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ADVISORY OPINION TO THE
ATTORNEY GENERAL

CASE NO. 90,160

RX: RIGHT OF CITIZENS TO
CHOOSE HEALTH CARE
PROVIDERS

ANSWER BRIEF IN OPPOSITION TO THE PROPOSED CONSTITUTIONAL AMENDMENT

ON BEHALF OF

FLORIDIANS FOR QUALITY PATIENT CARE
AMERICAN INSURANCE ASSOCIATION
THE FLORIDA SCHOOL BOARD ASSOCIATION
THE FLORIDA ASSOCIATION OF DISTRICT SCHOOL SUPERINTENDENTS
THE FLORIDA LEAGUE OF CITIES
FIREMAN'S FUND INSURANCE COMPANY
HARTFORD FIRE INSURANCE COMPANY
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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PRELIMINARY STATEMENT

This brief opposes the arguments made in the July 25, 1997 brief of "Floridians for Health Care Choice," who are hereafter referred to as the "Proponents." This brief is submitted on behalf of Floridians for Quality Patient Care, the American Insurance Association (AIA), the Florida School Board Association, the Florida Association of District School Superintendents, the Florida League of Cities, Fireman's Fund Insurance Company, and Hartford Fire Insurance Company, who filed their initial brief in this case on April 14, 1997, and on behalf of the National Association of Independent Insurers, which was granted permission to join in that brief by the Court's Order of May 22, 1997.

SUMMARY OF ARGUMENT

The Proponents do not dispel the single-subject defects which we and other opponents of this proposed constitutional amendment have pointed out. The Proponents abstract generalized language from inapposite or criticized decisions, but do not refute the analysis in our initial brief, nor show why the authorities we cited are not dispositive here. They do not overcome the fact that this proposed ballot initiative forces an impermissible logrolling choice between restriction of government power and limitation of private freedom of contract. They offer no rebuttal to the point that this initiative restricts existing fundamental rights of individuals granted under the "Privacy

Amendment" to the Florida Constitution and under its collective bargaining provision. They offer no persuasive rebuttal of the point that this initiative impermissibly alters the functions of more than one branch of government, the functions of both state and local government, and simultaneously alters individual rights, in contravention of pertinent decisions under Article XI, § 3, Florida Constitution.

The Proponents also fail to surmount the flaws apparent in the ballot summary. They assert that the summary contains more information than the proposed amendment's text, but neglect to deal at all with the point that the summary actually misinforms in several material respects. The summary asserts that the proposed amendment establishes, as if for the first time, privacy rights in the choice of medical providers, and that it grants those rights only to "citizens." In fact, freedom from governmental intrusion in the selection of one's medical providers is already guaranteed by Article I, § 23, Florida Constitution; and the proposed amendment would restrict individual freedom of choice in that domain. Moreover, the proposed amendment applies to "natural persons," a much broader group than the "citizens" which the ballot summary acknowledges. Nor do the Proponents explain why the ballot summary is not defective for completely failing to mention the effects which this ballot initiative would have on an individual's existing

privacy rights, or on collective bargaining rights already granted by the Constitution.

The Proponents also rely upon dissimilar constitutional and legislative concepts which do not apply in evaluating whether this ballot initiative meets the more stringent requirements imposed by Article XI, § 3, Florida Constitution. The Proponents offer no persuasive reasoning justifying a declaration that this ballot initiative meets the requirements of Article XI, § 3, Florida Constitution or of § 101.161, Florida Statutes (1995).

ARGUMENT

I. THE PROPOSED AMENDMENT VIOLATES ARTICLE XI, § 3, FLORIDA CONSTITUTION

We demonstrated in our initial brief that this ballot initiative would place a quintessential logrolling choice before the voters because it combines two distinct propositions (restricting governmental power to limit provider choice and restricting private freedom to contract for such limits on choice) into one all-or-nothing choice. Initial Brief of Floridians for Quality Patient Care, et al., pp. 23-24. We demonstrated in our initial brief that this ballot initiative would impinge upon more than one governmental function, in a manner contrary to the holdings of Fine v. Firestone, 448 So. 2d 984, 988-94 (Fla. 1984); Evans v. Firestone, 457 So. 2d 1351, 1353-54 (Fla. 1984); In re Advisory Opinion to the Attornev General - Restricts Laws Related to Discrimination, 632 So. 2d

1018 (Fla. 1994); Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486 (Fla. 1994). Initial Brief of Floridians for Quality Patient Care, et al., pp.24-26.

The Proponents do not address these points or attempt to distinguish those cases at all. Instead they rely upon language abstracted from inapposite or questioned decisions to support their thesis that the ballot initiative passes single-subject muster.

The Proponents rely on Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978), as justification for their claim of single-subject validity. However, the Court receded from the analysis of that case in Fine v. Firestone, 448 So. 2d 984, 988-994 (Fla. 1984).

The Proponents rely on Weber v. Smathers, 338 So.2d 819 (Fla. 1976)(considering the proposed "sunshine amendment"). The proposed amendment in that case dealt only with restrictions upon and disclosure requirements for public officers and employees. Unlike the ballot initiative at issue here, the "sunshine amendment" did not combine restrictions on wholly private freedom of action with disparate restrictions on the power of government, and entrenched upon no then-existing fundamental constitutional rights of individuals. The same is true of Advisory Opinion to the Attorney General re Limited Political Terms in Certain

Elective Offices, 592 So.2d 225 (Fla. 1991), on which the Proponents also rely.

Likewise, the Proponents' reliance on In re Advisory Opinion to the Attorney General English -- The Official Language of Florida, 520 So.2d 11 (Fla. 1988) ("Advisory Opinion--English"), is misplaced. The proposed amendment in that case dealt on its face with but one limited subject: making English Florida's official language. The proposal would have authorized broad implementing legislative power, but, as the Court noted, there was no overbreadth of subject matter by force of the amendment itself in that case, which is the test under Article XI, § 3. Advisory Opinion--English, at 12-13. Those are not the facts here. As we showed in our initial brief, by its own force this ballot proposal would place far-ranging restrictions on both governmental power and private freedoms, and would restrict fundamental constitutional rights already possessed by Floridians.

Nor do Advisory Opinion to the Attorney General re Limited Casinos, 644 So.2d 71 (Fla. 1994), and Advisory Opinion to the Attorney General re Florida Locally Approved Gaming, 656 So.2d 1259 (Fla. 1995), aid the Proponents. The proposed amendments in those cases dealt only with the subject of authorizing casino gambling, and the incidentals of regulating and taxing it. They did not, as this ballot initiative does, "combine subjects which

are dissimilar so as to require voters to accept one proposition they might not support in order to vote for one they favor." Advisory Opinion to the Attorney General re Limited Casinos, at 73. Nor did the proposals at issue in those cases impinge upon other fundamental constitutional rights of their own force. This proposal does.

Advisory Opinion to the Attorney General -- Limited Marine Net Fishing, 620 So.2d 997 (Fla. 1993), is likewise not on point. The constitutional proposal in that case did not mix a restriction on governmental regulatory power with a restriction on private choice, as this ballot initiative does. In this connection, we note that the Proponents err in footnote 3, at page 16 of the Proponents' initial brief. The Proponents assert in that footnote that the proposed amendment "primarily focus[es] on the limitation of private conduct." They therefore argue that their proposal is analogous to the net ban proposal, which limited itself to restricting private conduct. The Proponents overlook the fact, however, that their proposal would limit governmental power, as well as private volition. For that reason alone, their proposal is wholly different from the net ban proposal which was found to meet single-subject requirements. Moreover, the net ban proposal, as was true of the proposals considered in the other cases which the Proponents cite, impinged

on no fundamental constitutional rights. The Proponents' proposed amendment does so.

Just as the Proponents mistakenly rely on inapplicable decisions, they likewise argue statutory and constitutional analogies which are not pertinent to Article XI, § 3 analysis. The Proponents assert that their proposal embraces but one subject, within the meaning of Article XI, § 3, because its language tracks the language employed by the legislature in § 440.13(3)(j), Florida Statutes (1995) pertaining to pharmacy selection by workers compensation claimants. Initial Brief of Floridians for Health Care Choice, pp. 15-16. In making that argument, the Proponents forget that Article XI, § 3's fundamental purpose is to restrict the latitude given to citizens in amending the Florida Constitution by initiative measures. Unlike legislation, which may be easily repealed or refined if it proves unwise or unworkable, and which is tempered by debate and collegial deliberation, initiative amendments imbed provisions in our Constitution which are not subjected to such deliberative scrutiny, and which are difficult to repeal or amend once ensconced. Therefore, merely because a particular formulation may be appropriate in a legislative act does not make it a suitable ballot initiative under the more rigorous scrutiny required by Article XI, § 3.

Similarly, the Proponents incorrectly attempt to liken their proposal to the "Right to Work" provision of Article I, § 6, Florida Constitution. Article I, § 6 was not placed in the Florida Constitution by means of ballot initiative, and therefore was not subject to the strictures of Article XI, § 3. The proposal at bar is subject to those strictures, however; and it fails completely to pass muster.

II. THE BALLOT S-Y IS DEFECTIVE

The Proponents concede that the summary must **be** accurate and not misleading. They wholly fail, however, to rebut the points raised in our initial brief showing that this ballot summary is misleading in several critical respects: it uses the term "citizens," while the text employs the much broader term "natural persons"; it asserts that the proposed amendment "establishes" the right to choose health care providers, when that right is already guaranteed by Florida's "Privacy Amendment" and when the proposed amendment would actually restrict citizens' freedom of choice in that area; and it fails to advise that the amendment would have those effects and would impinge on citizens' collective bargaining rights, presently guaranteed by the Florida Constitution. The ballot summary is defective by the lights of cases such as Advisory Opinion to the Attornev General re Casino Authorization, Taxation and Regulation, 656 So. 2d 466 (Fla. 1995) ; Advisorv Opinion to the Attornev General re: Stop Earlv

Release of Prisoners, 642 So. 2d 724 (Fla. 1994); Askew v. Firestone, 421 So. 2d 151 (Fla.1982); and Evans v. Firestone, 457 so. 2d 1351, 1354-55 (Fla. 1984). The Proponents do not distinguish those authorities nor offer any explanation why those authorities do not compel the conclusion that this ballot summary likewise misleads.

CONCLUSION

For the foregoing reasons and for the reasons stated in our initial brief, we urge the Court to find that this proposed amendment should not be placed before the voters because it is not in compliance with Article XI, § 3, Florida Constitution, nor with § 101.161, Florida Statutes.

Respectfully submitted this 25TH day of August, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **THE HONORABLE ROBERT A. BUTTERWORTH,** Florida Attorney General, The Capitol, Tallahassee, Florida 32399-1050; **SANDRA B. MORTHAM,** Secretary of State, The Capitol, Tallahassee, Florida 32399-0250; **FREDERICK B. KARL, CHRISTOPHER L. GRIFFIN** and **PAMELA K. COTHRAN,** Annis, Mitchell, Cockey, Edwards & Roehn, P.A., Post Office Box 3433, Tampa, Florida 33601; **PAUL WATSON LAMBERT,** Attorney at Law, 1114 East Park Avenue, Tallahassee, Florida 32301; **JAMES C. MASSIE** and **JANICE G. SCOTT,** Massie & Scott, Post Office Box 10371, Tallahassee, Florida 32302; **RANDY D. ELLISON, ESQ.,** 1645 Palm Beach Lakes Blvd., **Suite** 350, West Palm Beach, Florida 33401-2289; **LOUIS F. HUBENER, III, ESQ.,** and **PETER ANTONACCI, ESQ.,** Office of the Attorney General, Dept. of Legal Affairs, PL-01, The Capitol, Tallahassee, Florida 32399-1050; **BARNEY T. BISHOP, III,** President, The Windsor Group Consultants, 501 E. Tennessee St., Suite A, Tallahassee, Florida 32308-4906; **THOMAS J. MAIDA, ESQ.,** and **AUSTIN B.** NEAL, **ESQ.,** P.O. Drawer 229, Tallahassee, Florida 32302-0229; **ARTHUR J. ENGLAND, JR., ESQ.,** 1221 Brickell Avenue, Miami, Florida 33131-3260; **JEROLD I. BUDNEY, ESQ.,** One Herald Plaza, Miami, Florida 33132-1609.

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