IN THE SUPREME COURT
STATE OF FLORIDA

CASE *No. 90,160*

IN RE: ADVISORY OPINION TO THE ATTORNEY GENERAL --
RIGHT OF CITIZENS TO CHOOSE HEALTH CARE PROVIDERS

INITIAL BRIEF
OF
BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.

(Filed in Opposition to the Initiative Petition)

ORIGINAL PROCEEDING

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Jerold I. Budney, Esq.
Florida Bar No. 283444
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Blue Cross and Blue Shield of Florida, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

Constitutional Provisions

TABLE OF CITATIONS
(Continued)

Page

Statutes and Regulations

TABLE OF CITATIONS
(Continued)

Other **Authorities**

INTRODUCTION

The Florida Constitution abounds with rights conferred on its citizens and residents, providing a broad range of freedoms from governmental intrusion and control. The proposal now before the Court seeks to add by initiative the unfettered right to select health care providers without governmental or contractual limitation. The appeal for having such a *constitutional* right is powerful; what could be more important than absolute freedom of choice in the selection of a personal physician, anesthesiologist, dentist or other health care provider?

The attractiveness of the concept for a constitutional "Right of Citizens to Choose Health Care Providers" must be temporarily set aside, however, when the constitutional change being proposed has been institute-d through citizen initiative. In that special circumstance, constitutional and statutory restraints apply that must be given **first** priority. This is the only proceeding by which the health care choice proposal is tested against the threshold requirements for assuring that the electorate of Florida understand, and are not misled, by that which the framers of the initiative petition are seeking to secure a majority vote in a general election for placement in the Constitution.

In the real world, not all citizens and residents of the state can afford the cost of "on demand" medical care, from providers of their choice. In the real world, not all citizens and residents of Florida would ***want*** "on demand" medical care, even if it could be obtained, at the costs that might have to be paid. In that world, both the governmental bodies and private, entrepreneurial groups formed by the state's citizens and residents have sought ways by which the costs of medical care can be lowered, or in the colloquialism of the day "managed. "

The constitutional proposal now before the Court constitutes an attack on managed health care, with fatal ramifications for both private and governmental management efforts. The breadth and sweep of the proposal cannot be minimized, in light of the extremely dogmatic language of the proposal that freedom of choice in selecting health care providers is to be constitutionally "free, full, and absolute." Out of a sincere belief that the proposal before the Court is at odds with the threshold requirements of informing voters by a non-misleading ballot summary of a proposed amendment that contains only one subject, Blue Cross and Blue Shield of Florida, Inc. (Blue Cross) -- the largest private, managed health care organization doing business in the state -- presents this brief in opposition to the placement of this proposal on a ballot for a general vote of the electorate.

STATEMENT OF THE CASE AND FACTS

Pursuant to Article IV, section 10 of the Florida Constitution, the Attorney General has invoked the Court's jurisdiction[1/] to review for ballot placement an initiative petition for a proposed amendment to the Florida Constitution which the Secretary of State has certified meets the threshold number of votes for obtaining an advisory opinion.[2/] The text of the proposed amendment reads as follows:

> Article I of the Constitution of the State of Florida is hereby amended to add the following:
>
> 1) "SECTION 24. Bight 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,

---

1/ Article V, section 3(b)(10), Fla. Const,

2/ See, §§ 15.21, 16.061, Fla. Stat. (1995).

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 ballot title for the proposed constitutional amendment is "Right of Citizens to Choose Health Care Providers," and the ballot summary for the proposal states in its entirety:

Establishes the right of citizens to choose health care providers. This provision prevents insurance companies, managed care personnel, employers, and other such third parties from controlling a citizen's selection of health care providers; requiring provision for choice of health care providers in future contracts providing care under programs such as those organized under Chapter 440, Chapter 627, Chapter 636 and Chapter 641, Florida Statutes.

Under applicable constitutional, statutory and case law principles, the Court's responsibility in this proceeding is to review the initiative for compliance with the ballot title and summary requirements expressed in section 101.161 of the Florida Statutes, and with the one subject limitation on initiative petitions that is contained in Article XI, section 3, of the Florida Constitution. *E.g., Advisory Opinion to Attorney General Re Tax Limitation, 644* So. 2d 486, 489-90 (Fla. 1994) ("*In re Tax*"). In his transmittal petition to the Court, the Attorney General has expressed concerns regarding initiative's compliance with two of the three requirements, stating:

the ballot summary does not track the language of the amendment; rather it suggests applications not contained in the text of the proposed amendment. The Court, therefore, may wish to consider whether the ballot title and

summary adequately reflect the language of the proposed amendment such that the voter is given fair notice of the decision he must make.

* * *

The initiative . . . does not elaborate on the effect or breadth of "free, full, and absolute choice, " No other articles of the Constitution are identified as being substantially affected. The Court may wish to consider whether the proposed amendment may be so broad as to violate the single subject requirement.[3/]

By order enter-cd on March 24, the Court has authorized interested parties to file briefs on or before April 14 addressing the initiative petition's compliance with the requisites for its placement on a general election ballot. Blue Cross is such an interested party, and respectfully suggests that the initiative proposal does ***not*** comply with the ballot summary and single subject requirements.

S - Y O F ARGUMENT

This ballot summary for the proposed constitutional amendment does not satisfy the requirement of section 101.161 in several regards. The chief purpose of the proposal, as stated in its summary, is the elimination of private sector and public controls on the right of citizens to select health care providers. The proposed amendment cannot and will not achieve that chief purpose, however, and for that reason flies under false colors.

The summary states that the proposed amendment will achieve its objective by requiring third parties to provide a choice of providers in future contracts under various, identified managed care programs. The text of the amendment itself, however, contains no such requirement, and in fact nowhere addresses the contract obligations of ***providers*** at all.

[3/] Letter of the Attorney General dated March 21, 1997, at pages 3 and 4. The Attorney General does not address the initiative's compliance with the ballot title requirement of section 101.161, **Fla.** Stat. **(1995).**

The text of the amendment is directed at the ***rights*** of health ***care recipients,*** as opposed to the ***obligations*** of health ***care suppliers.***

The ballot summary additionally conceals more than it reveals. It fails to advise voters that the proposed amendment overrides existing managed care laws, and eliminates managed care programs, by freeing "citizens" to make "full and absolute" choices as to health care providers. Nor does it disclose that future cost containment legislation and programs will be effectively prohibited. Moreover, the ballot summary deceives voters into believing that the proposed amendment addresses only "citizens" while the text of the amendment itself reaches "every natural person, " whether a citizen or not. And the ballot summary fails to disclose that many managed health care plans cannot be revised to include choice of provider provisions inasmuch as the Supremacy Clause of the United States Constitution prohibits that result by preemption as a result of the federal mandates of ERISA.

The proposed constitutional amendment violates the single subject requirements of the Constitution, as well. The proposal harbors prohibited "logrolling, " by simultaneously attracting those who would like to restrict ***governmental*** interference with private decision-making (the right conferred being described in the proposed amendment as not "limited by law"), on the one hand, and those who would not want any interference with ***private, non-governmental*** contractual arrangements designed to limit health care costs through limitations on the selection of health care providers, on the other hand. The proposed amendment also dramatically affects multiple functions and branches of the government, including the constitutional right of employees to collectively bargain for contractual arrangements that lessen the cost of health care through limitation on the choice of providers.

ARGUMENT

I. The initiative petition for health care provider choice violates section 101.161, Florida Statutes (1995), inasmuch as the ballot summary is misleading and does not disclose the true meaning and ramifications of the proposed amendment.

Section 101.161 requires that the substance of a proposed constitutional amendment be expressed in clear and unambiguous language, in the form of an explanatory statement "of the chief purpose" of the amendment. Over the years, the Court has declared its construction of that ballot summary requirement in various formulations, all of which have the same central theme of full, adequate and non-deceptive disclosure.

The Court has said the purpose of section 101.161 is "to assure that the electorate is advised of the true meaning, and ramifications, of an amendment,"* so that the ballot itself "must give the voter fair notice of the decision he must make. "[5] The ballot summary must be both "accurate and informative, "[6] and it must give "sufficient notice of what [the voters] are asked to decide to enable them to intelligently cast their ballots. "[7]

Aside from providing accurate information, a ballot summary cannot affirmatively mislead, such as by recasting "language of limitation in the amendment to language of affirmation in the ballot summary, "[8] or proclaiming as the effect of a proposed amendment

---

[4] *In re Advisory Opinion to Attorney General - Restricts Laws Related to Discrimination, 632 So.* 2d 1018, 1020 (Fla. *1994) ("In re Discrimination"), quoting, Askew v. Firestone,* 421 So. 2d 151, 156 (Fla. 1982).

[5] ***Askew v. Firestone,*** 421 So. 2d at 155.

[6] ***In re Tax, 644 So.*** 2d at 495.

[7] ***Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation, 656 So. 2d 466, 468*** (Fla. 1995) ***("In re Casino Authorization").***

[8] ***Evans v. Firestone, 457 So.*** 2d 1351, 1355 (Fla. 1984).

an event which is "neither enumerated nor alluded to in the language of the amendment. "[9] At the end of the day, the Court's simple responsibility is "to determine whether the language as written misleads the public. "[10]

The ballot summary for the initiative proposal here under consideration cannot satisfy the threshold requirements of providing voters with a full, fair, non-deceptive and informative disclosure of the substance of the amendment itself.

The ballot summary for this initiative proposal has multiple flaws. It both conceals the real effect of the amendment, and affirmatively misleads voters as to its true meaning. The breadth of the proposal defies a complete evaluation of the mismatch between its text and the ballot summary, but at least the following disclosure defects are obvious.

A. The summary misleads the electorate into believing that third parties will be required to affirmatively provide for a choice of providers in future contracts authorized under the enumerated statutes.

The summary states that the proposed amendment affirmatively requires a "provision for choice of health care providers in future contracts providing care under programs such as those organized under Chapter 440, Chapter 627, Chapter 636 and Chapter 641, Florida Statutes. " No such requirement can be found in the proposed amendment, and none can plausibly be inferred.

There is no reference in the amendment whatsoever to any of the enumerated statutes, or to any entities or programs organized under those statutes, but that distinction between the text of the amendment and its purported "explanatory statement" is the least of the section

---

[9] *Id.* at 1355.

[10] *In re Casino Authorization, 656 So.* 2d at 468.

101.161 defects. More significantly, the focus of the summary differs entirely from the focus of the amendment in two critical ways.

The amendment's chief purpose, without any question, is to provide Floridians with a choice of health care providers -- the establishment of a private right that can be exercised by any person in Florida. That focus of the amendment is evident from its title ("Right of *Citizens* to Choose Health Care Providers"), from its proposed placement in the Constitution (as a new section in Article I, which is entitled "Declaration of ***Rights"), by*** the text of subsection (a) of the amendment (***"The right*** ... shall not be denied or limited"), and by the lead sentence of the summary itself (***"Establishes the right*** of citizens to choose") (emphasis added).

Yet the ballot summary casts the purport of the amendment as being an affirmative obligation for entities or organizations in the health care field "and other such third parties" -- a seeming mandate of the Constitution over those who do business in the state. It says, pointedly, that future contracts under various state-authorized or directed programs are mandated to include a provision that gives a choice of health care providers. The focus of such a directive is not on the citizen's right, but rather on the obligations of those who do business with citizens.

The ballot summary then compounds this distortion: the amendment purports only to ***prohibit limitations*** on Floridians' right of choice, while the ballot summary asserts an *affirmative mandate* over health care organizations. A constitutional ***directive*** to insert a provision in the contracts of health care providers is a far cry from a constitutional ***prohibition*** against limiting Floridians' right of choice. The two are unrelated subjects. The difference was recognized in ***Evans*** v. ***Firestone, 457 So.*** 2d at 1355, where the Court held a

summary violated section 101.161 by recasting "language of limitation in the amendment to language of affirmation in the ballot summary."

In *Evans*, the summary asserted civil litigants would have an affirmative right to fully recover all actual expenses when the amendment only prohibited non-economic damage awards in excess of $100,000, and made no reference to recovery of actual expenses. ***Id.*** at 1355. Similarly, here, this ballot summary asserts third parties would be affirmatively required to insert "choice of provider" provisions in their contracts when the proposed amendment only prohibits limitations on choice of providers and makes no reference to any affirmative obligations of third parties.

Because this amendment does not contain the affirmative mandate over health care organizations asserted in the ballot summary, the summary is misleading and violates section 101.161.

The misleading summary statement that the amendment will mandate choice provisions in future contracts is particularly egregious because that asserted effect will be, in reality, impossible to achieve. If put in the Constitution, this health care choice provision will eradicate these health care organization, and the programs they provide.

Chapters 627, 636 and 641 of the Florida Statutes[11/] govern several health care organizations whose core function is to limit the choice of providers in order to reduce costs

---

11/ The ballot summary also lists Chapter 440, the Worker's Compensation law. Effective January 1, 1997, health care under that statute was to be exclusively provided through managed care arrangements. Section 440.134(2)(b), Fla. Stat. (1995). This requirement was adopted as a part of the sweeping 1994 revisions to the workers' compensation laws designed to avert the financial crisis which threatened the viability of workers' compensation coverage in this state. ***See generally,*** J. ALPERT, WORKER'S COMPENSATION, § 2-6.5 at 40 (1995). Nowhere does the ballot summary disclose the dramatic impact of the proposed amendment on the cost and viability of worker's compensation coverage.

and maximize quality control: Preferred Provider Organizations ("PPOs")[12] and Exclusive Provider Organizations ("EPOs")[13] under sections 627.6471-627.6473, Fla. Stat. (1995); Prepaid Limited Health Service Organizations under Chapter 636[14]; and Health Maintenance Organizations ("HMOs") under Chapter 641.[15] Although the limitations on providers may vary within each organization, the essence of each type of organization is to contract with a group of providers to offer services to their participants,= in order to reduce health care costs and maximize value and quality control.[17]

The enumerated health care organizations have as an indispensable element of their very existence a restriction on the groups of health care providers that have been selected by the organizations to provide services to each plan's participants. [18] Those limitations on who may offer health care services may include exclusivity requirements or financial

---

12/ Section 627.6471, Fla. Stat. (1995), provides for a "preferred provider network" with whom the insurer has contracted for reduced rates of payment under PPO programs.

13/ Section 627.6472, Pla. Stat. (1995), provides for insurers to condition payment on the use of "exclusive providers" who have contracted with the insurer.

14/ Section 636.003, Fla. Stat. (1995), defmes "prepaid limited health service organization" as an entity providing enrollees access to limited health care services through an exclusive list of providers.

15/ Section 641.19, Fla. Stat. (1995), defines an HMO as an entity which, infer *alia*, provides prepaid health care services to its subscribers either directly or through arrangements with other persons.

16/ See *generally*, B. FURROW, HEALTH CARE, § *8-1* at309 (1995) (WEALTH CARE"); B. Platt & L. Stream, *Dispelling the Negative Myths of Managed Care, 23* FLA. ST. U. L. REV. 489, 499 (1995) *("Dispelling the Negative").*

17/ HEALTH *Cm,* § 8-1 at 308; D. Drake, ***Managed Care: A Product of Market Dynamics, 277*** JAMA 560, n.7 (Feb. 19, 1997); *("Managed Care"); Dispelling the Negative,* at 499-500.

18/ HEALTH CARE, § 8-1 at 310; *Dispelling the Negative,* at 499; see, *generally, Managed Care.*

disincentives if other providers are used,[19] in order to provide the cost savings and quality control which are the very "raison d'etre" for the organizations.= If the limitations cannot be maintained because citizens have "free, full, and absolute choice" in the selection of health care providers, then in all likelihood the organizations and the health care plans they provide cannot continue.

Nowhere does the ballot summary disclose this "highly likely collateral result of the proposed amendment. " ***Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners, 642 So.*** 2d 724, 726-27 (Fla. 1994) ***("In re Stop Early Release").*** In ***In re Stop Early Release, the*** proposed amendment prohibited the release of prisoners prior to their serving the full term of their sentence, and prohibited gain time from exceeding 15 days for every 100 days of the sentence. The ballot summary asserted only one collateral consequence -- that the amendment would "ensure" prisoners serve at least 85 % of their sentence. The Court held the summary violated section 101.161 because it inaccurately asserted the amendment would "ensure" that result, and it failed to identify at least two other more likely consequences. ***Id.*** at 726-27.

The omitted, most likely consequence of the health care choice amendment is to eradicate the limited-choice organizations and health care plans made possible by the legislation identified in the summary. Yet that summary inaccurately tells voters that the amendment will be "requiring" agreements developed under these statutes to offer a choice of

---

[19] HEALTH CARE, § 11-12 at 532.

[20] See, HEALTH CARE, § 8-1 at 308; ***Dispelling the Negative,*** at 499-500; ***see, generally, Managed Care.***

providers. As the Court said in *In re Stop Early Release*, 642 So. 2d at 727: "The proposed amendment will not deliver to the voters of Florida what [the summary] says it will."

The misleading nature of the ballot summary was apparent to the Attorney General, whose transmittal of the initiative petition to the Court noted that "the ballot summary does not track the language of the amendment; rather it suggests applications not contained in the text of the proposed amendment. "[21]

B. The summary misleads voters by not disclosing its effect on existing and future laws,

Subsection "(a)" of the proposed constitutional amendment is the operative, declaratory provision that the framers of this amendment want placed in Article I of the Constitution That subsection would have the Constitution declare that the right of choice in health care providers " shall not be denied or limited by law or contract. "

This declaration -- setting out the chief purpose of the proposed amendment -- is expressly intended to effect both existing and prospective laws. By its terms, it will render unconstitutional existing state statutes and local government ordinances to the extent they authorize limitations on choice after the effective date of the amendment,[22] and it curtails the authority of governments to enact any such limiting laws in the future. The ballot summary says nothing at all about these features of the amendment. It talks only about the private sector's role in providing managed, choice-limiting health care mechanisms:

---

[21] Letter of the Attorney General at page 3.

[22] Section 2 of the amendment preserves contracts in existence at the time of enactment, but does nothing to preserve the viability of the laws under which those contracts may have been instituted.

> This provision prevents ***insurance companies, managed care personnel, employers, and other such third parties*** from controlling a citizen's selection of health care providers; requiring [choices] in future ***contracts*** providing care . . . . (emphasis supplied).

The Court has previously spoken to ballot summaries that omit any discussion of a proposed amendment's effect on future legislative capability. In ***In re Discrimination,*** 632 So. 2d 1018 (Fla. 1994), the proposed amendment prohibited any governmental entity from enacting or adopting any law regarding discrimination which did not comply with ten enumerated criteria in the amendment, and it repealed any inconsistent laws. The summary only advised voters of the first feature of the amendment -- that it "[r]estricts" such laws and "[r]epeals all laws inconsistent with this amendment." Id. at 1020. The Court held the ballot summary misled voters in violation of section 101.161, because it failed "to state that the proposed amendment would curtail the authority of government entities, " and voters "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."' ***In re Discrimination,*** 632 So. 2d at 1021 (emphasis in the original).[23/]

C. The summary misleads voters by asserting "citizens" will have the right to choose providers, when the amendment grants the right to "every natural person".

The ballot summary tells voters that the right to choose health care providers will be granted to "citizens. " The amendment, however, establishes that right for "every natural

---

[23/] The ballot summary is particularly misleading in this regard by singling out particular chapters contained in Florida's legislative enactments, implying that they arc the only ones affected by the new right being inserted in the Constitution. The summary does not even hint that local governments would have the same inhibitions as the legislature with respect to citizens' choices of health care providers.

person." The summary does not meet the Court's test for accuracy. See, ***In re Tax, 644 So. 2d*** at 489-90.

This inaccuracy is not insignificant in light of contemporaneous restrictions being placed on the rights of persons in Florida, and elsewhere in the country, who are not "'citizens." Recent legislation from Congress drew a distinction between the rights of citizens and non-citizens to obtain federal welfare benefits.%' The ballot summary's inaccurate description of the proposed amendment will mislead voters who either favor or oppose granting "all natural persons" the same right of health care provider choice that is available only to "citizens." The characterization of the amendment as only affecting "citizens" will have particular significance for voters who would be prepared to pay increased costs for health care in order to have their "full and absolute" right to choose providers, but would be not be prepared to pay those costs to provide a similar right to persons who are not citizens.

To the extent that the ballot summary suggests that only "citizens" are to be given the right of choice, the proposed amendment itself flies "under false colors." ***Askew v. Firestone,*** 421 So. 2d at 156. The same situation pertained, and was held to be misleading, in the recent casino authorization initiative petition. ***In re Casino Authorization,*** 656 So. 2d 466 (Ha. 1995). There the ballot summary asserted casinos would be allowed in "hotels," while the amendment allowed them in "transient lodging establishments." The former was narrower than the latter, and had the potential of misleading voters into misperceiving the scope of the rights being granted. The Court held the ballot summary to be misleading. The current political and highly emotional implication of distinguishing between citizens and non-

---

24/ See, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996).

citizens in this health care choice proposal has an even greater potential for deceiving one or another segment of voters.

Another more subtle misdescription inheres in the ballot summary's reference to "citizens, " because that term includes both natural persons (expressly embraced in the text of the amendment) and businesses (necessarily excluded from that embrace). See, ***Florida Wildlife Federation v. State Dept. at Environmental Regulation, 390*** So. 2d 64, 68 (Fla. 1980) ("corporations are citizens for the purpose of pursuing rights granted to citizens"); ***In re Advisory Opinion to Governor, 243 So.*** 2d 573, 581 (Pla. 1971) (corporations were "citizens" under Article VII, section 5 of the 1968 Constitution).[25/] In ***In re Tax,*** the Court agreed with the Attorney General that a broader, "business"-inclusive term in a ballot summary is misleading under section 101.161 where the text of the amendment itself includes no reference to business entities. ***Id.*** , 644 ***So.*** 2d at 495.

D. The summary misleads the electorate into believing the amendment's right of choice in selecting providers applies to employer health care programs governed by ERISA.

The summary unqualifiedly declares that the amendment "prevents . , . employers, and other such third parties from controlling a citizen's selection of health care providers. " The amendment cannot fulfill this promise to the electorate, however, in light of the Supremacy Clause of the United States Constitution and the preemptive effect of the terms of ERISA.

The Employment Retirement Income Security Act ("ERISA"), 29 U.S. C. §§ 1001, ***et*** seq., governs any "employee benefit plan" established or maintained by any employer

---

25/ The 1971 amendment to Article VII, section 5(b) of the Constitution expressly applies to "citizens other than natural persons. "

engaged in any activity affecting interstate commerce. 29 U.S.C. § 1003(a). An "employee benefit plan" includes any "employee welfare benefit plan," which in turn is defined as including any "plan, fund or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical or hospital care benefits . . . . " 29 U.S.C. §§ 1002(1) and (3).

Congress has mandated that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. " 29 U.S.C. § 1144(a). Preemption is not limited to state laws directly targeted to ERISA plans, but applies to laws that relate to employee benefit plans in general. *Shaw v. Delta Airlines, Inc., 463* U.S. 85, 98-99 (1983). The phrase "relate to" was intended by Congress to be applied in its broadest sense, applicable if the law simply "has a connection with or reference to such a plan, " *Id.* at 97. ***Accord, FMC Cop v. Holliday***, 498 U.S. 52, 58 (1990) (ERISA's preemption clause is "conspicuous for its breadth"); ***Pilot Life Ins. Co. v. Dedeaux***, 481 U.S. 41, 47 (1987) (the phrase "relate to" has a "broad common-sense meaning").

ERISA preempts any state law "that refers to or has a connection with covered [ERISA] benefit plans . . . 'even if the law is not specifically designed to cover such plans, or the effect is only indirect' . . . and even if the law is 'consistent with ERISA's substantive requirements. ' " *Dist. of Columbia v. Greater Washington Bd. of Trade, 506* U.S. 125, 129-30 (1992). ERISA preempts "state laws that mandate employee benefit structures or their administration. " *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. co.,* 514 U.S. 645 (1995).

There can be no doubt that the proposed amendment at issue here strikes directly at employee welfare plans maintained by employers. The ballot summary advises voters that

the amendment will restrict the ability of "employers" to control participants' choice of Providers under their health care programs -- an effect that would mandate the structure of Florida employee benefit plans. Indeed, the ballot summary specifically refers to the laws authorizing those very plans.

ERISA was held to preempt the structure of contracts in the health care field in ***E.I.*** C. ***Elkins Constructors,*** Inc. v. ***Chiles***, 872 F. Supp. 931, 936 (N.D. Fla. 1994). There, a Florida statute required contractors on competitively bid state agency contracts to ensure that their employees have access to hospitalization and medical insurance benefits. The statute did not mandate a specific administrative scheme for the benefit plans, but "compliance with the statute -- for the most part -- will be accomplished through an employer's modification, establishment or maintenance of an ERISA-covered plan. " ***Id.*** at 937.[26/] ***Accord, CIGNA Healthplan of Louisiana v. State of Louisiana ex rel. Ieyoub***, ***82*** **F.3d** 642, 648 (5th Cir. 1996) ("Any Willing Provider" statute preempted because it "prohibits those ERISA plans which elect to use **PPO's** from selecting a PPO that does not include any willing, licensed provider . , . . It is sufficient for preemption purposes that the statute eliminates the choice of one method of structuring benefits. **");** ***Texas Pharmacy Association v. Prudential Insurance Company,*** 105 **F.3d** 1035, 1037 (5th Cir. 1997) ("any willing provider statute" that prohibited managed care plans from interfering with an employee's selection of a pharmacist was preempted by ERISA because it "eliminates the choice of one method of structuring benefits").

[26/] The Florida statute did not expressly refer to ERISA, but it did expressly refer to employee health care plans. The court stated as an alternative ground for its holding that the statute was preempted "on that basis alone." 872 F. Supp. at 936, ***Accord, Dist. of Columbia v. Greater Washington Bd. of Trade,*** 506 U.S. at 130.

The proposed amendment, seeking to establish a constitutional right of choice in health care providers, necessarily eliminates one method of structuring benefits under an ERISA plan -- a limitation on the choice of providers. Under the terms of ERISA itself, and under the Supremacy Clause,[27] ERISA preempts the state's attempt to achieve that limitation. It follows that the ballot summary holds out a false hope to voters -- that they will never be limited by contract provisions or by employer arrangements.281 If the amendment cannot deliver what the ballot summary offers, section 101.161 requires that the proposal be withheld from the electorate. ***In re Stop Early Release, 642 So.*** 2d at 727.

E. The summary fails to disclose the extremely broad collateral effects of the amendment that "fair notice" requires.

In ***In re Discrimination,*** then-Justice Kogan expressed his concern over unspecified collateral impacts that a proposed constitutional amendment may have -- "collateral effects that arc not and probably could not be adequately explained to the people within existing constraints. " ***In re Discrimination, 632 So.*** 2d at 1022 (Kogan, J., concurring). His concern harks back to a fundamental concern of other members of the Court over the years -- that voters "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. " ***Askew v. Firestone, 421 So.*** 2d 151, 155 (Fla. 1982). ***Accord, Florida League of Cities v. Smith,***

27/ The Supremacy Clause of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . , shall be the supreme Law of the Land . . . any Thing in the ***Constitution*** or Laws of any State to the Contrary notwithstanding." Article VI, cl. 2, of the U.S. Constitution (emphasis added).

28/ However, ERISA may not preempt public employee benefit plans. See, 29 U.S.C. §§ 1002(32), 1003(b)(1), 1321(b)(2).

607 So. 2d 397, 398-99 (Fla. 1992) (non-disclosure of loss of a portion of the homestead exemption would be misleading because "such a change in the existing law has sweeping ramifications for taxpayers and local governments"); ***In re Tax, 644 So.*** 2d at 495 (initiative violated section 101.161 where the fiscal impact of the proposal would be substantial but "the ballot title and summary are devoid of any mention of these consequences").

This health care choice proposal is rife with collateral effects that are not disclosed, and perhaps cannot be because of the breadth being given a natural person to exercise "free, full and absolute choice" in selecting health care providers. An obvious undisclosed effect of the proposal is to eviscerate programs by which the State of Florida has saved the taxpayers millions of dollars in health care costs through the use of managed care for its employees, for prison inmates, for indigents and others for whom the state pays health care providers.291 The "free, full and absolute" right to choose health care providers, be they doctors, dentists or a host of other licensed and recognized health care providers,[30/] is antithetical to the right of the state, employers and other voluntary association of persons to limit access to groups of providers chosen in order to "manage" the costs of delivering health care services.

29/ In 1992, Florida's total health care bill was $38 billion. ***Dispelling the Negative,*** at 491. Managed health care programs reduce health care expenses by 10-23%. FLORIDA HOSPITAL ASSOCIATION, ENVIRONMENTAL ASSESSMENT AND HOSPITAL FACT BOOK at 94 (1993). And requiring unlimited choice of providers would increase premiums by as much as 14%. ***Dispelling the Negative,*** at 499, n.85.

30/ The brief filed in opposition to the proposed initiative petition by Floridians for Quality Patient Care enumerates in some detail the providers that would be covered by the proposal. Blue Cross will not burden the Court with a repetition of that information"

The undisclosed collateral consequences arc not merely financial, however. They might well extend to where a person exercises the newly-created constitutional right to choose by declining to select a provider at all. For example, hospitals would run the risk of violating this constitutional right if it were called upon to provide life-saving medical care to patients who, for religious or other reasons, choose to die rather than accept them as a health care provider. The possible collateral effect of the proposal authorizing constitutionally-assisted suicide is nowhere raised in the ballot summary.

A distinct lack of clarity surrounds the term "free, full and absolute choice." While all possible speculative effects arc not to be taken into account here,[31] there are certainly some that have realistic overtones that cannot be ignored. These would include:

1. the effect of a "right" to select a provider who would decline to provide medical care without full compensation for the services performed;

2. the effect on Florida Medicaid recipients who receive federal reimbursements when Florida can not longer comply with the federal requirement that its Medicaid plan "limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency";[32] and

3. the effect on the freedom of hospitals to control staff privileges when a hospital patient chooses to use a physician who does not satisfy the hospital's accreditation requirements.

II. The proposed amendment violates the one subject limitation for initiative petitions.

Article XI, section 3, of the Florida Constitution provides that ballot initiatives "shall embrace but one subject and matter directly connected therewith." The guiding principle of

---

[31] *See, Advisory Opinion to the Attorney General re Limited Casinos, 644 So.* 2d 71, 74-75 (Fla. 1994).

[32] *42* C.F.R. § 447.15.

the single subject requirement is that a proposed constitutional amendment "manifest a "logical and natural oneness of purpose. '" ***In re Discrimination, 632 So.*** 2d at 1020, ***quoting, Fine v. Firestone, 448 So.*** 2d 984, 990 (Fla. 1984). The court determines if there is a "oneness of purpose" by inquiring "whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution. " Id. Where a proposed amendment "changes more than one government function, it is clearly multi-subject." ***Evans v. Firestone, 457 So.*** 2d at ***1354, Accord, In re Advisory Opinion to the Attorney General*** -- ***Save Our Everglades,*** 636 So. 2d 1336, 1340 (Fla. 1994) ("no single proposal can substantially ***alter*** or ***perform*** the functions of multiple branches").

The evil that led the electorate to insist on the imposition of a one-subject restriction is "'logrolling'" -- the situation in which voters arc 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 at 988. ***Accord, Evans v. Firestone, 457 So.*** 2d at 1354. As the last and only guardian of the rights of Floridians expressed in their Constitution, the Court requires "strict compliance." ***Fine v. Firestone, 448 So.*** 2d 984, 989 (Fla. 1984).

The proposed constitutional amendment on health care provider choice has an insidious logrolling effect. It combines the subject of limiting "laws" enacted by governmental entities, with the very distinct subject of limiting contracts entered into by private parties, In one phrase, the proposal states that freedom of choice shall neither be denied nor limited "by law or contract. " That these are separate subjects is manifest from the Declaration of Rights section of the Florida Constitution, where section 10 of Article I prevents the utilization of one to impair the effectiveness of the other.

The Court has held that limitations on the power of government and the rights of private parties are separate subjects:

> we fmd that the subject of discrimination in the proposed amendment is an expansive generality that encompasses both civil rights and the power of all state and local governmental bodies,

In re Discrimination, 632 So. 2d at 1020. Similarly, here, the subject "free choice of health care providers" is also "an expansive generality" encompassing the separate subjects of the power of government to enact laws, and the rights of private parties to enter into consensual relationships.

A limitation of governmental authority -- prohibiting "laws" that deny or limit the choice of health care providers -- may appeal to the voter who is concerned about government interfering with private consensual relationships. A governmental restriction (through constitutional prohibition) on private contractual rights for health care, through groups, employers or coalitions, may well be an anathema to that same voter. This proposal forces such voters "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 at 988. The effect is ***the same*** as it was in ***In re Discrimination,*** where the proposed amendment was stricken from the ballot because the amendment lumped together several classifications of people who would be entitled to protection from discrimination:

> Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

In re Discrimination, 632 So. 2d at 1020. By requiring voters to choose whether they feel more strongly about the electorate restricting the power of government to enact laws limiting private choice than they do about government restricting the power of private parties to

voluntarily enter into consensual contracts, this amendment defies the purpose of the single subject requirement.

This proposal also changes more than one governmental function by its encroachment on the legislative powers of the state, its political subdivisions, local taxing districts and local governments, and its impact on the functions of executive agencies administering those laws.

The proposed amendment addresses specifically the intended limitations on the "law"-making function of the legislative branch of government. The selection of health care providers is also controlled by local governments, however, under their Home Rule powers[33/] and by the boards of local taxing districts throughout the State.341 The proposal undeniably sweeps into those realms, altering the performance of these functions.

Beyond the levels of legislative authority throughout the state, the proposal alters the functioning of a myriad of executive branch agencies that have intimate involvement in the delivery of health care. As one example, the prison population regulatory agencies of the state are mightily impacted, for it is through the Department of Corrections and the State of Florida Correctional Medical Authority that health care providers are selected and given contractual authority to provide health care to inmates in Florida's prisons.351 As another example, the Agency for Health Care Administration ("AHCA") coordinates with the

---

33/ Article VIII, section 6, of the Constitution provides Home Rule powers to Dade County, under which it has established a Public Health Trust controlling the selection of health care providers in the County's health care facilities. See, Section 25A-4(f), Dade County Code.

34/ For example, the Board of the North Broward Hospital District (created by Chapter 27438, Laws of Florida, Special Acts of 1951) is empowered to determine membership in the District's medical staffs, and its decisions are quasi-judicial functions. See, Chapters 73-411 and 78-481, Laws of Florida, Section 31.

35/ Sections 945.603 and 945.6033, Fla. Stat. (1995).

Department of Management Services in purchasing and administering health care for state employees, and determining which health care providers will be available under each of the approved health care plans.[36] AHCA also administers, and selects the health care providers under the state's MedAccess program, in order to provide health care to eligible indigents.[37] A critical feature of the functioning of these agencies is the selection of health care providers who will participate in these programs, the design of which arc to limit the very choice that the proposed amendment seeks to elevate to constitutional "right" status.

Both the separate and distinct functions of government, and the functions of more than one level and branch of government, would be substantially affected by the proposed amendment. A similar situation existed in the proposal reviewed ***in In re Discrimination,*** where the amendment's language "any other governmental entity" was held to encroach on municipal home rule powers and on the rulemaking authority of executive agencies.[38]

Moreover, this proposed amendment would have an undisclosed substantial effect on the separate constitutional right contained in Article I, section 6 of the Constitution, which provides: "The right of employees . . . to bargain collectively shall not be denied or abridged. " If adopted, the health care choice amendment would abridge that right by prohibiting employees from negotiating through collective bargaining for less costly health benefits under managed health care plans.[39] The effect of an initiative proposal on another

---

[36] Section 110.123, Fla. Stat. (1995). AHCA is an executive branch agency under Section 20.42, Fla. Stat. (1995).

[37] Sections 408.90-408.908, Fla. Stat. (1995).

[38] ***In re Discrimination, 632*** So, 2d at 1020.

[39] ERISA would not preempt public employees' benefit plans. See, 29 U.S.C. §§ 1002(32), 1003(b)(1), 1321(b)(2).

section of the Constitution is an appropriate factor to be considered in determining whether it embraces more than one subject. *Fine v. Firestone, 448 So.* 2d at 990.[40/]

CONCLUSION

For the foregoing reasons, the Initiative should be removed from the ballot.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Jerold I. Budney, Esq.
Florida Bar No. 283444
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P. A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Blue Cross and Blue Shield of Florida, Inc.

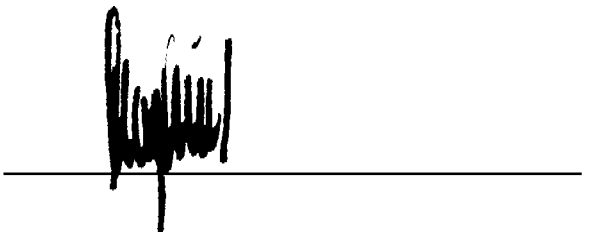
40/ This proposal affects collective bargaining rights under the Constitution without disclosing that fact. Yet, "identifying the articles or sections of the constitution substantially affected 'is necessary for the public to be able to comprehend the contemplated changes in the constitution.' " *In re Tax, 644* So. 2d at 490, ***quoting, Fine v. Firestone, 448 So.*** 2d at ***989.*** In ***Fine v. Firestone, the court*** was also concerned with the breadth of the effect of the proposal:

> The very broadness of the proposal makes it impossible to state what it will affect and effect and violates the requirement that proposed amendments embrace only one subject.

Id. at 995 (McDonald, J., concurring). That same undefmed breadth inheres in this Proposal.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing initial brief was hand-delivered on April 14, 1997 to: Robert A. Butterworth, Attorney General, and Peter Antonacci, Deputy Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050.



GTH\ENGLANDA\473312.3\04/14/97\1:45pm