OA 10-6.97

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL

CASE NO. 90,160

RE: RIGHT OF CITIZENS TO
CHOOSE HEALTH CARE
PROVIDERS

BRIEF IN OPPOSITION TO THE PROPOSED CONSTITUTIONAL AMENDMENT

ON BEHALF OF THE FLORIDA WORKERS' COMPENSATION

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STATEMENT OF THE CASE

This amicus curiae brief is filed pursuant to the Interlocutory Order ("the Order") entered by this Court on Monday, March 24, 1997, in the matter styled "Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers," The Order arises from a petition filed by Florida's Attorney General on March 21, 1997, requesting the Court's opinion whether the constitutional amendment contained in the citizens' initiative petition called "Right of Citizens to Choose Health Care Providers" complies with Article XI, Section 3 of the Florida Constitution and whether the proposed ballot title and summary comply with Section 101.161, Florida Statutes.

This brief is filed on behalf of the Florida Workers' Compensation Joint Underwriting Association, Inc. (the "JUA"), a statutorily created joint underwriting association formed on January 1, 1994 to provide workers' compensation insurance to Florida employers who are entitled to, but unable to obtain, such coverage. The JUA, through its servicing carrier, has implemented workers' compensation managed care as required by Section 440.134, Florida Statutes. Additionally, the JUA's viability is affected by shifts in the workers' compensation industry, which has moved substantially toward managed medical care since 1994. Accordingly, any constitutional amendment or other measure threatening to impact managed medical care substantially affects the interests of the JUA.

The JUA asserts that the constitutional initiative at issue is invalid because it violates the single-subject rule of Article XI, Section 3 of the Florida Constitution and because it fails to satisfy the ballot title and summary requirements embodied in Section 10 1.161, Florida Statutes.

SUMMARY OF THE ARGUMENT

The constitutional amendment initiative known as "Right of Citizens to Choose Health Care Providers" should be invalidated and not permitted to appear on the ballot because the amendment violates the single-subject rule of Article XI, Section 3 of the Florida Constitution and because the ballot title and summary fail to apprise the voters of the true meaning and ramifications of the amendment as required by Section 10 1.16 1, Florida Statutes. As a member of Florida's workers' compensation insurance industry, an industry which now heavily utilizes managed medical care, the JUA's interests are substantially affected by any significant policy change relating to such managed care, The JUA opposes the initiative at bar, not only because it violates the Florida Constitution, but because it threatens without adequate notice to the public to emasculate the workers' compensation managed care mandated by Section 440.134, Florida Statutes, which the JUA believes has played a substantial role in controlling workers' compensation costs and premiums since its implementation.

As interpreted by this Court, Article XI, Section 3 of the Florida Constitution requires that a citizens' initiative amendment must reflect a logical and natural oneness of purpose. In determining whether an initiative satisfies this "single-subject" rule, the Court is to consider whether the proposal affects more than one function of government; the manner in which it affects other provisions of the Constitution; and the extent to which it combines different subjects to achieve a "logrolling" affect.

The initiative at bar affects many different functions of state and local government. If adopted, the amendment would affect the rights of all natural persons in the state, limit the power of state and local governmental bodies, encroach upon the regulatory and rule-making authority of the legislative and executive branches of government, and affect the constitutionally protected rights

of public and private employees and employers to bargain collectively. Additionally, the initiative affects several varied and unrelated provisions of the Florida Constitution, and does not adequately contemplate those affects. The initiative affects privacy rights with regard to medical care, rights to contract, and rights to collectively bargain, among others. None of these collateral constitutional affects are contemplated or accounted for in the proposed amendment. Finally, the initiative combines two incongruous subjects, i.e. regulation of private contracting and restriction of powers of state and local government, The proposed amendment provides that the right to choose one's health care provider may not be denied by law or contract. In doing so, the amendment embraces not only all of the different types of state regulation of medical care and medical managed care, but also embraces the rights of private citizens and employers to negotiate among themselves and with health care providers for the most cost-effective medical care. Without more, this dual nature of the amendment would dictate its invalidation.

However, even if the initiative were found to meet the single-subject requirement, its ballot title and summary would dictate that this Court strike it from the ballot. Section 101.161, Florida Statutes, as interpreted by this Court, requires that the ballot and summary "advise the electorate of the true meaning and ramifications of the amendment, and in particular, be accurate and informative." An appropriate ballot summary states the true import of the amendment, and does not attempt to "fly false colors" over the amendment to deceive the electorate. A ballot summary does not meet statutory requirements where it uses terms inconsistent with those in the amendment; where it deceives the reader by implying that the amendment is necessary to confer a right that already exists or to prohibit an activity that is already prohibited; or where it fails to disclose its affect upon other provisions of the constitution. The initiative at bar fails on all three counts.

The ballot summary uses terms inconsistent with those contained in the amendment. Most importantly, the summary implies that only private interests are affected by the amendment, and contains no reference to the restrictions upon government which are obviously imposed by the amendment. This Court has specifically held that failing to disclose the impact of an amendment upon governmental entities is a serious deficiency in a ballot summary and invalidates the initiative as a whole. Moreover, in light of the potentially broad impact of the amendment upon governmental entities and operations, the risk of having the electorate approve such an amendment without knowing its true import is great indeed.

Additionally, the ballot title and summary imply that the amendment confers a new right upon Floridians when, in fact, the right to choose one's provider already exists under Florida law. The proposed amendment does not broaden one's right to choose a provider, but rather limits the manner in which one may contract for care. This Court has specifically held that a ballot title and summary that implies that an amendment does something it does not invalidates the underlying initiative.

Finally, the ballot summary fails to meet the requirements of Section 101.161, Florida Statutes, as interpreted by this Court, because it fails to disclose the collateral constitutional affects of the amendment. While the constitution no longer requires that amendments affect only one constitutional section, a summary must at least identify or contemplate the collateral affects. The effects of this amendment upon established privacy rights, rights to collectively bargain, and other constitutional provisions are significant, and are not disclosed in the ballot summary.

ARGUMENT

1. THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT RULE OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION

Article XI, Section 3 of the Florida Constitution provides, in pertinent part:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but e sn bjubj and matter directly connected therewith.

This Court has interpreted the final clause of Section 3 to require that the proposed amendment reflect a "logical and natural oneness of purpose." Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984). In determining whether such "oneness of purpose" exists, the Court must consider (1) whether the proposal affects separate functions of government and (2) how the proposal affects other provisions of the constitution. Id. The restriction of constitutional initiatives to a single subject is important because amendments proposed by initiative lack the benefit of a filtering legislative process, or the opportunity for a public hearing, debate and input on the issues which are present with regard to the three other methods of constitutional amendment. Id. at 988.

A. THE INITIATIVE AT BAR VIOLATES THE SINGLE-SUBJECT REQUIREMENT BECAUSE IT ALTERS SEPARATE FUNCTIONS OF GOVERNMENT

While a constitutional initiative no longer need address only one section of the constitution, it must not alter or perform multiple functions of government. In re Opinion to the Attorney General- Save Our Everglades, 636 So.2d 1336, 1340 (Fla. 1994). In Fine v. Firestone, the Court wrote that Article XI, Section 3, as it currently exists, is meant "to place a functional as opposed to a locational restraint on the range of authorized amendments," Id. at 990. The Court concluded that the initiative in Fine v. Firestone included three distinct functions of government, which the Court

equated to three distinct subjects: it limited the way governments could tax; it limited what user-paid-for services governments could provide; and it changed how governments could finance capital improvements. Id. at 990-992. The contention that the amendment dealt with a single subject - revenue - was not sufficient to overcome the existence in fact of many different subjects. This Court has warned that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." Evans v. Firestone, 457 So. 2d 135 1, 1353 (Fla. 1984).

In In re Advisory Opinion to the Attorney General-Restricts Laws Relating to Discrimination, 632 So. 2d 1018 (Fla. 1994), this Court invalidated a proposed constitutional amendment in part because it impacted many of the same interests implicated by the amendment at bar. The initiative in Advisory Opinion - Discrimination would have restricted the ability of state and local governments to enact laws regarding discrimination except against certain enumerated classes of people. Id. at 1019. The Court found that the initiative violated the single-subject rule because the amendment was "an expansive generality that encompass[ed] both civil rights and the power of all state and local governmental bodies;" because it encroached upon the rule-making authority of both executive agencies and the judiciary; because it modified the constitutional rights available to all natural persons; and because it dealt with the rights of employees to bargain collectively. Id. at 1020.

Similarly, the proposed constitutional amendment at bar would reach the rights of all natural persons in the state, limit the power of state and local governmental bodies, encroach upon the regulatory and rule making authority of the legislative and executive branches of government, and affect Floridians' constitutionally protected rights to bargain collectively. The sweeping generality of the current initiative encompasses all of the purposes, effects, and collateral consequences found

in the initiative in Advisory Oainion-Discrimination.

In order to understand the effects of the proposed amendment at issue, one must understand the general framework of managed care against which it is directed. The savings achieved from managed care result primarily from the ability of a managed care organization to exercise a degree of control over its providers. See The Managed Health Care Handbook, by Peter R. Kongstvedt, MD, Aspen Publications, 1993, at p. 91.[1] Without the ability to sanction providers, which in common sense must include the ultimate sanction of termination, a managed care plan cannot realize savings for the insured or third party payor.

The proposed amendment affects the rights of all natural persons to enter into contracts which would restrict their choice of providers. Thus, private persons would no longer be permitted to contract with closed-panel type HMOs or other managed care organizations in order to achieve

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'Kongstvedt, who at the time of publication was an executive vice president for Blue Cross and Blue Shield of the National Capital Area, Washington, D.C., wrote: "The practice behavior of physicians in a managed health care plan is the most important element in controlling cost and quality," Kongstvedt went on to write:

> Changing physician behavior is crucial to the success of any managed care plan. Physicians are unique with their strong need for autonomy and control, potential for role conflicts, uneven understanding of the economics or insurance functions of managed care, and ingrained practice habits. . . When reasonable efforts to get a physician to change are unsuccessful and the problems are serious, discipline and sanctions must be applied, Due process must be followed before termination for poor quality, and it may be useful in other settings as well. In the final analysis, it is the plan's responsibility to effect changes in provider behavior that will benefit all the parties concerned and to take action when necessary.

Id. at 91. See also Fred J. Hellinger, &y-Willing-Provider and Freedom of Choice Laws, 14 Health Affairs 297, 300-301 (cost savings only realized if managed care systems able to exclude inefficient providers).

cost savings. Proponents of the initiative would argue that such arrangements and organizations could exist, but as stated above, without restrictions upon providers, no managed care plan can succeed.

In addition, the power of the state to require managed care in certain settings will be taken away. The state will not be able to contract with managed care organizations to provide care for the indigent or the elderly in order to efficiently spend tax dollars. The state will be unable to implement managed care even where its inability to do so could result in a loss of federal funding, such as with mandated managed care for Medicaid recipients. Nor will state or local governments be permitted to utilize managed care to reduce health care costs for their own employees, for wards of the state, for resident aliens, or for any other group of people. The state's ability to mandate managed care in the workers' compensation context will be destroyed, opening the gate to higher workers' compensation costs and ultimately discouraging insurers from writing as much insurance in Florida as they would otherwise have written.

Finally, the amendment will affect the zealously protected right to bargain collectively regarding one's terms of employment. If the amendment becomes law, no longer could medical care, which represents such a substantial portion of an employer's benefit expense, be provided through managed care organizations ***even pursuant to a collective bargaining agreement.***

B. THE INITIATIVE AT BAR VIOLATES THE SINGLE-SUBJECT REQUIREMENT BECAUSE IT DOES NOT IDENTIFY THE NUMEROUS CONSTITUTIONAL PROVISIONS IT AFFECTS

A constitutional amendment initiative may amend multiple sections of the constitution, provided that it addresses but a single subject. Fine v. Firestone, 448 So. 2d 984,989 (Fla. 1984). However, the initiative proposal "should identify the articles or sections of the constitution

substantially affected by the proposal," Id. Such identification is necessary "for the public to be able to comprehend the contemplated changes in the constitution and to avoid leaving to [the] Court the responsibility for interpreting the initiative proposal to determine what sections and articles are substantially affected , . ." Id. Moreover, this Court has expressly held that "how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal." Id. at 990.

The initiative in Fine v. Firestone was a limitation on revenue, including taxes, sale of bonds, receipts of agencies and instrumentalities, and income of proprietary and trust funds. Id. at 986. The Court found the Fine initiative violated the single-subject rule in part because it affected numerous provisions of the constitution relating to specific taxes, public trust funds, and government bonds. Id. at 990-992. The amendment was not invalid because it affected multiple sections of the constitution, but because it made sweeping and diverse constitutional changes, and without notice to the electorate voting upon those changes.

The amendment at bar impacts several constitutional provisions. While that alone is not dispositive of the single-subject issue, it is a factor to be considered. Fine, id. at 990. The constitutional provisions impacted are broad and varied, and extend from the most fundamental rights of privacy to the right of collective bargaining. The sweeping constitutional changes to be effected by the proposed amendment are too varied to comply with the single-subject requirement.[2]

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[2]In In re Advisory Opinion to the Attorney General - Save Our Everglades, 636 So.2d 1336, 1339 (Fla. 1994), this Court cautioned that the single subject rule "is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change," The intent of the rule is to protect against "multiple precipitous changes" in the Constitution. Fine, id. at 988.

C. THE INITIATIVE AT BAR VIOLATES THE SINGLE-SUBJECT REQUIREMENT BECAUSE IT COMBINES NUMEROUS SUBJECTS, RENDERING IT IMPOSSIBLE FOR VOTERS TO VOTE FOR ONE WITHOUT APPROVING THE OTHERS AS WELL

A principal purpose of the single-subject requirement is to prevent voters from being forced to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support. Fine v. Firestone, 448 So. 2d 984,988 (Fla. 1984). This type of constitutional "logrolling" has consistently been discouraged by the Court. Id. at 988. Thus, "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." Evans, v. Firestone, 457 So. 2d 1351 (Fla. 1984).

The initiative at bar contains two principal subjects which cannot be contained within one constitutional amendment. Specifically, the amendment provides that "[t]he right of every natural person to the free, full and absolute choice in the selection of health care providers, licensed in accordance with state law, shall not be denied or limited *by law or contract*. The incorporation of this one phrase, without more, would be sufficient to render the proposal invalid under this Court's interpretation of the single-subject requirement. By just these four words, supporters of the initiative intend the amendment to make sweeping changes in the manner in which the state and all statewide and local governmental entities operate and regulate with regard to health care **and** make similarly broad changes to the manner in which private employers, health care entities, and citizens can provide and obtain health care.

II. THE BALLOT TITLE AND SUMMARY VIOLATE SECTION 101.161, FLORIDA STATUTES, BY MISLEADING THE VOTERS AS TO THE TRUE PURPOSE AND EFFECT OF THE AMENDMENT

Section 101.161, Florida Statutes, requires that whenever a constitutional amendment is submitted to a vote of the people, the resolution must contain (1) a ballot title, consisting of the name

by which the measure is commonly referred to or spoken of and (2) a ballot summary, explaining in clear and unambiguous language the chief purpose of the amendment. § 10 1.16 1, Fla. Stat. (1995). The ballot title and summary must "advise the electorate of the true meaning and ramifications of the amendment, and in particular, must be accurate and informative." Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486,495 (Fla. 1994).

This Court has recognized that "the proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation." Crawford v. Gilchrist, 64 Fla. 41, 54, 59 So.2d 963 (1912) (as quoted in Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982)). Consequently, voters asked to approve constitutional amendments "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976). In Advisory Opinion - Discrimination, this Court explained that "[a]lthough we [the Court] are wary of interfering with the public's right to vote on an initiative proposal, we are equally cautious of approving the validity of a ballot summary that is not clearly understandable." Id. at 102 1 . Thus, in determining whether the ballot title and summary at issue here are sufficient, the Court should apply a very strict scrutiny.[3]

A. THE BALLOT SUMMARY DOES NOT ACCURATELY DESCRIBE THE SCOPE OF THE AMENDMENT BECAUSE IT USES TERMS THAT ARE INCONSISTENT WITH THOSE IN THE AMENDMENT

A ballot summary that uses terms which are inconsistent with those contained in the

[3]In Smith v. American Airlines, 606 So.2d 6 18, 62 1 (Fla. 1992) this Court reminded us that proponents of an amendment bear the burden of adequately informing the public about a proposed amendment; a burden which must be borne in the ballot title and summary. Availability of information in the public domain is of no consequence. Accord, Wadhams v. Board of County Commissioners of Sarasota County, 567 So.2d 414,417 (Fla. 1990).

amendment is invalid. Advisory Opinion of the Attorney General e Casino Authorization, Taxati and Regulation, 656 So. 2d 466 (Fla. 1995). In Advisory Opinion re Casinos, the ballot summary indicated that the amendment would allow local voters to authorize casinos on river boats and at hotels, among other locations and facilities. Id. at 467, However, the amendment itself would have allowed local voters to authorize casinos in transient lodging establishments, a term found by the Court to be broader than the term hotels. Furthermore, the amendment would have permitted casinos on board stationary and nonstationary river boats and vessels, which could permit landlocked casinos as long as the facility could be characterized or designed as a river boat. Because the amendment itself contained terms which broadened its applicability beyond what the terms in the ballot summary would have described to voters, the amendment was found to be invalid. Id. at 468-469.

With regard to the proposed amendment at bar, several terms are included in the ballot summary which differ either in fact or in probable perception from those in the amendment itself. First, and most important, neither the title nor the summary indicate that the amendment will impose restrictions upon ***the State's*** ability to manage health care costs by utilizing HMOs and similar entities to provide care to indigents, the elderly, and others, The ballot summary states only that: "This provision prevents insurance companies, managed care personnel, employers, and other such third parties from controlling a citizen's selection of health care providers . . ." In contrast, the amendment provides that: "The right of every natural person to the free, full and absolute choice in the selection of health care providers, licensed in accordance with state law, shall not be denied or limited *by* ***law*** or contract." The amendment clearly restricts governmental action, a restriction not warned of in the ballot summary.

Proponents of the amendment might argue that the ballot summary's inclusion of the catch-

all phrase "and other such third parties" could include the government. However, the listing preceding the catch-all phrase is limited to non-public entities, and the language "other ***such*** third parties" indicates that those third parties are similar entities. The amendment restricts the acts of government just as plainly as the acts of private entities. However, in "selling" the amendment to the voters, the ballot summary gives a laundry list of those affected, but leaves out perhaps the most important interest impacted by the amendment.

Failing to disclose the impact upon governmental entities is a serious deficiency in a ballot summary and thus in an initiative as a whole, In In Re Advisory Opinion - Discrimination, this Court wrote:

> The summary also fails to state that the proposed amendment would curtail the authority of governmental entities. Instead, the summary merely states that the proposed amendment "restricts laws related to discrimination," Thus, a voter might conclude from the summary that the amendment would restrict existing laws when in fact the amendment would restrict the power of governmental entities to enact or adopt any law in the future that protects a group from discrimination, if that group is not mentioned in the summary, The omission of such material information is misleading and precludes voters from being able to cast their ballots intelligently. We cannot approve an ambiguity that will in all probability confuse the voters who are responsible for deciding whether the amendment should be included in the state constitution.

Id. at 1021. Surely the difference between the language in the ballot summary and that in the amendment described in the quote were less pronounced than those existing between the ballot summary and the amendment under consideration here. Notwithstanding, the Court placed such importance upon adequately warning voters of the impact an amendment will have upon the government's ability to govern, that it found even a subtle difference troubling.

The impact of prohibiting Florida's government from controlling medical costs by mandating

managed care is significant. As an example, one can easily envision circumstances in which federal funding could be restricted because of a state's refusal to shift Medicaid recipients into effective managed care systems. In that event, federal funding could be lost due to a restriction on governmental power added to the constitution *without the voters ever having known they voted for it.* In Advisory Opinion - Discrimination, Justice Kogan recognized in his concurring opinion that one consequence of the amendment in that case not adequately explained to the people was a possible loss of federal revenue resulting from a violation of federal fair housing guidelines. Id. at 1022. Citing Florida League of Cities v. Smith, 607 So. 2d 397,399 (Fla, 1992), Justice Kogan went on to note that "case law already has established that serious undisclosed collateral effects of an initiative can be reason enough to remove it from the ballot." Id. at 1023.

Another example of such inconsistent terms can be seen in the ballot summary's implication that it will confer a right upon *citizens* to choose their health care providers. However, the amendment itself refers to "natural persons," not citizens. The ballot title and summary incorrectly imply that the amendment's benefits will extend only to citizens. However, a literal interpretation of the amendment itself would extend the right to choose one's health care provider to those who are not citizens, including aliens temporarily or permanently residing in Florida. More specifically, while the ballot title and summary would lead one to believe that the state could continue to utilize managed care to control the cost of care provided to indigent aliens or other non-citizens, the amendment does not in fact provide for that exception.

B. THE BALLOT SUMMARY VIOLATES SECTION 101.161 BY IMPLYING THAT THE AMENDMENT IS REQUIRED TO CONFER UPON FLORIDIANS A RIGHT THAT THEY ALREADY HAVE

The ballot title at issue indicates that the amendment "establishes the right of citizens to

choose health care providers," By implication, the title represents that Floridians currently have no right to choose their physicians, which, of course, is not the case. Notwithstanding managed care, Floridians have the right to seek health care from any provider they choose. Indeed, managed health care affects only whether a third party will undertake to pay for one's medical service, not a citizen's right to determine from whom he or she will obtain treatment.

In Advisory Opinion to the Attorney General re Casino Authorization. Taxation and Regulation, 656 So. 2d 466, 469 (Fla. 1995), this Court invalidated a proposed constitutional amendment based in part upon the Court's conclusion that the ballot summary misled the reader in suggesting that the amendment was required to prohibit casino gambling, when in fact, casino gambling was already largely prohibited. In that case, the first line of the summary read: "This amendment prohibits casinos unless approved by the voters . . ." The summary thus created the false impression that casinos were at that time allowed in Florida. Id. at 469.

Similarly, in Askew v. Firestone, 421 So. 2d 15 1 (Fla. 1982), this Court found that by omitting the current state of facts relating to an issue, a ballot summary describing the effect of an amendment was misleading and invalid. The amendment in Askew would have prohibited former statewide offers and legislators from lobbying in front of any governmental body or agency for two years after leaving office, unless they filed financial disclosures required of candidates and incumbents. Id. at 153. The ballot title and summary fairly characterized the content of the amendment. However, the amendment also removed an existing absolute restriction against former legislators lobbying in the legislature and against former statewide officers lobbying the agencies with which they were employed for two years after leaving employment, Thus, the purpose and effect of the amendment were concealed because the summary implied only a strengthening of the

law against influence peddling by public officials, when the amendment arguably weakened that law. Id. at 155-156. The Court concluded that "[a] proposed amendment cannot fly under false colors; this one does." Id. at 156,

Again, in Advisory Opinion to the Attorney General Re Tax Limitation, 644 So.2d 486 (Fla. 1994), this Court found that the ballot title and summary for an initiative requiring voter approval of new taxes had to be stricken because it mislead the reader by implication, Specifically, the ballot title read "Voter Approval of New Taxes: Should New Taxes Require Voter Approval in this State?" Id. at 492. The first line of the summary provided: "This provision requires voter approval of new taxes enacted in this State." Id. The Court found the title and summary to be misleading because they implied that no cap or limitation on taxes existed in the constitution at that time when, in fact, such limitations already existed for certain taxes. Id. at 494."

Floridians already have the right to choose their medical providers, at least to make such choices free from governmental intrusion. This Court has consistently held that Article I, Section 23 of the Florida Constitution extends to all choices regarding medical care. See In re Guardianship

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[4]In In re Advisory Opinion to the [redacted] General - Save Our Everglades, 636 So.2d 1336 (Fla. 1994), this Court again condemned a misleading title because it pointed to a danger that did not exist. The Court found the title to be misleading because it implied a serious and imminent danger to the Everglades, a danger not reflected in the ballot summary or the amendment itself. The Court wrote:

> The title of the present initiative - "Save Our Everglades" - is misleading. It implies that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be "saved" via the proposed amendment. . . A voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment.

Id. at 1341.

of Browning;, 568 So. 2d 4, 10 (Fla. 1990) ("an integral component of self-determination is the right to make choices pertaining to one's health , . . . Recognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses all medical choices"); Harrell v. St. Marv's Hospital. Inc., 678 So, 2d 455, 456-457 (Fla. 4th DCA 1996). The state may only intrude into the medical decisions of an individual where a compelling state interest exists, and the intrusion must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." Guardianshin of Rrowning, id. at 13-14. In light of the foregoing, how can the implied statement in the ballot summary and title that no right to choose providers currently exists be anything but the political rhetoric disfavored by this Court. See Advisor-v Oninion re Casinos, supra.

The purpose and effect of the amendment at issue here is to undermine medical managed care and to return to fee-for-service medicine. Its principal achievement will be to relieve physicians of any obligation to account to an insurer, employer, or other third party payor for over-utilization or improper treatment of individuals, If the amendment becomes a part of the constitution, Floridians will not be granted a freedom to contract currently lacking, but will be deprived of an existing freedom to choose the type of medical care they desire, Additionally, the amendment will deprive them of the right to achieve cost-savings by contracting with managed care organizations which control costs by regulating the physicians participating therein. By failing to accurately characterize the current state of the law with regard to physician choice, supporters of the proposed amendment commit the errors cited by this Court in Askew and Advisory Opinion re Casinos, and consequently, the proposal here is invalid as well.

Statements implying that a proposed amendment prohibits an activity that is in fact already

prohibited, or confers a right that in fact already exists, are not only violative of Section 101.161, Florida Statutes, because they are misleading, but also because they are the type of political rhetoric which has been condemned by the Court. In Advisory Opinion Re Casinos, the Court found that language implying that an amendment eradicated the nonexistent evil of casino gambling was political rhetoric of a kind not appropriate for inclusion on a ballot. See also In Re Advisory Opinion to the Attorney General - Save Our Everglades, 636 So. 2d 1336, 1342 (Fla. 1994) (holding that ballot title and summary misled voters by implying peril of Everglades not borne out in amendments); Wadhams v. County Commissioners of Sarasota County, 567 So.2d 414 (Fla. 1990) (holding that failing to inform public of changes being effected invalidated ballot summary).

C. THE BALLOT SUMMARY IS INVALID BECAUSE IT FAILS TO DISCLOSE THAT THE AMENDMENT WILL AFFECT OTHER SECTIONS OF THE FLORIDA CONSTITUTION

A ballot summary which does not adequately identify collateral effects such as impact upon other provisions of the constitution is insufficient, In Fine v. Firestone, this Court cautioned that:

> [a]n initiative proposal should identify the articles or sections of the constitution substantially affected. This is necessary for the public to be able to comprehend the contemplated changes in the constitution and to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal. . , We do not believe it was the intent of the authors of the initiative-amendment provision, nor the intent of the electorate in adopting it, that the Supreme Court should be placed in the position of redrafting substantial portions of the constitution by judicial construction. This, in our view, would be a dangerous precedent.

Id. at 989. The Court in Fine couched the quoted language in its argument relating to the single-subject rule, but it is equally applicable to a discussion of the adequacy of a ballot summary, since

the summary is relied upon to adequately inform voters of the effect of the amendment.

Similarly, in Advisory Opinion of the Attorney General Re Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994), this Court noted that the ballot summary with regard to the early release initiative failed to mention the collateral effect of the amendment, which was to substantially modify another section of the constitution. In Advisory Opinion re Early Release, the Court wrote:

> It is apparent from the plain language of the proposed amendment that it will substantially modify this provision of the constitution: While not expressly repealing article IV, section 8(c)[parole and probation commission], the proposed amendment essentially will eliminate the commission's primary powers and abolish parole and conditional release in the vast majority of cases. However, nothing in the ballot summary mentions this collateral consequence of the amendment.

Id. at 642.

Finally, in Advisory Opinion to the Attorney General Re Tax Limitation, the Court invalidated two proposed amendments based upon their failure to identify to voters specific provisions of the constitution hindered by the amendments. The first amendment would have required voter approval of new taxes, which would have substantially affected existing constitutional provisions relating to local taxes and numerous other provisions relating to the government's power to impose certain taxes without referendum. Id. at 491-493. The second amendment related to protection of property rights, and substantially hindered the existing constitutional mandate to protect the state's natural resources, Id. at 494-495. Both proposals were found deficient, in part because they failed to give the adequate notice required by Fine that they substantially affected numerous constitutional provisions. Id. at 494,495, n.3.

The initiative at bar likewise affects numerous provisions of the Florida Constitution, none of which are identified in the ballot title or summary. The initiative at the very least alters privacy

rights and public sector collective bargaining rights as conferred by Article I, Section 23 and Article I, Section 6 of Florida Constitution, respectively. Indeed, the current initiative calls to mind Justice Kogan's concurring opinion in Advisory Oninion - Discrimination, where he wrote:

> Whatever else may be said of the initiative process, it was ***not*** created as a means by which multiple changes can be made in state government or law. Unlike other initiatives in the past, this one is too broadly worded and has too many possible collateral effects that are not and probably could not be adequately explained to the people within existing constraints. These possible collateral effects are too diverse to meet the single subject requirement and are not mentioned in the ballot summary, even in a general sense. This initiative, in other words, tries to do much and reflects draftsmanship that has not adequately considered all the collateral effects, which could seriously disrupt other important aspects of Florida government and law. Voters relying on the initiative's text and the ballot summary would clearly be misled in this sense.

Id. at 1022. Interestingly, one of the collateral effects specifically mentioned in Justice Kogan's concurrence was the effect that the amendment would have upon statutorily protected collective bargaining rights.

III. ONE COLLATERAL EFFECT OF THE AMENDMENT NOT CONTEMPLATED BY THE AMENDMENT OR NOTED IN THE BALLOT SUMMARY IS THE DISASTROUS IMPACT THE AMENDMENT WILL HAVE UPON THE STATE'S WORKERS' COMPENSATION SYSTEM

The Florida Workers' Compensation Joint Underwriting Association is the market of last resort for employers who are unable to secure coverage in the voluntary market. The Florida Legislature authorized the formation of the FWCJUA as part of the sweeping workers' compensation reforms enacted during its November 1993 Special Session. $627.3 11.4(a), Fla. Stat. (1995). The Workers' Compensation managed care law, embodied primarily in Section 440,134, Florida Statutes, was also enacted as part of the November, 1993 reforms. Section 440.134(1)(g) defines a workers' compensation managed care arrangement as:

> an arrangement under which a provider of health care, a health care facility, a group of providers of health care, a group of providers of health care and health care facilities, an insurer that has an exclusive provider organization approved under s. 627.6472 or a health maintenance organization licensed under part 1 of chapter 641 has entered into a written agreement directly or indirectly with an insurer to provide and to manage appropriate remedial treatment, care, and attendance to injured workers in accordance with this chapter.

The purpose of the FWCJUA is to provide workers' compensation and employers' liability insurance to applicants who are required by law to maintain such coverages and who are in good faith entitled to but who are unable to purchase such coverages in the voluntary market. Id.

All insurance companies and self-insurance funds writing workers' compensation insurance in Florida are required to participate in the FWCJUA. §627.311(4)(a). The FWCJUA is directed by a Board of Governors comprised of industry members including insurers, agents and the Consumer Advocate of the Florida Department of Insurance. Id. Thus the FWCJUA, its Board, and its members, are deeply involved in and concerned about Florida's workers' compensation market.

Unlike the assigned risk plan it replaced, the FWCJUA is entirely self-funded by premiums charged to its insureds. 5627.311(4)(c). Employers assigned to Subplan "C" are issued assessable policies, meaning that they may be assessed for deficiencies occurring in Subplan "C" during a particular year. Id.[5] Thus employers who are insured through the FWCJUA likewise are affected by changes in the market which may increase workers' compensation costs.

Workers' compensation costs are positively affected by the implementation of managed medical care for injured employees. This proposition is evidenced by the Legislature's enaction of

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[5]Although employers in Subplan "C" are subject to assessments for deficiencies of the subplan in a given policy year, no assessments have been made on participating members since the FWCJUA's inception. See The Division of Workers' Compensation, 1996 Annual Report, page 43.

Section 627.09155, Florida Statutes, which required the Department of Insurance "to approve rating plans for workers' compensation that provide for premium credits not to exceed 10 percent for employers that utilize managed care arrangements as certified by the Agency for Health Care Administration, 5627.09155, Fla. Stat. (1995). In order to receive such credits, insurers were required to present actuarial proof that their workers' compensation managed care arrangements would indeed result in savings, which insurers throughout the state were able to do. See §4-189.014, Fla. Admin. Code[6]. Finally, earlier this year the Insurance Commissioner recommended an across the board decrease in workers' compensation rates of more than 10 percent in part due to the fact that since January 1, 1997, workers' compensation managed care has been mandated for all Florida employers. §440.134(2)(b)[7].

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[6]Among other things, an insurer seeking approval to offer a managed care premium credit was required to provide:

> (g) A description of the financial arrangements between the insurer and the provider network, showing any cost savings, risk assumption and risk sharing. The documentation shall clearly define the financial responsibility of all parties for all contingencies and shall include a copy of contracts entered into by the insurer. Adequate financial incentives to control utilization and costs shall be provided as substantiation for a high premium credit.
>
> (h) A description of the incentives and procedures for health care providers to encourage a rapid return to work, to minimize indemnity payments, and to assist the employer in the implementation of a return-to-work program. Significant indemnity savings derived from return-to-work activities are necessary to substantiate a high premium credit.

[7]Section 440.134(2)(b), Florida Statutes, provides:

> Effective January 1, 1997, the employer shall, subject to the limitations specified elsewhere in [Chapter 440], furnish to the employee solely through managed care arrangements such

The F WCJUA is concerned that an abrupt reversal in the movement toward managed medical care in workers' compensation will lead to a disruption in the marketplace, increased costs, diminished voluntary market competition, and growth of the residual market.[8] This concern has several bases. First, the FWCJUA, through its servicing carrier, has implemented the workers' compensation managed medical care required by Section 440.134 in an effort to control its own medical claims costs. Because the FWCJUA is forced to carry some of the worst risks, its medical claims costs, if not adequately controlled, could skyrocket, Because the FWCJUA relies upon its insureds financially, such an increase in claims costs could only be funded through higher rates or assessments against insureds.

Second, any substantial effect on the voluntary workers' compensation insurance market is felt in the FWCJUA because it must insure those employers unable to obtain coverage elsewhere. If workers' compensation managed care is outlawed by the proposed amendment, rates in the voluntary and residual market will rise, profits will fall, competition will suffer, and the FWCJUA will be forced to once again play a more significant role in the market. The Legislature's goal of depopulating the FWCJUA, as evidenced throughout Section 627.3 11(4), could not be realized.

The proposed constitutional initiative has significant, far-reaching effects on the workers'

> medically necessary remedial treatment, care and attendance for such period as the nature of the injury or the process of recovery requires. §440.134(2)(b),Fla. Stat. (1995).

The managed care premium credit applied only to the three-year period from the enactment of Section 440.134 to the January 1, 1997 deadline.

*From 1993, the last year of the old workers' compensation assigned risk plan, to 1995, the percentage of the total workers' compensation insurance market serviced by the residual market has dropped from 9.4 to 2.4 percent. This drop is attributed to increased competition in the marketplace. See The Division of Workers' Compensation. 1996 Annual Report, page 43.

compensation insurance market. Those impacts are not adequately contemplated in the amendment or the ballot summary. Perhaps more importantly, the impact is so much broader, and so much different, from the language and purported purpose of the amendment that it can scarcely be considered to be within the same subject.

CONCLUSION

For the foregoing reasons, the Board of Governors of the Florida Workers' Compensation Joint Underwriting Association, Inc., urge that the Court render its opinion that the constitutional amendment initiative entitled "Right of Citizens to Choose Health Care Providers" violates the single-subject rule of Article XI, Section 3 of the Florida Constitution and that its title and ballot summary violate Section 101.161, Florida Statutes, and consequently should not be approved to appear on the ballot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 14th day of April, 1997, to:

Honorable Robert Butterworth
Attorney General
Department of Legal Affairs
The Capitol Plaza Level 01
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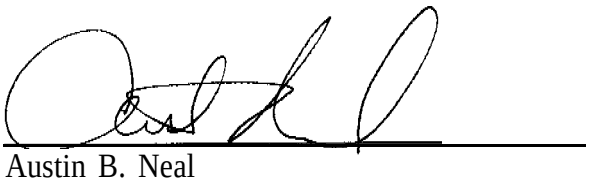

Austin B. Neal