPLIES WITH THE SINGLE SUBJECT REQUIREMENT, HAVING LIMITED EFFECT ON THE LEGISLATIVE APPROPRIATION FUNCTION WHILE LEAVING OTHER FUNCTIONS AND OTHER BRANCHES OF GOVERNMENT UNAFFECTED

In the Requirement for Adequate Education Funding initiative, this Court is presented with a simple, clear and logical extension of the current Education article of the Florida Constitution. Fla. Const. art. IX. Based upon the historical place of education in the Florida Constitution, defining "adequate provision" to add a minimum level of education funding represents a specific and minor modification to the Constitution.

a. The Education Funding Initiative has Only Incremental Effects on the Legislative Appropriation Function and does not Substantially Affect Multiple Functions of State Government

The Education Funding proposal has a defined and measured impact on the appropriation function. It sets a minimal appropriation level for education. The term "appropriation" is used to limit the impact of the proposal to one exclusively legislative function. Fla. Const. art. III, § 8; art. VII, § 1(c). The proposal does not restrict "revenues" or "expenditures," which would possibly have had some greater impact on agencies and present a problem of definition and undefined impact. Using "appropriation" avoids broader effects, while providing a specific,

ascertainable definition confined to one governmental function - appropriations by the Legislature.

Opponents argue that the impacts are drastic and substantial, but they fail to specify these **impacts**.¹ Opponents must rely upon hypothetical scenarios and overlook the fact that such impacts on funding levels result from legislative determinations and priorities unmodified by this initiative. Such unpredictable occurrences cannot properly be considered impacts of the Education Funding proposal, because the effects are dependent upon possible future actions within the discretion of the Legislature. Opponents assume that, if 40% of overall appropriations go toward education, other functions of government unrelated to education will receive reduced funding. This assertion is speculative and dependent upon future legislative actions and priorities. This Court has held that "possible impacts" based upon "premature speculation" will not defeat an initiative. Advisory Opinion to the Attorney General re:

¹The following statements demonstrate this lack of specificity in Opponents' arguments:

- "A glance below the surface of the current amendment discloses that it is unique among all those reviewed by this Court in its fundamental alteration of the basic functions of multiple government functions, branches and agencies, and its continuing impact upon **them**." Brief of Opponents, at 11
- "The latter limitation [on Article VII, Section 14] will undoubtedly affect the constitutional mandate in Article II, Section 7 that the Legislature make adequate provision for the abatement of air and water pollution." *Id.* at 13.
- "The proposed amendment would have a significant impact upon the ability for state and local agencies to fund fixed capital outlay projects through the use of state bonds pledging full faith and credit of the state as authorized by Article VII, Section 11 of the Constitution. It is self-evident that a constitutional 40% reduction on available funds to secure such bonds would make it more difficult and costly to market such obligations." *Id.*

Limited Casinos, 644 So. 2d 71, 74 (Fla. 1994); Advisory Opinion to the Attorney General re: Funding for Criminal Justice, 639 So. 2d 972 (Fla. 1994).

Significantly, with regard to claims of effects on other branches or levels of government, Opponents are, in effect, arguing that receiving more or less money is a function of government. Note, however: **Receiving money is not a function.**² True functions are those activities and purposes which agencies, branches or local governments perform based on defined constitutional roles. In reality, Opponents speak always of the SAME FUNCTION - i.e. the appropriation function and how a future Legislature decides to exercise this one function may or may not affect state bodies which receive appropriated funds.

Under this Court's single subject jurisprudence, an initiative may have some effect on multiple branches of government, so long as it does not "substantially alter or perform the functions of these branches." Advisory Opinion to the Attorney General - Fee on the Everglades Susar Production, 681 So. 2d 1124, 1128 (Fla. 1996) . The fact that an agency's budget may hypothetically be affected by a future legislative action fails to qualify **as a** true impact on any function, much less a substantial impact.

Opponents work arduously to distinguish the Criminal Justice Funding initiative from the instant initiative. See Brief of Opponents, **at** 15-16. Yet the Education Funding proposal clearly

²Opponents find a "budgetary function" belonging to "every state funded agency." See Brief of Opponents, at 14.

has lesser impact on government functions than Criminal Justice Funding, which **had** specific and predictable impacts on a series of governmental functions by **requiring** additional taxes,³ **requiring** additional expenditures, **creating a** trust fund, and **determining** the purposes for which funds raised could be spent. Funding for Criminal Justice, 639 So. 2d at 973. In contrast, this initiative deals with one function: a minimum level of appropriations for education funding. It does not mandate taxes or define the specific purposes of appropriations.

The Education Funding proposal also follows the precedent set by the Criminal Justice Funding amendment in using a historical perspective and relying upon a certain fiscal year (1993-94 for Criminal Justice Funding, 1986-87 for Education Funding) as a minimum level of funding for their respective desired purposes. See Id. at 973. The Education Funding proposal is much less restrictive on the Legislature and allows for far greater discretion than did Criminal Justice Funding. Education Funding does not require additional taxes or additional expenditures, it does not create any trust fund, nor does it attempt to manage the

³Opponents misinterpret the Criminal Justice Funding amendment when they assert that it "only authorized the levy of a tax of up to 1% sales tax . . ." Brief of Opponents, at 16. In fact, Criminal Justice Funding required rather than merely authorized the imposition of that tax. Funding for Criminal Justice Funding, 639 so. 2d at 973 (explicitly asserting that the newly created trust fund "shall be funded by a **tax** of up to one percent on the sale of goods . . ."). Interpreting this clause, this Court stated, "We **read** this language as a mandatory requirement for some funding up to one percent." Id. at 974. Despite this mandatory requirement, the Criminal Justice Funding initiative did not violate the single subject requirement.

funds raised. In the Education Funding proposal, this Court considers an initiative that treads far more lightly on the various functions within the legislative domain than Funding for Criminal Justice.

The proposed Requirement for Adequate Education Funding amendment likewise has no effect upon the veto function of Article II, Section 8. Following passage of the Education Funding amendment, this power will be exercised in the same fashion, to the same degree, and with the same result as before. The only impact of the proposed amendment is on the legislative appropriation function. There is no impact on the Executive branch because the only governmental function which implicates "adequate funding" is appropriations. A series of assumptions must come true before the Governor's veto can even have an impact on education spending: first, the Governor must choose to veto education items;⁴ second, the vetoed items must reduce education funding levels to less than the required 40% of appropriations; and finally, the Legislature's appropriations to education must be such that the veto will sink funding below the minimal level.⁵

⁴Note also that the Governor may choose to delete specific education appropriations while the funds remain within education generally. Such an action would not implicate the Education Funding amendment.

⁵As a matter of perspective, from 1979 to 1997, total education vetoes have amounted to some \$235 million out of total appropriations of \$309 billion, or only 0.08% of this funding. For Fiscal Years 1979-90 to 1994-95, Veto Messages are on file with the Secretary of State, Florida State Archives, Tallahassee, Florida; for Fiscal Years 1995-96 and 1996-97, Veto Messages on file with Secretary of State, Bureau of Administrative Code.

There is no impact on the function of the veto. The executive power to veto is unaffected.⁶ In fact, there is no definable impact, even insubstantial, to which Opponents can point. The alleged impact on the veto is non-existent.

Arguments about possible impacts on bonding are likewise speculative. Nothing in this amendment alters either the authority or the obligations of any governmental entity. Any impacts on local funding or agencies remain similarly speculative, based on assertions that, as a result of this amendment, the Legislature may choose to curtail funding to certain non-educational programs. This type of speculative impact cannot -defeat an initiative.

b. The Education Funding Initiative, by Defining a Clear and Logical Standard for Adequate Education Funding, Helps Avert Cataclysmic Change

The Education Funding initiative provides a logical extension of the definition of adequacy in Article IX of the Florida Constitution, and is designed to minimize impact on state government and avoid cataclysmic or precipitous change. Opponents assert that the changes required by the instant initiative would produce such cataclysm. Brief of Opponents, at 16. Ironically, true cataclysm might well arise in the absence of the clear

⁶The operation of the Education Funding initiative will continue to affect the Legislature, requiring it to come to some logical solution within a reasonable time in order to bring that year's appropriations into compliance with the minimal requirement. Note also that, in the event of an impasse between the branches, the emergency suspension provision of the initiative could be invoked.

standard for adequate funding established by the Education Funding initiative.

Within the last month, after the filing of initial briefs in this case, the Ohio Supreme Court, in a 4-3 decision, declared that state's educational funding levels to be constitutionally inadequate. DeRolph v. Ohio, ___ N.E.2d ___, 1997 WL 130568, *4-5 (Ohio, March 24, 1997). The court in DeRolph recognized that schools were no longer safe or healthy, and that the decision they reached would likely involve increased taxes.' Id. at *16-17.

The DeRolph case was distinct from the more numerous cases that have found education systems unconstitutional for reasons of inequality or lack of uniformity.' While other cases may also have found school funding inadequate, DeRolph is particularly relevant because it directly addresses inadequate funding as unconstitutional. At least one fact in the DeRolph case is quite similar to the recent education funding situation in Florida: since 1975, education funding levels in Ohio have declined from 45% to 35% of the state budget. See Randy Ludlow, Finance Formula Declared Unconstitutional, Court Tells Ohio: Fix School Funding, Cincinnati Post, March 24, 1997, available at <<<http://www.cincypost.com/news/fund032497.html>>>.

⁷The Ohio Supreme Court in DeRolph reviewed a vast record from the thirty day trial which included some five thousand six hundred pages of transcript, four hundred fifty exhibits and testimony from sixty-one witnesses. Id. at *1.

⁸See, e.g., cases cited in Id. at *17 n.6.

The Ohio court recognized the severe consequences of its decision, but nevertheless felt compelled to act, citing problems including "coal bin classrooms, free-floating asbestos fibers, leaking roofs, and arsenic-laced water." Id. at *61 (Pfeifer, J., concurring). A future incarnation of the recent case, Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996), might present issues similar to those that created the crisis in Florida.⁹ Significantly, members of the Ohio Court lamented the absence of standards such as the one proposed in the instant case.¹⁰

Unlike the drastic situation in Ohio, the Education Funding Initiative allows a more measured response and may avoid a cataclysmic crisis by implementing a gradual change in education funding. The Education Funding initiative provides the definable standard for education appropriations. Further, the instant proposal supplies this definite standard in a way which minimizes impact on the Legislature and performs no other governmental function in compliance with the single subject requirement of Article XI, Section 3.

'This is especially so given the consensus of the majority of the Court that certain factual evidence could overcome this Court's reluctance to adjudicate a political question, and would substantiate unconstitutional inadequacy under the current version of Article IX, Section 1, Florida Constitution. See Coalition, 680 So. 2d at 408-10 (Fla. 1996) (Overton, J., concurring); 680 So. 2d at 410 (Anstead, J., dissenting) .

¹⁰See DeRolph, 1997 WL 130586, at *66 (Moyer, C.J., dissenting) (lamenting the "lack of judicially demonstrable or manageable standards for determining what constitutes a 'thorough and efficient system of common schools.'").

Finally, Opponents raise the claim that the Education Funding proposal amounts to the log-rolling so often condemned by this Court. Opponents find log-rolling where one wishing to improve education funding through this initiative is obliged to change the Constitution to achieve this objective. Brief of Opponents, at 16-17 ("A voter desiring to see an increase in educational funding would be required by the proposed amendment to accept a fundamental alteration in the functions and relationships of Florida government as part of the package."). This is not log-rolling by any definition, let alone by this Court's. Log-rolling occurs when "several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue." Fee on the Everslades Susar Production, 681 So. 2d at 1127 (quoting In re Advisory Opinion to the Attornev General - Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994)). The Education Funding initiative carefully avoids this, appealing only to those voters who agree with the single subject of the initiative - required minimum appropriations to education.

II. THE EDUCATION FUNDING INITIATIVE FAIRLY AND ACCURATELY SETS FORTH THE SUBSTANCE OF THE AMENDMENT IN THE BALLOT SUMMARY AND TITLE IN COMPLIANCE WITH SECTION 101.161, FLORIDA STATUTES

Opponents' argument that the ballot summary and title are misleading is based upon a misreading or a misinterpretation of the existing language of Article IX, Section 1. Opponents represent that the Florida Constitution currently creates a textual right to

adequate funding.¹¹ In fact, there is no such textual requirement, and it is this requirement for adequate education funding that this initiative seeks to add to the Florida Constitution.¹²

Importantly, the requirement for an adequate system of public education will remain as a separate standard. After **passage** of the Education Funding initiative, the original provision will still require "adequacy" in **ways** additional and supplementary to funding. For example, policies of safety and academic standards are not based solely on funding. A system could be adequately funded by the Legislature, while being inadequately administered. This initiative, however, addresses only the narrow topic of education funding.

The word "adequate" was included in both the title and summary for the simple reason that the Education Funding amendment seeks to add to the definition of "adequacy," a term already used in Article IX, Section 1, to include aspects of funding. The term "adequate" is used in the title in exactly the same sense as in both the summary and text of the proposal. Cf. Save Our Everglades, 636 So. 2d at 1341 (where the title was improper because it introduced an emotional plea entirely unrelated to the purpose of the initiative) . There is no "sloganeering," the amendment does not

¹¹See Brief of Opponents, at 19 ("The use of the word 'adequate' in the title is misleading for two reasons. First, it indicates that the Constitution does not currently require adequate funding for education, which is untrue. Article IX, Section 1 expressly so requires.").

"Article IX, Section 1, of the Florida Constitution provides for an adequate "system," not adequate funding.

"fly under false colors," but honestly proclaims its true nature, its limitations and effects. Cf. Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

Arguments by Opponents that the use of the figure 40%, the year 1986-87, and reference to the state lotteries should not be in the summary are without merit. See Brief of Opponents, at 20-23. The adoption of the 40% standard as the definition of adequate funding is the heart of this amendment! Clarity is its purpose, and to omit those terms could be considered misleading. The year and reference to the lottery are also significant, both as a basis for the chosen percentage and because that year marked the beginning of the trend away from traditionally high levels of education funding. Note, however, that the summary carefully avoids rhetoric or lobbying. The reference to the lottery is only factual, and carefully avoids drawing any conclusions or passing any judgment from that reference. In fact, all of these essential references must be included in the summary to accurately reflect the substance of the proposed amendment. See Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991) (summary omitting material facts may be defective and misleading).

Read together, title and summary are crystal clear and do not mislead. See Advisory Opinion to the Attorney General re Tax Limitation (Tax Limitation II), 673 So. 2d 864, 868 (Fla. 1996). Together, title and summary allow the voters "to learn the chief purpose of the initiative and be able to make an informed decision

about whether to approve or reject the amendment." Fee on the Everslades Susar Production, 681 So. 2d at 1130. After reading the title and summary of the Education Funding proposal, the voter has all the essential information necessary to decide whether to adopt this 40% standard for adequate education funding.

CONCLUSION

The purpose and policy question of the Education Funding proposal are clear: Should the state fund education at a minimum of 40% of appropriations? The voter is not forced to choose between two different policy imperatives, but respond to this issue alone. The speculative and hypothetical arguments raised by Opponents do not amount to the substantial effect or significant impact necessary under the single subject requirement to defeat a citizens' initiative. The impact on multiple governmental functions must be tangible and substantial. With the instant proposal no such impact can be demonstrated. Further, the voters are not being tricked or enticed by the ballot title and summary, but will be able to make an informed decision.

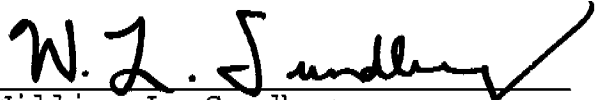
In short, the proposed Education Funding initiative embraces "but one subject and matter directly connected therewith" per Article XI, Section 3, and the title and summary are sufficiently clear and informative. For these reasons, this Court should allow

the voters to decide whether to adopt the proposed Education Funding amendment.

Respectfully submitted,

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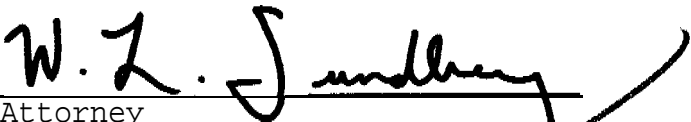
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to **ROBERT BUTTERWORTH**, Attorney General, Plaza Level, Room 1, The Capitol, Tallahassee, Florida **32399-1050**; **PAMELA COOPER**, FTP/NEA National Education Association, 213 South Adams Street, Tallahassee, Florida 32301; and **BARRY RICHARD**, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, **101 East** College Avenue, Tallahassee, Florida 32301, this 14th day of April, 1997


Attorney