Filing # 99807235 E-Filed 12/04/2019 04:25:56 PM

SUPREME COURT OF FLORIDA

Case No.: SC19-1070

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: PROVIDE MEDICAID COVERAGE TO ELIGIBLE LOW-INCOME ADULTS

ANSWER BRIEF OF SPONSOR FLORIDA DECIDES HEALTHCARE, INC.

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RECEIVED, 12/04/2019 04:26:29 PM, Clerk, Supreme Court

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STATEMENT OF THE FACTS

The current Medicaid program, in which all states participate, provides federal matching funds to states to assist in paying certain medical care costs for pregnant women, children, needy families, the blind, the elderly, and the disabled ("original covered classes"). 42 U.S.C. § 1396d(a). The Patient Protection and Affordable Care Act ("ACA"), was enacted by Congress in 2010. As interpreted by the U.S. Supreme Court, the ACA gives states the option of accepting a 90% federal financial participation in coverage of an expanded class of persons consisting of adults with incomes up to 133% of the federal poverty level ("the newly eligible class.") 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).[1]

A state may elect not to participate in the expanded coverage provided for by the ACA and continue to receive the minimum federal financial participation under the original Medicaid Act, or it may maximize federal financial participation by qualifying for additional coverage of the newly eligible class ("Medicaid expansion.")

The amendment proposed by the initiative petition currently under review ("the Amendment") states:

> SECTION 33. Provide Medicaid Coverage to Eligible Low-Income Adults.

[1] The methodology for calculating percentage of federal poverty level included in the ACA disregards 5% of income for most individuals so that the actual percentage of poverty level is 138%.

(a) MEDICAID COVERAGE FOR LOW-INCOME ADULTS. The State shall provide Medicaid benefits to Low Income Adults over age 18 and under age 65 whose income is one-hundred thirty-eight percent (138%) of the federal poverty level or below, and who meet other nonfinancial eligibility requirements of the federal Medicaid statute. The State shall not impose on Low Income Adults any greater or additional burdens or restrictions on eligibility, enrollment, or benefits than on any other population eligible for medical assistance.

(b) DEFINITIONS. For the purposes of this section, the following words and terms shall have the stated meanings:

(1) "Low Income Adults" refers to those individuals over age 18 and under age 65, whose income is one-hundred thirty-eight percent (138%) of the federal poverty level or below, as described by and using the income methodology provided for by the federal Medicaid statute at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII), and who meet applicable non-financial eligibility conditions for Medicaid under 42 CFR Part 435, Subpart E.

(2) "Agency for Health Care Administration" or "Agency" refers to the single State agency responsible for administering Florida's Medicaid plan pursuant to 42 U.S.C. § 1396a(a)(5) and § 409.902, Fla. Stat.

(3) "State Plan Amendment" refers to the document(s) the State submits to the Centers for Medicare and Medicaid Services (CMS) for review and approval before making a change to its program policies, including setting forth the groups of individuals to be covered.

(4) "Centers for Medicare and Medicaid Services" refers to the agency responsible for administering the Medicaid program at the federal level, including review and approval of State Plan Amendments.

(c) IMPLEMENTATION.

(1) Within 90 days of voter approval of this Section, in order to implement the provision of Medicaid coverage to Low Income Adults and obtain Federal Medical Assistance Percentage funds for the cost of their coverage, the Agency for Health Care Administration shall submit a State Plan Amendment and all other necessary documents, as well as

> take any additional necessary steps to seek required approvals from the Centers for Medicare and Medicaid Services to include Low Income Adults as a coverage group in Florida's Medicaid program.
>
> (2) Nothing in this Section shall limit the Legislature from enacting laws consistent with this Section. Specifically, it is consistent with this section to add a new subsection (section (9) below) to Fla. Stat. 409.903 Mandatory payments for eligible persons.—
>
> (9) A person over age 18 and under age 65 whose income is 138 percent of the poverty level or below.

The ballot summary for the Amendment states:

> Requires State to provide Medicaid coverage to individuals over age 18 and under age 65 whose incomes are at or below 138 percent of the federal poverty level and meet other nonfinancial eligibility requirements, with no greater burdens placed on eligibility, enrollment, or benefits for these newly eligible individuals compared to other Medicaid beneficiaries. Directs Agency for Health Care Administration to implement the initiative by maximizing federal financial participation for newly eligible individuals.

SUMMARY OF ARGUMENT

Ballot Summary

The chief purpose of the Amendment is to cause Florida to participate in expanded Medicaid coverage in a manner that will qualify for maximum federal financial participation. That purpose is clearly, unambiguously, and accurately set forth in the ballot summary.

The statement in the summary that the Agency for Health Care Administration ("ACHA") is directed to implement the Amendment by maximizing federal financial participation is accurate. A state has the option of participating in basic Medicaid

coverage alone or expanding coverage pursuant to the ACA. Federal financial participation in the basic Florida Medicaid plan is limited to a percentage based upon a formula that results in a current federal contribution of 61% and an all-time high of 67%. If the Amendment is implemented, the federal contribution to the cost of the expanded coverage will be 90%. This would be the maximum percentage contribution available to Florida under Medicaid. Florida could expand Medicaid coverage to the newly eligible class without qualifying for or accepting a federal contribution to the cost of the expansion. However, the Amendment directs the state to implement the Amendment by maximizing the federal contribution. Thus, the summary accurately says what the Amendment does. It is of no consequence that the Amendment doesn't use the word "maximize" or "maximizing" because a ballot summary is not required to track the language of the proposed amendment verbatim.

Opponents' references to various possible ramifications of the Amendment's passage are appropriately made on the campaign trail, not in this forum. This Court has often stated that it is not necessary or practicable for the summary to include all perceived ramifications.

Single-Subject

The test set forth by this Court for compliance with the single-subject requirement is whether the proposal "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or

scheme." The Amendment easily meets that test. Its purpose is to cause Florida to participate in the expansion of Medicaid provided for in the ACA. Everything included in the Amendment is directly related to that single dominant plan.

Opponents do not claim that there is more than the singular objective of Medicaid expansion under the ACA or that there are any elements not connected with that objective. Instead, they reference a judicially created test not actually found in the constitution: whether the Amendment substantially alters or performs the constitutional function of more than one branch or level of government. Opponents argue the Amendment affects the legislative branch by establishing policy, and the executive branch by directing action by AHCA and limiting the governor's veto options, and affects local government by potential financial impact on some counties. The Court has held that the single-subject requirement is not violated simply because multiple branches or levels of government are *affected* by an amendment, noting that almost every amendment will have such an effect. Rather, a violation occurs only if an amendment *substantially alters or performs* the constitutional functions of multiple branches or levels.

The Amendment does not alter or perform constitutional functions of the executive branch or local governments. ACHA is not in the executive branch. It is a legislative creation that performs duties assigned to it by the Legislature. Even if it were held to be an executive branch agency, the filing of a one-time application

with a federal agency is not the performance of "the types of primary policy decisions" that are prohibited. This Court has rejected claims that proposed amendments violate the single-subject requirement because they indirectly affect the governor's potential exercise of veto power, and has held that possible future impact on a local government's finances is not a substantial alteration of its constitutional function.

Opponents' arguments regarding illegal delegation, and the federal Guarantee and Supremacy clauses call for this Court to disregard long-standing precedent regarding the limited function of this review. The arguments also ask the Court to issue what amount to advisory opinions beyond the Court's constitutional jurisdiction. In addition, Opponents fail to provide authoritative support for the arguments.

The House asks this Court to fashion a new constitutional limitation on the right of the people to amend their constitution. The assertion that an initiative petition should not be allowed to propose an amendment that would directly exercise a legislative power is not supported by any language in the Florida Constitution, would severely limit the power of the people to amend the constitution, and would give the Court an almost unlimited discretion to block ballot access.

ARGUMENT

I
THE BALLOT SUMMARY CLEARLY, UNAMBIGUOUSLY, AND ACCURATELY SUMMARIZES THE CHIEF PURPOSE OF THE AMENDMENT.

A. The ballot summary correctly states that the Amendment "[d]irects Agency for Health Care Administration to implement the initiative by maximizing federal financial participation for newly eligible individuals."

In seventy-five words or less, the ballot summary must clearly and unambiguously give voters notice of the chief purpose of the proposed amendment and not contain any materially misleading language. *Rights of Electricity Consumers,* 188 So. 3d 822 (Fla. 2016). The purpose of the Amendment is to cause Florida to participate in expansion of Medicaid coverage in a manner that will qualify for maximum federal financial participation in funding. The ballot summary explains this and contains nothing misleading.

Opponents argue that the ballot summary is misleading when it states that the Amendment directs the Agency for Health Care Administration to maximize federal participation. They argue that the terminology does not appear in the Amendment and that the amount of federal financial participation is set according to a formula over which the state has no control. The ACA expanded Medicaid coverage to a previously uncovered class consisting of adults with incomes up to 133% of the federal poverty level. As it was enacted in 2010, the ACA required state plans to

cover the newly eligible class as a condition of participation in basic Medicaid. Two years after its enactment, the U.S. Supreme Court declared unconstitutional the ACA provision mandating state participation in the expanded coverage. *National Federal of Independent Business v. Sebelius*, 567 U.S. 519 (2012). However, the Court allowed the expansion provisions to stand as a voluntary state option. The result is two separate levels of federal funding.

A minimum level of federal financial participation is available to a state such as Florida that chooses not to exercise the option to expand coverage pursuant to the ACA. As the House correctly states, the degree of federal financial participation in basic Medicaid is based on a formula over which the state has no control. The federal contribution to Florida Medicaid is currently 61% and has been as high as 67% in Fiscal Year 2009-2010. House Brief, p. 5.

A second level of federal financial participation is available to states that elect to expand coverage to the newly eligible class under the ACA (all but 14 states). Those states receive a significantly higher level of federal contribution.[2] The federal contribution to coverage of the newly eligible class if Florida were to adopt and implement the ACA would be 90%. 42 U.S.C. § 1396d(y)(1)(E). There is no

[2] The federal contribution to Medicaid in the absence of ACA participation is calculated according to a formula in the federal act based upon relative per capita income in each state compared to the national per capita income. 42 U.S.C. § 1396d(b).

provision in federal law by which Florida could increase the percentage of federal contribution beyond the amount received by participation in the ACA. By any reasonable understanding of the English language, Florida's adoption and implementation of the Amendment would maximize the federal contribution to Florida Medicaid.

It is of no consequence that the text of the Amendment doesn't use the word "maximize" or "maximizing" because the summary is not required to use the verbatim terminology of the Amendment text. *Physician Shall Charge,* 880 So. 2d 659 (Fla. 2004); *Right to Treatment,* 818 So. 2d 491 (Fla. 2002).

The Senate argues that the summary's reference to maximizing federal contribution amounts to gratuitous political rhetoric. In fact, it is necessary for the summary to note that maximization of the federal contribution is part to the Amendment's chief purpose because Florida could expand its coverage to the newly expanded class without qualifying for or accepting the additional federal contribution. The Opponents would undoubtedly have argued that the summary was misleading if it had failed to mention the additional federal contribution.

B. It is not necessary or appropriate for the ballot summary to mention all possible ramifications of the Amendment's passage.

Opponents assert that the ballot summary is defective for failing to mention some ramifications of the Amendment, including speculative possible future ramifications. For example, Opponents argue that the ballot summary fails to

adequately inform voters that federal law requires a state to continue to participate in basic Medicaid in order to take advantage of expansion to the newly eligible class, that the Amendment would effectively limit the discretion of the Legislature to opt out of basic Medicaid,[3] and that that participation in Medicaid expansion might have an economic impact on some counties. The Court has explained on multiple occasions that it is not necessary or practicable for the ballot summary, which is limited to 75 words, to list all possible ramifications. See e.g., *Physician Shall Charge the Same Fee*, 880 So. 2d 659 (Fla. 2004); *Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415 (Fla. 2002). In *Physician*, 880 So. 2d at 665, the Court stated:

> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education. What the law very simply requires is that the ballot give the voter fair notice of the question he must decide so that he may intelligently cast his vote.

[3] Federal law places no limitation on a state's ability to opt out of Medicaid. It just requires the state to participate in basic Medicaid coverage if it wishes to add the expanded coverage.

Accord: *Local Trustees,* 819 So. 2d 725, 732 (Fla. 2002) ("[It can be presumed] that the average voter has a certain amount of common understanding and knowledge.") (Brackets by court.)

The premise of Opponents' argument – that a ballot summary must list all ramifications perceived by opponents to be negative – is not only unnecessary, but unworkable. In addition to the 75-word limitation noted by this Court and the inability for a sponsor to guess at all the ramifications an opponent might think of, the summary would also have to list all possible positive ramifications in order to give the voter a fairly balanced picture. This would draw an argument that the summary contains political rhetoric. The proper forum for discussion of perceived ramifications, positive and negative, is the political campaign, not the ballot summary.

Moreover, there is no reason in this case to believe that the failure to include reference to the federal requirement would be material to a voter. Anyone favoring an expansion of Medicaid to the newly eligible class would logically be expected to favor retention of basic Medicaid. Furthermore, Florida has participated in the Medicaid program for 50 years and there is no state that has opted out. The likelihood that the Florida Legislature or Florida voters would be inclined to do so is too insignificant to have required a discussion of such possibility in the ballot summary.

Opponents' arguments are directed at the wrong decision-maker at the wrong time. Whether or not the Amendment would prohibit the Legislature from opting out of basic Medicaid in the future is an issue for post-election litigation.

II
THE AMENDMENT DOES NOT VIOLATE THE SINGLE-SUBJECT REQUIREMENT.

This Court has set forth the test for compliance with the single-subject requirement contained Article XI, section 3 of the Florida Constitution:

> We have repeatedly held that "in determining whether a proposal addresses a single subject, the test is whether it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test….'" The amendment must have a "natural oneness" of purpose.

Physician, 880 So. 2d at 662 (internal citations omitted).

The Amendment has a singular purpose: participation of Florida in the optional Medicaid expansion as provided for in the ACA. All elements of the Amendment are designed to implement that objective. Provisions that are incidental to an amendment's chief purpose and designed to implement the purpose do not violate single-subject. *See e.g., Limited Casinos,* 644 So. 2d 71 (Fla. 1994); *English – The Official Language of Florida,* 520 So. 2d 11 (Fla. 1988); *Floridians Against Casino Gambling Takeover v. Let's Help Florida,* 363 So. 2d 337 (Fla. 1978).

A. The Amendment does not substantially alter or perform the functions of more than one branch of government or local governments.

Opponents do not claim the Amendment seeks to advance more than the singular objective of participation in Medicaid expansion or that it contains any elements not directly connected with that objective. Instead, they invoke the judicially created rule that an initiative-proposed amendment will not meet the single-subject test if it substantially alters or performs the functions of multiple branches or levels of government.

Opponents assert that the Amendment performs legislative functions by establishing policy and requiring appropriations, and that it performs executive functions by requiring AHCA – which the House describes as "an executive branch agency" – to submit documents to a federal agency, and by restricting the governor's veto power. In the first place, AHCA is not a constitutional part of the executive branch. It is a creature of the Legislature created by section 20.42, Florida Statutes, subject at all times to the will of the Legislature. See *City of Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d 493, 495 (Fla. 1973) ("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute.")

Second, the Court has recognized that a proposed amendment does not violate the single-subject rule simply because it affects multiple branches or levels of government.

> We recognize that the petition, if passed, could affect multiple areas of government. In fact, we find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent. However, this Court has held that a proposed amendment can meet the single-subject requirement even though it affects multiple branches of government [citation omitted]. Further, this Court has held that the possibility that an amendment might interact with other parts of the Florida Constitution is not sufficient reason to invalidate the proposed amendment.

Limited Casinos, 644 So. 2d 71, 74 (Fla. 1994). In *Medical Marijuana I*, 132 So. 3d 786, 796 (Fla. 2014), the opponents, much the same as in the case at bar, argued that the proposed amendment violated the single-subject requirement by its effect on both the Legislature and the Department of Health, which was required to perform regulatory oversight. The Court rejected the argument stating:

> The fact that a branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule. *Advisory Op. Att'y Gen. re Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco*, 926 So. 2d 1186, 1192 (Fla. 2006). Moreover, the Department of Health would not be empowered under this amendment to make the types of primary policy decisions that are prohibited under the doctrine of non-delegation of legislative power.

The Court has also rejected the argument that proposed amendments violated the single-subject rule because of their indirect effect on the governor's veto power. *See*, *e.g. Funding for Embryonic Stem Cell Research*, 959, So. 2d 195 (Fla. 2007) ("We have clarified that '[a] proposal that affects several branches of government will not automatically fail; rather, it is when a proposal *substantially* alters or

performs the functions of multiple branches that it violates the single-subject test.'") (Brackets and italics by court.)

Most initiative-proposed amendments involve policy issues that reduce the Legislature's exercise of its constitutional powers because, in the absence of language in the amendment to the contrary, their provisions are beyond the Legislature's power to change the policy established by the amendment. Those same proposed amendments necessarily also indirectly affect the governor's veto power since he cannot veto a constitutional amendment. If that were the test, few if any initiative proposals would pass. Those are the types of indirect effects this Court has said are not contemplated by the single-subject requirement. Instead, the requirement is directed to amendments that impinge directly on the constitutional powers of more than one branch.

Even if the Amendment were found to alter or perform a constitutional executive branch function, it would not be a substantial alteration or performance. The Amendment simply requires one state agency to file qualifying documents one time. It is far from the types of "primary policy decisions" the Court has said violate the single-subject requirement. *See Medical Marijuana I*, 132 So. 3d at 796.

The private Opponent speculates that the Amendment might have a financial impact on certain county budgets. It makes no attempt to explain how this could substantially alter or amend a constitutional function of those governments.

B. The Senate's illegal delegation arguments are prematurely presented.

The Senate argues that the Amendment violates the non-delegation principle that arises from the separation of powers provision of the Florida Constitution, and the Guarantee and Supremacy clauses of the U.S. Constitution. In order to entertain the arguments, the Court would have to recede from its long-standing precedent and consider matters other than the ballot summary and single-subject requirement. An opinion on the delegation arguments would be an advisory opinion that would exceed the constitutional jurisdiction of the Court in this pre-election review. Nonetheless, the merits of the arguments will be briefly addressed below.

(1) The Florida non-delegation principle

The non-delegation principle arises from article II, section 3 of the Florida Constitution, which assigns the legislative power exclusively to the Legislature. An amendment to the constitution that assigns a legislative task to another body would take precedence over article II, section 3 to the extent of an irreconcilable conflict. Consequently, if the Amendment did conflict with the non-delegation doctrine, the Amendment would prevail. However, it does not conflict with the principle as it has been set forth by this Court.

The Senate acknowledges that the Court has upheld state laws adopting then-existing federal regulations provided that the state is not bound to future federal regulations without legislative ratification. The Senate erroneously claims that the

Amendment forever binds Florida to federal law on the Medicaid expansion regardless of how the federal law may be changed in the future, and that the Legislature has no authority to respond to such changes. The Amendment does no such thing. The Amendment requires the state to participate in the expanded Medicaid coverage as it currently exists and instructs AHCA to submit a state plan for federal approval. The Amendment says nothing about Florida's obligation to comply with any materially changed federal program. Moreover, the Amendment specifies that it does not limit the ability of the Legislature to enact laws "consistent with this section."

(2) The Guarantee Clause

The Senate argues that the Amendment delegates Florida legislative authority in violation of the U.S. Constitution's guarantee that the States will have a republican form of government. The argument is based, like the delegation argument, on the erroneous premise that the Amendment binds Florida to future changes in the Medicaid law, regardless of how radical. That issue is for determination at a later time, but there is no language in the Amendment to support that conclusion.

(3) The Supremacy Clause

The Amendment provides that, "The State shall not impose on Low Income Adults any greater or additional burdens or restrictions on eligibility, enrollment, or benefits than on any other population eligible for medical assistance." The Senate

argues that the provision violates the federal supremacy clause because it requires a condition in the Florida plan that conflicts with the federal law. The supremacy clause states that federal law (in a field within Congressional authority) is the law of the land, and takes precedence over any conflicting state law. The argument should be rejected, not only because it seeks a ruling beyond the scope of this review, but also because it assumes a number of future events: the federal government approves a Florida plan that contains the challenged language; a court declares that, despite the approval, the language is in conflict with federal law; a court decides the challenged phrase is not severable from the rest of the Amendment. *See Limited Casinos* 644 So. 2d at 74 (Rejecting single-subject arguments as "premature speculation.") The review the Senate seeks is clearly premature.

III
THE COURT SHOULD REJECT THE HOUSE'S INVITATION TO WRITE A NEW PROVISION INTO ARTICLE XI, SECTION 3 OF THE CONSTITUTION.

The House urges the Court to write into the Constitution a major new restriction on the people's right to change their fundamental document. The House argues that the Amendment attempts to "enlist the electorate in the direct exercise of a legislative power," and that this should not be permitted. Article XI, section 3 of the Florida Constitution reserves to the people of Florida the unlimited power to revise or amend the Constitution by initiative with only one restriction; the

Amendment must contain "but one subject and matter directly connected therewith." Nothing in section 3 prohibits the people from amending the Constitution with respect to the powers of any of the three branches so long as an amendment does not substantially change the powers of more than one branch simultaneously. The House cites no authority in the legislative history or language of the Florida Constitution to support this novel proposition. If it were correct, most of the initiative-sponsored amendments to the 1968 Constitution would have been invalid. Moreover, considering that most proposed amendments can be said to involve a degree of policy-making, the Court would have an almost unlimited ability to decide which proposed amendments will and will not be available for consideration by the voters.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to hold that the Amendment meets the single-subject and ballot summary requirements.

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed electronically with the Clerk of the Court via the e-filing Portal and served via email to the following this 4th day of December, 2019:

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