OA 10-6-97

FILED
SID J. WHITE
APR 14 1997
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN TEE **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 OPPOBITION TO **THE PROPOSED CONSTITUTIONAL AMENDMENT**

ON **BEHALF** OF

FLORIDIANB FOR QUALITY PATIENT CARE
AMERICAN **INSURANCE** ABBOCIATION
THE FLORIDA BCHOOL BOARD ASSOCIATION
THE FLORIDA ABBOCIATION *OF* DISTRICT SCHOOL SUPERINTENDENTS
THE FLORIDA LEAGUE *OF* **CITIES**
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PRELIMINARY **STATEMENT** AND STATEMENT OF THE CASE

On February 27, 1997, the Secretary of State certified to the Attorney General that a political committee called "Floridians for Health Care Choice" had secured sufficient signatures for the citizens' initiative petition called "Right of Citizens to Choose Health Care Providers" to commence the advisory opinion process pursuant to Article IV, § 10, Florida Constitution and § 16.061, Florida Statutes. The Attorney General petitioned the Court for such an opinion on March 21, 1997. The Court entered its Interlocutory Order on March 24, 1997, permitting interested parties to file briefs on or before April 14, 1997.

This brief is filed in opposition to the initiative called "Right of Citizens to Choose Health Care Providers." It is filed 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. Floridians for Quality Patient Care is an association of self-insured businesses, associations of Florida businesses, insurers, medical provider organizations, associations of managed care providers, and associations of individuals. The American Insurance Association is a national trade association representing more than 300 companies writing property and casualty insurance in every state and jurisdiction of the United States. The Florida School Board Association is a private, voluntary association of school board members. The Florida Association of District School Superintendents is a private,

voluntary association of Superintendents of public school systems. The Florida League of Cities is a private, voluntary association of Florida municipalities. Fireman's Fund Insurance Company and Hartford Fire Insurance Company write workers compensation insurance in Florida and elsewhere. The parties on whose behalf this brief is filed have a vital interest in the subject of the initiative, and hold the view that managed health care systems are beneficial tools in pursuing the twin aims of delivering quality health care and controlling inflation in health care costs.

The parties on whose behalf this brief is submitted believe this proposed constitutional amendment is defective under Article XI, §3, Florida Constitution, and under § 101.161, Florida Statutes. They submit this brief to demonstrate that invalidity, and they ask that the Court declare that the proposed amendment violates Article XI, §3, Florida Constitution, and § 101.161, Florida Statutes.

SUMMARY OF ARGUMENT

The objective of the proposed amendment is to constitutionally ban managed health care systems, although both the text of the amendment and the ballot summary mute that intent. Managed health care necessarily requires limiting providers in the managed care system, both to make the system economically feasible and to ensure the quality of care.

This proposed constitutional amendment violates Article XI, § 3, Florida Constitution. On its face it deals with more than one subject. It not only seeks to eliminate government power to

require managed care in any context; it also seeks to prevent purely private agreements for managed care, by providing that the selection of health care providers "shall not be denied or limited by law <u>or contract</u>." In mixing a ban on governmental power to require managed health care with a ban on private contracts for managed health care, the proposal embodies the very sort of logrolling which the Florida Constitution forbids in citizen initiatives.

Moreover, the proposal acts upon and interferes with the functions of several branches and levels of government. It interferes with the legislative power of state government and the executive power of state government in various ways, and it interferes with the functions of local governments.

The proposal also affects more than one existing constitutional provision. It narrows the right of collective bargaining granted by Article I, § 6, Florida Constitution, eliminating managed health care as a legitimate subject of bargaining, at least as to public employees. It narrows the privacy rights of natural persons now granted by Article I, § 23, Florida Constitution. It eliminates a choice individuals now have: the right to select managed care as a means of providing themselves with affordable, quality health care. Presently, the state may not abridge individuals' decisions concerning medical care without demonstrating a compelling and overriding state interest. However, by means of the constitution itself, the proposal would ban voluntary, individual elections to choose managed medical care.

Further, the proposal has such far-reaching effects that it cannot be said to deal with but "one subject and matters directly connected therewith." It eliminates the power of the state government and local governments to implement managed care for the delivery of health care to those on Medicaid, to the indigent, to incompetent wards of the state, to injured workers under the state's workers compensation laws, and to prisoners in state and local correctional facilities. It limits the executive power of the state in approving health insurance forms and rates. It restricts the power of the state government and local governments to bargain with public employees over the terms and conditions of employment, and it purports to affect the ability of private employers to do so as well. It prevents even private individuals and voluntary groups from exercising the wholly consensual option of joining a managed care plan to control health care costs. It places the Florida Constitution squarely in conflict with federal law.

By the light of any accepted test of propriety under Article XI, § 3, this proposal therefore fails to meet the constitutional requirements to be placed on the ballot.

The ballot summary is also defective. It is affirmatively misleading, and it is misleading because of its omissions.

ARGUMENT

1. TEE AMENDMENT'S REACH IS EXTRAORDINARILY BROAD

The proposed amendment would amend Article I of the Florida Constitution as follows:

> Article I of the Constitution of the State of Florida is hereby amended to add the following:
>
> 1) "SECTION 24. Right to Select Health Care Providers. -
>
> (a) 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.
>
> (b) This section shall not be construed to limit the authority of the state to regulate health care providers to ensure the preservation of the health, safety and welfare of the public."
>
> 2) This amendment shall take effect on the date it is approved by the electorate, however, this section shall not be applied to impair the obligations of contracts existing and in force at the time this section takes effect.

The proposal would thus grant to all "natural persons" "free, full and absolute choice in the selection of health care providers."

"Natural persons" is not specially defined in the proposal. The term therefore has the broad meaning given to "natural persons" in other constitutional provisions. It includes aliens residing in Florida, legally or illegally,' and minor children. B.B. v. State,

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'Article I, § 2, Florida Constitution provides:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownershiw.

(continued...)

659 So. **2d** 256 (Fla. 1995); In re T.W., 551 so. 2d 1186 (Fla. 1989). It encompasses incompetent persons in the custody of the state and prisoners incarcerated in state facilities and local facilities. **See** Corbett v. **D'Alessandro,** 487 So. 2d 368, 370 (Fla. 2d DCA **1986),** rev. denied, 492 So. 2d 368 (Fla. 1986) (Florida Constitution's right of privacy for natural persons extends to incompetents); **Cf., McCleskey** v. **Kemp,** 481 U.S. 279, **reh'g.** denied, 482 U.S. 920 (1987) (prisoner has standing to bring equal protection challenge to death penalty on basis of racial bias),

To all these "natural persons," the proposed amendment extends in the strongest possible terms the "free, full and absolute" right to select **any** licensed health care provider under **any** circumstances, and prohibits limitations on that "free, full and absolute choice" either "by law or by contract."

The proposed amendment does not define "health care provider." The initiative process does not provide the "filtering legislative process" for the drafting of a proposed constitutional amendment, nor the "opportunity for public hearing and debate" afforded by other means of constitutional amendment. Fine v, Firestone, 448 so. 2d 984, 988 (Fla. 1984). Accordingly, contemplation of the

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[1](. ..continued)

> **inheritance, disposition and possession of** real **property by** aliens inelisible for **prohib**ens-v be reaulated or **ited** bv **law.** No person shall be deprived of any right because of race, religion or physical handicap. (Emphasis added.)

The Florida Constitution thus textually recognizes that aliens residing in the state are natural persons.

proposal's meaning requires that its terms be given commonly understood meanings, informed by existing usages of the terms which the proposal employs. That process leads to the conclusion that the phrase "health care provider" in the proposal is at least broad enough to include all professionals who must obtain a license from the state to deliver any form of health care treatment or consultation: allopathic physicians (*i.e*, M.D.'s), osteopathic physicians, physician assistants, osteopathic physician assistants, chiropractors, podiatrists, naturopathists, optometrists, opticians, registered nurses, licensed practical nurses, advanced registered nurse practitioners, advanced nurse practitioners, nurse anesthetists, nurse midwives, acupuncturists, pharmacists, dentists, dental hygienists, speech pathologists, audiologists, occupational therapists, respiratory therapists, dieticians, nutritionists, nutrition counselors, physical therapists, clinical psychologists, school psychologists, clinical social workers, marriage and family therapists, mental health counselors, and sex therapists.[2] This phrase probably also includes licensed

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[2]See Florida Statutes §§ 457.105, 458.311, 458.347, 459.0055, 459.022, 460.406, 461.006, 462.08, 463.006, 464.008, 464.009, 464.012, 465.007, 466.006, 466.007, 468.1185, 468.209, 468.211, 468.357, 468.358, 468.504, 468.509, 468.51, 484.007, 486.028, 486.041, 490.005, 490.006, 490.012, 491.003, 491.005, 491.0055, 491.006, 491.012, and 491.0143 (1995 and 1996 Supp.). See also § 408.07(28), Fla. Stat. (1995) (for purposes of Florida health care administration statutes, "health care provider" includes persons licensed under Florida Statutes Chapters 458 to 461, 463 to 466, 483, 484, 486, 490, 491, and Parts I, III, V, and X of Chapter 468); § 455.01(4), Fla. Stat. (Supp. 1996) (for purposes of rural health network statutes, "health care practitioner" includes any persons licensed under Florida Statutes Chapters 457 to 466, 474, 484, 486, 490, 491, and Parts I, III, V, and X of Chapter 468);
(continued...)

facilities for the delivery of health care services, such as acute care hospitals, specialty hospitals (including rehabilitative hospitals), birth centers, ambulatory surgical centers, health maintenance organizations, nursing homes, assisted living facilities, home health agencies, adult day care centers, hospices, adult family care homes, homes for special services, and transitional living facilities.[3]

(...continued)
§ 627.357(1)(b), Fla. Stat. (1995) (for purposes of medical malpractice self-insurance, "health care provider" includes allopathic physicians, osteopathic physicians, podiatrists, chiropractors, psychologists, optometrists, dentists, pharmacists, registered nurses, licensed practical nurses, and advanced registered nurse practitioners); § 766.1115(3) (d), Fla. Stat. (Supp. 1996)(for purposes of governmental contracts to provide health care to low-income persons, "health care provider" includes allopathic physicians, osteopathic physicians, physician assistants, osteopathic physician assistants, chiropractors, podiatrists, registered nurses, nurse midwives, licensed practical nurses, advanced registered nurse practitioners, midwives, and "any other health care professional, practitioner, provider, or facility under contract with a governmental contractor").

[3]See Florida Statutes §§ 383.304, 383.305, 395.002, 395.003, 400.021(8), 400.021(11), 400.062, 400.071, 400.404, 400.407, 400.464, 400.552, 400.554, 400.602, 400.619, 400.801, 400.805, 408.07(16), and 641.21 (1995 and Supp. 1996). See also §381.0406(2)(b), Fla. Stat. (1995) (for purposes of rural health network statutes, "health care provider" includes "any individual, group, or entity, public or private, that provides health care, including . . . in-hospital health care"); § 440.13(1)(h,i), Fla. Stat. (Supp. 1996) (for purposes of worker's compensation statutes, "health care provider" includes "health care facility," which includes hospitals licensed under chapter 395 and nursing homes and other facilities licensed under chapter 400); §§ 627.357(1)(b), Fla. Stat. (1995) and 766.105(1)(b), Fla. Stat. (Supp. 1996) (for purposes of certain medical malpractice statutes, "health care provider" includes hospitals, health maintenance organizations, ambulatory surgical centers, and other medical facilities); §766.1115(3) (d), Fla. Stat. (Supp. 1996) (defining "health care provider," for purposes of contracting with governmental entities for provision of health services to low-income recipients, to include birth centers, ambulatory surgical centers, hospitals,
(continued...)

What then are the effects of this proposed amendment? It purports to extend to all natural persons 'free, full and absolute choice" in selecting their "health care providers," and it purports to prohibit limiting or denying that 'free, full and absolute choice" either by law or by contract. Though neither the amendment's text nor its ballot summary expressly says so, the amendment's purpose is to constitutionally eradicate managed health care systems such as Health Maintenance Organizations (HMOs) and Preferred Provider Organizations (PPOs), whether authorized or mandated by law or established consensually by private parties.[4]

The essential ingredient of any viable managed health care system is limiting the number of providers who participate in the system. Managed health care arrangements cannot work economically if every licensed provider must be a part of the system. In order to reduce the cost of delivering quality health care (and the commensurate expense of health insurance), managed care systems

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(...continued)
health maintenance organizations, and any other medical facilities whose purpose is to deliver human diagnostic services or human nonsurgical medical treatment).

[4]§ 408.701(17), Florida Statutes (1995), describes the attributes of managed health care systems as follows:

> . . . . Managed-care techniques most often include one or more of the following: prior, concurrent, and retrospective review of the medical necessity and appropriateness of services or site of services; contracts with selected health care providers; financial incentives or disincentives related to the use of specific providers, services, or service sites; controlled access to and coordination of services by a case manager. . . .

must persuade providers to lower their charges for service. As in any economic system, lower charges require increased volume to realize equivalent revenue. If every licensed provider must in the future be admitted to every Florida managed care network, as would be the case under the proposal, then managed care networks could not assure any provider of an increase in patients in return for the provider's agreement to lower charges. The economic incentive for providers to participate in managed health care arrangements would vanish. Fred J. Hellinger, Anv-Willins-Provider and Freedom of Choice Laws, 14 HEALTH AFFAIRS 297, 300-301; Anonymous, "Any Willinq Provider", INTEGRATED HEALTHCARE REPORT, April, 1995, at 1, 3-4; LEWIN-VHI, THE COST OF LEGISLATIVE RESTRICTIONS ON CONTRACTING PRACTICES: THE COST TO GOVERNMENTS, EMPLOYERS, AND FAMILIES, Final Report dated June 21, 1995, at ii-iv.

Similarly, if managed care networks are to provide quality care at lower costs than fee-for-service arrangements, managed care systems must be able to exclude providers who do not provide quality care efficiently, though they may meet the minimum requirements for licensure. Fred J. Hellinger, Anv-Willincr-Provider and Freedom of Choice Laws, 14 HEALTH AFFAIRS 297, 301; LEWIN-VHI, THE COST OF LEGISLATIVE RESTRICTIONS ON CONTRACTING PRACTICES: THE COST TO GOVERNMENTS, EMPLOYERS, AND FAMILIES, June 21, 1995, at iv, vi, ix. Another effect of the proposed amendment thus will be to lower the quality of care which a managed care network can provide to the lowest common denominator. In addition, the proposal entails a multitude of other far-reaching effects.

A. **EFFECTS ON STATE LEGISLATIVE** POWER

The proposal would place profound limits on the legislative power of state government in regard to many legislative functions. The federal government has embarked upon a course of budget cutting and retrenchment from funding health care for the needy. With the advent of federal budget cuts, the state is required, with fewer resources, to find ways of delivering health care to those in need. The legislature has heretofore responded by authorizing or mandating managed care arrangements for Medicaid recipients,' for delivering health care to the impoverished who do not meet Medicaid criteria,[6] and for prisoners' health care which the Department of Corrections cannot provide.[7] To control the spiraling cost of worker's compensation insurance, the legislature has mandated that managed care systems be implemented for covered injured workers,' and has authorized the state to provide care to Medicaid recipients

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[5]§ 409.912, Fla. Stat. (1995)(agency may contract with health maintenance organizations in providing Medicaid service.)

[6]§ 409.2673, Fla. Stat. (1995) (Persons' eligibility for hospital care through the shared state-county trust fund conditioned upon "participation of the eligible person prior to hospitalization in a case-managed program of primary care and health care services.")

[7]§ 945.6033, Fla. Stat. (1995): "The Department of Corrections may enter into continuing contracts with licensed health care providers, including hospitals and health maintenance organizations, for the provision of inmate health care services. . . ."

[8]§ 440.134(2)(b), Fla. Stat. (1995) ("Effective January 1, 1997, the employer shall . . . furnish to the employee solelv throuqh manased care arranqements . medically necessary remedial treatment, care, and attendance') (emphasis supplied).

and other low-income persons through managed care arrangements.[9] In an effort to increase the availability of managed care plans,[10] the legislature required the development of a statewide system of community health care purchasing alliances,[11] and required such alliances to make managed care plans available to their **members.**[12] And finally, the legislature has authorized the state to offer managed care arrangements as an option in the state employee health **plan,** in order to reduce the cost of government and the expense of health insurance to its **employees.**[13]

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[9]**§ 408.7042(2),** Fla. Stat. (1995).

[10]See **§ 408.70(1),** Fla. Stat. (1995) ("The availability of preventive and primacy care and **managed,** family-based care is limited. . . . Managed-care and group-purchasing mechanisms are not widely **available** to small group purchasers") (emphasis supplied).

[11]§ 408.704, Fla. Stat. (Supp. 1996).

[12]**§ 408.702(6)(o),** Fla. Stat. (1995) (an alliance has the duty of **"[e]nsuring** that any health care plan reasonably available within the jurisdiction of an alliance, through a preferred provider network, a point of service **product,** an exclusive **provider organization,** a **health** maintenance orsanization, or a pure indemnity **product,** is offered to members of the alliance") (emphasis supplied).

[13]See **§ 110.123(3)(a),** Fla. Stat. (Supp. **1996)("the** state group insurance program . . . may include . . . health maintenance organization plans"); **§ 110.123(3)(e)1.,** Fla. Stat. (Supp. 1996) (establishing procedures for including health maintenance organizations in the state group insurance program); **§ 408.7042(1),** Fla. Stat. (1995) (establishing conditions under which state employee health insurance may be provided through community health purchasing alliances, and providing that coverage provided to state employees through such alliances must include options for coverage through "health maintenance organizations, exclusive provider organizations, preferred provider organizations, and managed-care pure indemnity plans").

No such legislation could survive the passage of the proposed amendment. Since limits on the choice of health care providers could not then be imposed by law, no legislation mandating or authorizing managed care as a cost containment tool in any of those contexts, or in similar contexts, would be valid.[14]

The proposed amendment would also interfere with the presently exercised legislative power to regulate hospital staff privileges. Present laws limit staff privileges to particular types of licensed medical providers. Section 155.18, Florida Statutes (1995), governing county hospitals, empowers their boards of trustees to adopt rules governing the granting of staff privileges, but provides that such rules "shall provide that only those persons licensed to practice medicine and surgery, i.e., medical doctors and osteopathic physicians, may be granted privileges to treat patients in the hospital." Section 395.0191, Florida Statutes (1995), requires licensed hospitals to grant staff privileges to certain classes of medical practitioners, but does not require the granting of staff privileges to all categories of licensed practitioners. These statutes would likely be victims of the proposed amendment, as well. If an individual's absolute right to select treatment by any licensed provider may not be denied <u>or limited</u> by law, laws excluding a particular class of provider from

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[14]Moreover, as we discuss more fully below, no state agency or local government could implement managed health care by contract, in the exercise of its executive or proprietary powers, for treating prisoners, the needy, the impoverished indigent, or government employees, since the constitutional proposal would ban provider choice limitation either by law or by contract.

hospital staff privileges would limit the individual's choice of providers, and, accordingly, would run afoul of the proposed amendment.

Such laws would not be saved by section 1(b) of the proposed amendment, which preserves the state's right to "regulate health care providers," because these statutes do not regulate requirements for admission to practice in licensed disciplines, nor do they relate to practitioners' fitness to continue practicing in licensed disciplines. Instead, they regulate access to patients at facilities. If a particular discipline of health care practice is licensed and is thereby permitted in this state, then, ipso facto, the discipline is not a danger to the health, safety and welfare of the public. Therefore, excluding practitioners of particular licensed disciplines from hospital privileges could not be viewed under the proposed amendment as regulation of health care providers "to ensure the preservation of the health, safety and welfare of the public." See id.

B. EFFECTS ON STATE EXECUTIVE BRANCH FUNCTIONS

Besides curtailing the legislative power, the proposed amendment would extensively curtail the power of the executive branch of state government. Since no future contract limiting a natural persons 'absolute" right to select any licensed health care provider would be lawful under the proposed amendment, the Insurance Department would be prohibited from approving health insurance contracts which called for closed provider networks as a means to lower health insurance premiums for individual and group

policies, whether for workers compensation insurance, group health insurance, or individual health insurance.

Moreover, the proposal calls into question the continued validity of terms commonly found in health insurance policies approved by the Insurance Department today which are not associated solely with managed care arrangements. For instance, policy forms commonly limit the number of visits to certain providers which the insurer will cover in any policy period, such as the number of chiropractic visits, physical therapy visits, or massage therapy visits. Since under the proposal no law or contract could limit any person's absolute right to select the health care provider of his choice, such policy terms would be open to serious question. Unless visits to all providers are similarly limited, one could well conclude that such selective limits trench upon individuals' "free, full and absolute choice in the selection of health care providers." If so, the Insurance Department would be precluded from approving policy terms viewed today as beneficial in controlling health insurance costs and conserving scarce medical resources, provisions routinely approved today so that individuals and groups may have access to such policies in seeking the most cost-effective coverage for themselves.

Nor is it beyond the pale of reason to conclude that the proposal's 'free, full and absolute choice" language will limit the Insurance Department's discretion to approve policy language which limits or excludes payment for therapies deemed inappropriate for a particular condition by most health care practitioners. Such

provisions might well be viewed as indirect means of limiting one's selection of health care providers, particularly where a treatment is provided exclusively or predominantly by a particular practitioner or type of practitioner.

The proposal's effect on the state's executive power does not end there. It extends much farther. The state would be prohibited from exercising its executive power to enter into any managed care contract for delivering health care to the indigent and needy, to the incompetent wards of the state, to injured workers under workers compensation policies or self-insurance plans, to state employees who may wish to choose managed care as a means to lower their health insurance costs, or even to prisoners in the state's custody.[15] That is necessarily so, because the proposal would

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[15]In fact, the proposed amendment will affect even the state's ability to manage prisoner security. If a prisoner is able and willing to pay for it, he is entitled under the proposal to select any health care provider who is willing to treat him, and the state would likely be put to the test of demonstrating that there is a compelling state purpose in denying the prisoner access to any willing provider he might so choose, and that there is no less intrusive means to achieve that purpose other than denial of access to that provider. Cf. In re Guardianshin of Browning, 568 So. 2d 4, 13-14 (Fla. 1990)(under Florida's explicit constitutional right of privacy, the state may not interfere with a person's wishes regarding medical treatment absent a compelling state interest, and any intervention must be through means "narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual"); Citv of North Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995), cert. denied, 116 S.Ct. 701 (1996) (Florida's explicit constitutional right of privacy, once implicated, "demands evaluation under a compelling state interest standard"). That prospect does not even take into account the foreseeable profusion of disputes over whether particular conditions imposed on provider access to prisoners constitute an unconstitutional "limit" imposed "by law" upon the prisoner's right to absolute choice in selecting his health care provider.

outlaw contracts limiting natural persons' selection rights, as well as laws having that effect.

The state's power to bargain collectively with its employees over terms and conditions of employment - and the employees' corresponding right to bargain with the state - would also be limited by the proposed amendment. Health insurance, and its terms, are presently among the terms and conditions of employment as to which collective bargaining is guaranteed.[16] Though ERISA would preempt the proposed amendment's application to private employers' health insurance plans, ERISA would not preempt state law as to the employee benefit plans of state and local government. Thus, the amendment would preclude public collective bargaining over such contractual terms and would preclude state and local governments from using managed care programs to provide health care coverage to public employees.[17]

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[16]See § 447.203(2), Fla. Stat. (1995) ("public employer" includes the state and its subdivisions and agencies); §447.301(2), Fla. Stat. (1995) (public employees have the right to "negotiate collectively . . . with their public employer"); §447.309(1), Fla. Stat. (1995)(public employers shall bargain with recognized public employee organizations over "the wages, hours, and terms and conditions of employment"); § 110.123(3)(b), Fla. Stat. (Supp. 1996) (recognizing that collective bargaining will affect the health benefits and terms to be provided to state employees under the state group insurance plan).

[17]It is unlikely that the proposed amendment would prevent managed health care contracts incident to employee benefit plans of private employers, since such plans are governed exclusively by ERISA, and ERISA preempts state laws relating to such plans. Texas Pharmacy Ass'n v. The Prudential Ins, Co. of America, 105 F.3d 1035 (5th Cir. 1997); Cisna Healthplan of Louisiana, Inc. v. State of Louisiana ex re. Ieyoub, 82 F.3d 642 (5th Cir. 1996), cert. denied, 117 S.Ct. 387 (1996). However, ERISA excludes from its scope plans (continued...)

C. EFFECTS ON LOCAL GOVERNMENT

The proposed amendment would have effects on local government similar to those delineated above in respect to state government. No local ordinance authorizing managed care arrangements for delivering county-financed health care to the needy, or to the incarcerated, could be adopted. Nor could local governments implement such contracts in the exercise of their executive and proprietary powers, since the proposal forbids both contracts and laws limiting the provider choices of natural persons. No local unit of government would be permitted to collectively bargain with its employees over managed health care as a benefit of employment, nor could local governments offer it. See n.17.

D. EFFECTS ON PRIVATE INTERESTS

Assuming, as is likely, that ERISA preempts application of the proposed amendment to health care plans offered by private employers,[18] the proposal's effects on private interests

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(. ..continued)
offered by "the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." See 29 U.S.C.A. §§ 1002(32), 1003(b)(1), 1321 (b)(2); Silvera v. Mutual Life Ins. Co. of New York, 884 F.2d 423 (9th Cir. 1989). Thus, one probable effect of the proposed amendment will be that public employers will be governed by the amendment, and thereby precluded from using managed health care in employee benefit plans, while ERISA will preempt the amendment as to employee benefit plans sponsored by private employers. The omission from the ballot summary of this effect renders the ballot summary affirmatively misleading, as we discuss below.

[18]See Texas Pharmacy Association v. The Prudential Ins. Co. of America, 105 F.3d 1035 (5th Cir. 1997); Cigna Healthplan of Louisiana, Inc. v. State of Louisiana ex re. Ievoub, 82 F.3d 642 (5th Cir. 1996), cert. denied, 117 S.Ct. 387 (1996) ; Blue Cross and Blue Shield of Alabama v. Nielsen, 917 F. Supp. 1532 (N.D. Ala.
(continued...)

nevertheless would be immense. By its plain language, the proposal would bar not only managed care systems mandated by law, but managed care systems for which individuals or organizations wish to contract of their own volition. The amendment, for instance, would ban contracts for health insurance offered through wholly voluntary, non-employer associations to their members as a means of reducing the cost of health insurance. Associations such as the American Association of Retired Persons would be precluded from sponsoring a managed care plan under the amendment, since no contract - public or private - limiting a natural person's selection of health care providers would be lawful, even though individuals under no compulsion might wish to enter into such a contact.

Individuals' privacy rights in personal choices about medical care would be limited by the proposed amendment. This Court holds that Florida's constitutional privacy clause, Article I, § 23, Florida Constitution, "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." In re T.W., supra, at 1192. This explicit Florida constitutional right of privacy extends to all choices regarding medical care. See In re Guardianship of Browning, 8 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

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1996). But cf., Stuart Circle Hosp. Corp. v. Aetna Health Manasement, 995 F.2d 500 (4th Cir. 1993), cert. denied, 510 U.S. 1003, 114 S.Ct. 579 (1993).

choices about medical treatment, we necessarily conclude that this right encompasses all medical choices"); Harrell v. St. Mary's Hospital, Inc., 678 So. 2d 455, 456-457 (Fla. 4th DCA 1996). Under this provision, the state has a positive duty "to assure that a person's wishes regarding medical treatment are respected," and may not intrude into those medical decisions absent a compelling state interest. Where the state does intrude, it must do so through means "narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." Guardianship of Browning, supra, 568 So. 2d at 13-14; see also City of North Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995), cert. denied, 116 S.Ct. 701 (1996) ("unlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under a compelling state interest standard").

Under Florida's present constitution, we submit that decisions by individuals about how they will structure delivery of their own private medical care, including the decision to select managed care for themselves, normally implicate no compelling state interest and are private decisions against which the state may not legislate under most circumstances. Certainly, individuals' decisions concerning how they will provide themselves with optimal health care at optimal cost are equally as personal as decisions to seek or refuse a particular treatment, and implicate even fewer, if any, countervailing state interests.

The proposed amendment would prohibit individuals from choosing managed health care, even in the wholly private and personal sphere, by altogether prohibiting contracts which limit choices among licensed providers. It would outlaw a useful personal choice now available to Floridians in their private lives, without any cogent public interest in doing so. It will cement that radical prohibition in our state constitution.

Further, the proposed amendment would prohibit future non-competition agreements between health care providers and those whom they associate in their practices. Such contracts are permitted on reasonable terms today, and provide protection to those who take in new practitioners and give them access to an established practitioner's facilities and goodwill." However, under the plain wording of the proposed amendment, such agreements constitute contracts limiting natural persons' absolute freedom of choice in selecting health care providers, and, accordingly, would be banned.

Though it is unlikely, if it were held that ERISA did not preempt the proposed amendment as to health plans sponsored by private employers, then the proposed amendment's effects on the

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[19] See §§ 542.33(2),(3), Fla. Stat. (1995), and 542.335(1)(d)1.,(1)(d)3., Fla. Stat. (Supp. 1996) (authorizing certain non-compete agreements between employers and employees, between partners, and between the buyer and seller of a professional practice); Jewett Orthopaedic Clinic, P.A. v. White, 629 So. 2d 922, 925 (Fla. 5th DCA 1993) (restriction of patients' choice of physicians by physician non-compete agreement does not render agreement unenforceable); Salamon v. Karen Munuswamy, M.D.. P.A., 566 So. 2d 899 900 (Fla. 4th DCA 1990) and Hefelfinaer v. David, 305 So. 2d 823, 824 (Fla. 1st DCA 1975)(upholding physician non-compete agreements).

private sector would be vastly more sweeping. All employers would be prohibited under its terms from offering managed care options to check the rising cost of employee health insurance benefits. **They,** and their employees, would be prohibited from collectively bargaining over managed care, a right which both now have, and employers would be prohibited from implementing it. An employer's choice would be to bear the rapidly rising cost of fee-for-service health insurance arrangements, or simply not to offer health insurance as an employment benefit. If the first, the Florida employer's costs of doing business will be greater than its competitors in other states, and the competitiveness of the Florida economy will suffer. If the second, the social costs are **self-**evident and enormous.

II. THIS PROPOSED AMENDMENT VIOLATES TEE SINGLE-SUBJECT REQUIREMENT OF ARTICLE XI, § 3 OF TEE FLORIDA CONSTITUTION

Article XI, § 3, 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 one subject and matter directly connected therewith.

This proposal falls short of every test of compliance with Article XI, § 3 articulated in previous opinions of this Court.

A. **THE** FACE OF **THIS AMENDMENT** SHOWS THAT IT **DEALS** WITH AT LEAST TWO DISTINCT SUBJECTS AND CALLS FOR LOGROLLING DECISIONS BY VOTERS WHICH ARTICLE XI, § 3 FORBIDS

Pruned of refinements, the root requirement of Article XI, § 3 is that a citizens' initiative constitutional proposal must have a "logical and natural oneness of purpose." Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984). That requirement is fundamental, unbending, and is to be strictly enforced, id. at 989, bearing in mind a primary purpose of Article XI, § 3: to prevent initiatives, which by their nature are conceived with little debate and without broad participation, from being placed before the voters in a form which requires voters "to accept part of a proposal which they oppose in order to obtain a change which they support." Id. at 993. See also id. at 988; In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994) (hereafter "Advisory Oainion - Discrimination").

This proposed amendment on its face violates that requirement. It purports in one stroke to fundamentally affect two entirely separate and distinct subjects, and forces voters to accept both changes to obtain either one. On one hand, the proposal calls for banning limitations imposed "by law" on provider choice. At the same time, it proposes a ban on wholly private arrangements achieved through the exercise of un-coerced volition, by banning limitations on one's choice of providers even "by contract." Surely many voters who may disfavor government-imposed limits on choice of health care providers would equally favor retaining their personal freedom to agree "by contract" to such arrangements. Yet, the

proposal forces an all-or-nothing choice. There is no "natural and logical oneness of purpose" in this proposed amendment; but, instead, two wholly dissimilar propositions. One deals with the power of government to compel conduct; the other with private volitional choice and freedom of contract. "[E]nfolding disparate subjects within the cloak of a broad generality" does not satisfy the single-subject requirement. See Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984).

B. THE PROPOSED AMENDMENT ALTERS AND LIMITS MORE THAN ONE GOVERNMENT FUNCTION

A constitutional amendment proposed by citizen initiative which substantially affects more than one governmental function violates Article XI, § 3. Fine v. Firestone, supra; Evans v. Firestone, supra; Advisory Opinion - Discrimination, supra; Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486, (Fla. 1994) (hereafter "Advisory Opinion - Tax Limitation"). That is true whether the proposal alters multiple functions of one branch of government, Fine v. Firestone, functions of multiple branches of one level of government, Evans v. Firestone, or the functions of multiple levels of government. Advisory Opinion - Discrimination. It also appears that a citizen initiative proposal which alters both individual rights and governmental power does not comply with Article XI, § 3. Advisory Opinion - Discrimination, at 1020 ("[T]he subject of discrimination in the proposed amendment is an expansive generality which encompasses both civil rights and the power of all state and local governmental bodies.").

This proposal offends Article XI, § 3, in nearly all of those regards. As we point out above at pages 11-14, the proposal would limit the legislative power in connection with many distinct functions: the regulation of the workers compensation system, health care delivery to the needy, health care delivery to wards and prisoners in the custody of the state, the oversight and approval of insurance policies, the regulation of non-competition agreements, the regulation of hospital staff privileges, and the regulation of public employment and employee benefits, among others. In Fine v. Firestone, the Court found that a citizens' initiative which would have affected the legislative power to tax, to impose fees, and the power of appropriation was not limited to "one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. See also Evans v. Firestone, at 1354. In the same way, the proposal at bar would alter legislative power over diverse subjects, and thus violates the requirements of Article XI, § 3.

The Court held in Evans v. Firestone that a citizens' initiative which "affects the function of the legislative and the judicial branches of government" violates Article XI, § 3. Id. at 1354" Likewise, the proposal at bar alters the functions of both the legislative branch and the executive branch. It limits the function of the legislative branch in diverse ways, summarized above, and it limits the executive branch at least in these functions: collective bargaining, state employment, prison administration, and insurance regulation. Accordingly, the proposal is invalid under an Evans v. Firestone analysis.

This proposal also suffers from the type of single-subject defect which, among others, compelled the Court to invalidate the citizens' initiative in Advisory Opinion - Discrimination and the "Property Rights" initiative in Advisory Opinion - Tax Limitation. It affects the functions of both state and local governments in various ways: limiting the subjects of collective bargaining with employees of those units, limiting the power to opt for managed health care systems as a means to control employment costs and workers compensation costs, and limiting the power of state and local governments to use managed care as a tool to control the costs of health care delivered to the indigent and those in government custody. Moreover, the proposal affects both the subject of governmental power and the subject of individuals' freedom of choice. This proposal therefore fails under the principles laid down in Advisory Opinion - Discrimination and Advisory Opinion - Tax Limitation.

c. THE PROPOSED AMENDMENT SUBSTANTIALLY AFFECTS PROVISIONS OF TEE CONSTITUTION WITHOUT IDENTIFYING THOSE PROVISIONS FOR THE VOTERS

In Fine v. Firestone, the Court observed:

> .... [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.

Id. at 989; accord, Advisory Opinion - Tax Limitation, at 492. The Court invalidated the 'Voter Approval of New Taxes" initiative in Advisorv Opinion - Tax Limitation because it substantially affected

more than one provision of the constitution, but failed to identify the affected provisions in the amendment or its ballot summary so that the voters could make intelligent and informed decisions. Id.[20]

This proposal exhibits the same defect. As we demonstrate above, the proposal substantially alters collective bargaining rights, at least in the public sector, now guaranteed by Article I, § 6, Florida Constitution, and privacy rights secured by Article I, § 23, Florida Constitution.*' Yet, neither the text of the proposal, nor its ballot summary, nor its title gives the voter any hint of such effects.

This requirement is related to the concerns which Justice Kogan voiced in his concurrence in Advisorv Opinion-Discrimination:

> 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.

Id. at 1022. As in that case, the proposal at bar has far too many collateral effects which "deal with subjects far afield of the

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[20]This requirement might be viewed as pertaining, at least in part, to the proponents' duty to prepare a ballot summary which fairly and objectively informs voters of the initiative's effect. However, the fact that an initiative substantially affects several constitutional provisions gives equal impetus to the requirement. Whatever the technically correct etiology of the requirement, this initiative fails to meet it.

[21]See pages 17-21, susra.

initiative's purported subject matter" to be viewed as dealing with but one subject. Id. This proposal would affect private concerns of individuals, relations between public employers and employees, and the ability of state and local governments to deliver affordable health care to those injured on the job and to the impoverished, to reiterate but a few of its effects. As in that case, the proposal here would bring state law into direct conflict with federal law, in the form of ERISA's preemption of such limitations in private sector employer benefit **plans.**[22]

In sum, besides other single-subject failings of this proposal, as Justice Kogan aptly said in Advisorv Opinion - Discrimination:

> This initiative, in other words, tries to do too 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 clearly would be misled in this sense.

Id., at 1022.

III. THE BALLOT SUMMARY FAILS TO FAIRLY AND OBJECTIVELY INFORM THE VOTER, *AND,* IN *FACT,* AFFIRMATIVELY MISLEADS AND MISLEADS BY OMISSION

Section 101.161, Florida Statutes (1995) requires that the ballot title and summary "state in clear and unambiguous language

[22] As Justice Kogan noted, though the Court could not remove this initiative from a vote solely because it would be wholly or partially invalid under the federal Constitution and statutes, what cannot be ignored here are "the very serious repercussions such an initiative would have on other subjects--its domino effect."

Advisory Opinion - Discrimination, at *1023.*

the chief purpose of the measure." Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982). Proponents must take care

> "that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.... All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide.... What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot."

Id. at 156 (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954)). The court also states:

> [t]he purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors . , . the burden of informing the public should not fall only on the press and opponents of the measure--the ballot title and summary must do this.

Id. at 156.

Under these measurements, the Court has invalidated ballot summaries which contain affirmatively misleading language. Advisory Opinion re Casino Authorization Taxation and Regulation, 656 So. 2d 466 (Fla. 1995)(finding misleading the summary's use of "hotels," while the text of the amendment would have allowed casinos in "transient lodging establishments," and summary's implication that casinos would be allowed only on functioning vessels, while the amendment actually would have allowed casinos on stationary and non-stationary vessels); Advisory Opinion re Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994). The Court has also stricken initiatives when, by subtle implication or omission of material matters, the ballot summary conveys a false impression of the true purpose and effect of the initiative. Askew v. Firestone, 421 So.

2d 151, 156 (Fla. **1982)(proposed** amendment cannot "fly under false colors"); **Evans** v. Firestone, supra; **Advisory** Opinion re Stop **Early** Release of Prisoners, supra (failure to advise in any way of the deletion of Parole Commission powers).

By those measurements, the proposed amendment at issue here is equally invalid. The ballot summary is affirmatively misleading about the actual scope of the proposed amendment. Its title and the introductory sentence of the ballot summary tout the 'right of citizens" to choose health care providers. The amendment itself, however, refers to "natural persons," not to "citizens." "Natural person" is much broader than "citizen." **See** pages 5-6, supra. The ballot title and summary imply, for instance, that the state would remain free to implement **closed-** provider managed health care systems to deliver care to impoverished aliens. But, that is not so under the amendment's text.

Moreover, the term 'citizens" evokes in many people's minds the popular, but legally incorrect, notion that certain persons are not "citizens" because they have forfeited, or have not yet attained, some of the rights of citizenship. Many may hold the notion that incarcerated felons are not citizens because they have forfeited the right to vote, the right to freely associate with whom they chose, etc. Similarly, many may not include children in their notion of "citizen," since children have not yet attained the right to vote. These popular misconceptions, when combined with the fact that the amendment actually refers to all natural persons, serve to compound the misleading nature of the ballot summary on this score.

Further, the summary is affirmatively misleading because it is designed to leave the impression that it "establishes" a right which people presently lack: the right to choose any health care provider willing to treat them, free from government interference. The summary subtly implies that the state may now forbid individuals from seeing any licensed health care provider willing to treat them, by asserting that the amendment will "establish" that right, as if for the first time. In fact, however, the right to seek medical treatment from any licensed provider is already protected by the constitution's privacy amendment. See pages 18-20, supra. The proposed amendment is actually designed to prohibit limits on provider choice in connection with undertakings to discharge another's medical expenses.

Still further, the summary affirmatively misleads by asserting that the proposed amendment will prevent all employers from limiting their employees' selection of health care providers. The summary makes no mention that ERISA will preempt the amendment's application to private employers' health care plans. In other words, the summary affirmatively misstates the true probable effect of the proposed amendment. It does not put the voter on notice that it will prevent government employers, but not private employers, from implementing HMOs and similar plans; and it gives no hint that individuals and members of non-employer voluntary associations will be prevented from voluntarily choosing to use HMOs or PPOs to reduce their health care expenses.

The ballot summary also misleads by material omission. It offers no hint that the proposal would modify collective bargaining rights under Article I, § 6, Florida Constitution, or that it would modify privacy rights guaranteed by Article I, § 23.[23] It alludes not at all to the fact that the proposal prevents individuals from selecting managed care plans through individual insurance policies, or that the proposal would likely be superseded in significant part by federal law, or that it will affect other private contracts such as non-competition agreements. In sum, both in its affirmative assertions and in what it fails to say, the ballot summary does not provide a fair, objective, and accurate picture of what the proposed amendment would actually do.

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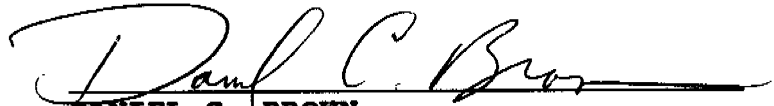
[23]See pages 17-21, supra.

CONCLUSION

For the reasons expressed herein, the parties to this brief urge the Court to render its opinion that the citizens' initiative constitutional amendment entitled "Right of Citizens to Choose Health Care Providers" violates the one-subject requirement of Article XI, § 3, Florida Constitution, and that its title and ballot summary violate the requirements of § 101.161, Florida Statutes. They 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, or § 101.161, Florida Statutes.

Respectfully submitted,



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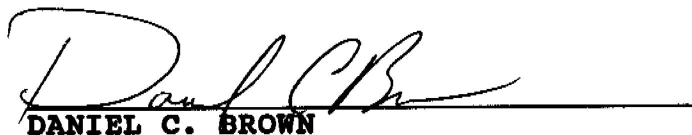
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to HONORABLE ROBERT A. BUTTERWORTH, Florida Attorney General, The Capitol, Tallahassee, Florida 32399-1050, this 14th day of April, 1997.



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