SC19-1070

IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES IN OPPOSITION TO THE INITIATIVE

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TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF CITATIONS iv
IDENTITY AND INTEREST OF OPPONENT 1
STATEMENT OF THE CASE AND FACTS 1
A. Overview of the Medicaid Program 1
B. Medicaid Expansion under the Patient Protection and Affordable Care Act 6
C. The Initiative Proposal 8
SUMMARY OF THE ARGUMENT 9
ARGUMENT 12
I. THE BALLOT TITLE AND SUMMARY ARE MISLEADING AND DO NOT CLEARLY AND UNAMBIGUOUSLY PROVIDE FAIR NOTICE TO VOTERS OF THE INITIATIVE PROPOSAL'S CHIEF PURPOSE. 12
A. The Ballot Summary falsely states that the Initiative Proposal would direct AHCA to implement the initiative "by maximizing federal financial participation for newly eligible individuals" when the initiative itself contains no such requirement. 13
B. The Ballot Title and Summary fail to clearly and unambiguously disclose the Initiative Proposal's chief purpose and most significant ramification: the imposition of a state constitutional requirement that Florida participate in the federal Medicaid program. 16
II. THE INITIATIVE PROPOSAL VIOLATES THE FLORIDA CONSTITUTION'S SINGLE-SUBJECT REQUIREMENT. 20
A. The Initiative Proposal substantially alters and performs the functions of multiple branches of state government. 21

III. THE INITIATIVE PROPOSAL IS INVALID BECAUSE IT REPRESENTS AN ATTEMPTED DIRECT EXERCISE OF THE LEGISLATIVE POWER THAT IS BEYOND THE SCOPE OF ARTICLE XI OF THE FLORIDA CONSTITUTION. 25

A. This Court has jurisdiction to determine the "validity" of an initiative petition. 26

B. "The legislative power of the state" shall be vested in the Florida Legislature. 28

C. A valid initiative petition may propose the revision or amendment of a portion of the Florida Constitution, but may not attempt to directly enlist the electorate in the exercise of legislative, executive, or judicial power. 31

D. The Initiative Proposal is an invalid attempt to enlist the electorate in the direct exercise of the legislative power. 36

CONCLUSION 37

CERTIFICATE OF SERVICE AND COMPLIANCE 39

TABLE OF CITATIONS

CASES

Adams v. Gunter,
238 So. 2d 824 (Fla. 1970) 31

Adv. Op. to Att'y. Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved,
2 So. 3d 968 (Fla. 2009) 27

Adv. Op. to Att'y Gen. re Fish & Wildlife Conservation Comm'n,
705 So. 2d 1351 (Fla. 1998) 21

Adv. Op. to Att'y Gen. re Fla. Marriage Protection Amendment,
926 So. 2d 1229 (Fla. 2006) 16

Adv. Op. to Att'y Gen. re Fla. Transp. Init. for Statewide High Speed Monorail, Fixed Guideway, or Magnetic Levitation System,
926 So. 2d 1218 (Fla. 2006) 24-25

Adv. Op. to Att'y General re Ltd. Marine Net Fishing,
620 So. 2d 997 (Fla. 1993) 33-34

Adv. Op. to Att'y Gen. re Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco,
926 So. 2d 1186 (Fla. 2006) 23-24

Adv. Op. to Att'y Gen. re Voter Control of Gambling,
215 So. 3d 1209 (Fla. 2017) 26

Adv. Op. to Att'y Gen. re Term Limits Pledge,
718 So. 2d 798 (Fla. 1998) 12, 19

Adv. Op. to Att'y Gen. re Req't for Adequate Pub. Educ. Funding,
703 So. 2d 446 (Fla. 1997) 23-24

Adv. Op. to Att'y Gen. re Water & Land Conservation,
123 So. 3d 47 (Fla. 2013) 12, 21

Askew v. Cross Key Waterways,
372 So. 2d 913 (Fla. 1978) 29

Askew v. Firestone,
421 So. 2d 151 (Fla. 1982) 19

Bd. of Pub. Instruction for Sumter Cty. for & on Behalf of Special Tax Sch. Dist. No. 12 v. Wright,
76 So. 2d 863 (Fla. 1955) 29-30

Chiles v Children A, B, C, D, E, & F,
589 So. 2d 260 (Fla. 1991) 28-29

Collier v. Gray,
157 So. 40 (Fla. 1934) 33

Crawford v. Gilchrist,
59 So. 963 (Fla. 1912) 34

Dep't of State v. Hollander,
256 So. 3d 1300 (Fla. 2018) 19

Evans v. Firestone,
457 So. 2d 1351 (Fla. 1984) 16, 22

Fine v. Firestone,
448 So. 2d 984 (Fla. 1984) 20

Fla. Dep't of State v. Slough,
992 So. 2d 142 (Fla. 2008) 12

In re Adv. Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply,
177 So. 3d 235 (Fla. 2015) 21

In re Adv. Op. to Att'y Gen. – Save Our Everglades,
636 So. 2d 1336 (Fla. 1994) 20, 22, 36

Morrison v. Olson,
487 U.S. 654 (1988) 30

Nat'l Fed. of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 7-8

Smathers v. Smith,
338 So. 2d 825 (Fla. 1976) 32

State v. Bd. of Pub. Instruction for Dade Cty.,
170 So. 602 (Fla. 1936) 29

Stone v. State,
71 So. 634 (Fla. 1916) 28-29

Sun Ins. Office, Ltd. v. Clay,
133 So. 2d 735 (Fla. 1961) 29

STATUTES AND LAWS

§ 16.061, Fla. Stat. 26, 28

§ 101.161, Fla. Stat. 12, 19, 26-27

§ 409.903, Fla. Stat. 2, 36-37

§ 409.904, Fla. Stat. 2

42 U.S.C. § 1396a 2, 6-7, 23

42 U.S.C. § 1396c 7

42 U.S.C. § 1396d.....4

124 Stat. 119 6

CONSTITUTIONAL PROVISIONS

Ariz. Const. Art. IV, § 1 30

Art. III, § 1, Fla. Const.....1, 11, 28

Art. IV, § 1, Fla. Const. 35

Art. IV, § 10, Fla. Const. 26, 36

Art. V, § 3, Fla. Const.....8, 26, 35

Art. XI, § 3, Fla. Const. ..... *passim*

OTHER AUTHORITIES

Executive Office of the President, Office of Management and Budget, "Fiscal Year 2013 Budget of the U.S. Government" (Feb. 13, 2012) 6

Fla. House of Representatives, "GS 203: Exploring Florida's Medicaid Program" (Dec. 11, 2018) 3

Fla. Legislature, Office of Economic and Demographic Research, "Medicaid Federal Share of Matching Funds for FFY 2020" (Aug. 6, 2019) 5

Office of Management and Budget, "Living Within Our Means and Investing in the Future: The President's Plan for Economic Growth and Deficit Reduction" (Sept. 2011).....6

P.K. Jameson & Marsha Hoscak, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives,* 23 Fla. St. U. L. Rev. 417 (1995).....33

R. Vogel, "AHCCCS: A New Medicare-Medicaid Model in Arizona," The New England Journal of Medicine (Oct. 13, 1983).....2

U.S. Department of Health and Human Services, "Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2018 through September 30, 2019", Federal Register, Nov. 21, 2017 (Vol. 82, No. 223).....4

IDENTITY AND INTEREST OF OPPONENT

The Florida House of Representatives is part of the Florida Legislature, the sovereign branch of Florida's government in which the people of the State of Florida have vested "[t]he legislative power of the state." Art. III, § 1, Fla. Const. The House submits this brief in opposition to the initiative entitled "Provide Medicaid Coverage to Eligible Low-Income Adults" (the "Initiative Proposal") because the proposal violates the Florida Constitution's single-subject requirement and the clarity and accuracy requirements imposed on ballot summaries by Florida statute.

The House also opposes the Initiative Proposal's ballot placement on more fundamental grounds. The Initiative Proposal is invalid because it does not truly represent an exercise of the power to propose "the revision or amendment" of a portion of the Florida Constitution. Instead, the Initiative Proposal is an attempted direct exercise of the *legislative power*—a power that is not reserved to the people under Article XI of the Florida Constitution, but one that is vested exclusively in the Florida Legislature.

STATEMENT OF THE CASE AND FACTS

A. Overview of the Medicaid Program

Authorized by Title XIX of the Social Security Act, Medicaid is a program designed to provide funding for health-related services for certain persons with

limited income. No state is required to participate in Medicaid, although all 50 states currently do so. Florida joined Medicaid in 1970. § 409.266, Fla. Stat. (1970). The last state to enter the program, Arizona, did so in 1982. R. Vogel, "AHCCCS: A New Medicare-Medicaid Model in Arizona," The New England Journal of Medicine (Oct. 13, 1983): 934-93.

Mandatory and Optional Populations

Federal law defines the overall structure of the Medicaid program by specifying certain services that a state must cover and populations that a state must serve for the state to participate in the Medicaid program. As a condition of federal funding, federal law *requires* state Medicaid programs to cover certain populations, including children in low-income families, low-income pregnant women, low-income parents with children, children in the state child welfare system, low-income disabled people, and low-income elderly people. 42 U.S.C. § 1396a(a)(10)(i); *see also* § 409.903, Fla. Stat. (identifying eight mandatory categorical coverage groups). Federal law does not require states to cover low-income adults who are not disabled or pregnant and who have no dependent children—that is, the population addressed by the Initiative Proposal.

Federal Medicaid law also *allows* states to cover other populations, in addition to the mandatory populations, with federal approval. 42 U.S.C. § 1396a(a)(10)(ii); *see also* § 409.904, Fla. Stat. (identifying optional categorical

groups covered by Medicaid in Florida). Florida covers several optional populations at higher income levels than the federal requirements, including children, pregnant women, disabled people, and elderly people. *Id*. Florida also covers other optional populations at higher income levels for limited benefits such as family planning services, breast and cervical cancer services, and AIDS-related services. *Id*.

Medicaid Cost and Enrollment Data

Florida's Medicaid population and expenditures have increased significantly in the last 30 years, from a $3.1 billion program covering 922,000 people in Fiscal Year 1990-91 to a $28.3 billion program covering about 4,000,000 people in Fiscal Year 2018-19. *See* Florida House of Representatives, "GS 203: Exploring Florida's Medicaid Program", pp. 5, 8, Dec. 11, 2018; Social Services Estimating Conference Medicaid Caseload and Expenditures July and August 2019, "Medicaid Expenditures Long Term Forecast", *available at* http://edr.state.fl.us/Content/conferences/medicaid/index.cfm (last viewed Nov. 14, 2019). Projected expenditures and current enrollment for this program for Fiscal Year 2019-20 are $28.1 billion and 3.79 million enrollees. *See* Social Services Estimating Conference Medicaid Caseload and Expenditures July and August 2019, "Medicaid Expenditures Long Term Forecast" and "Medicaid Caseload Summary", *available at*

http://edr.state.fl.us/Content/conferences/medicaid/index.cfm (last viewed Nov. 14, 2019). Expenditures and enrollment are projected to be $31.2 billion and 3.97 million enrollees for Fiscal Year 2024-25. *Id*.

Federal Matching Funds

Medicaid costs are shared by the federal and state governments. The federal government contributes federal matching funds for expenditures by states at rates called Federal Medical Assistance Percentages (FMAPs). 42 U.S.C. § 1396d(b). In general, the FMAP is set annually for each state based on relative per capita incomes in each state compared to the national per capita income. *Id*. States with lower per capita incomes receive higher FMAPs; states with higher per capita incomes have lower FMAPs. For example, the 2019 FMAP for Mississippi is 76.39 percent, while the 2019 FMAP for Connecticut is 50 percent. *See* U.S. Department of Health and Human Services, "Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2018 through September 30, 2019", Federal Register, Nov. 21, 2017 (Vol. 82, No. 223) at 55385, *available at* https://www.govinfo.gov/content/pkg/FR-2017-11-21/pdf/2017-24953.pdf (last viewed Nov. 14, 2019).

A state's FMAP may fluctuate year-to-year depending on changes to per capita income within that state and changes to per capita income in other states.

The Florida FMAP is currently 61 percent, such that of the projected total $28.1 billion in expenditures for the program in Fiscal Year 2019-20, approximately $11.2 billion is state funds and $16.9 billion is federal matching funds. *See* Social Services Estimating Conference Medicaid Caseload and Expenditures July and August 2019, "Medicaid Expenditures Long Term Forecast", *available at* http://edr.state.fl.us/Content/conferences/medicaid/index.cfm (last viewed Nov. 14, 2019). Florida's FMAP changes every year, from a low of 54 percent in Fiscal Year 1989-90 to a high of 67 percent in Fiscal Year 2009-10. *See* Florida Legislature, Office of Economic and Demographic Research, "Medicaid Federal Share of Matching Funds for FFY 2020", Aug. 6, 2019, pp. 1, 5, *available at* http://edr.state.fl.us/Content/conferences/fmap/index.cfm (last viewed Nov. 14, 2019).

Congress can (and does) change the FMAP formula and distributions. For example, Congress authorized FMAP adjusters for states in certain circumstances and has made temporary, recession-related increases to the FMAP. *See Children's Health Insurance Program Reauthorization Act of 2009*, P.L. 111-3 Section 614 (requiring Medicaid FMAP adjustments based on certain changes in employer contributions to pension or insurance funds); *American Recovery and Reinvestment Act of 2009*, P.L. 111-5 section 5001. Similarly, the Obama Administration proposed blending the varying FMAPs for in Medicaid and the

Children's Health Insurance Program and creating a single matching rate, which would have shifted costs to the state and saved the federal government $14.9 billion. *See* Office of Management and Budget, "Living Within Our Means and Investing in the Future: The President's Plan for Economic Growth and Deficit Reduction", p. 40, Sept. 2011, *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/budget/fy2012/assets/jointcommitteereport.pdf (last viewed Nov. 14, 2019). The Administration later added this proposal to its recommended 2013 budget, and estimated $17.9 billion in savings to the federal government by cost shifts to states. *See* Executive Office of the President, Office of Management and Budget, "Fiscal Year 2013 Budget of the U.S. Government", p. 36, Feb. 13, 2012, *available at* https://www.govinfo.gov/content/pkg/BUDGET-2013-BUD/pdf/BUDGET-2013-BUD.pdf (last viewed Nov. 14, 2019).

B. Medicaid Expansion under the Patient Protection and Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act. 124 Stat. 119. Among its provisions was an expansion in the scope of the Medicaid program, including a requirement that states provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). The Affordable Care Act provided that a state that did

not comply with the new Medicaid coverage requirements would lose not only the federal funding for the new population that would have been covered, but *all* of its federal Medicaid funds. 42 U.S.C. § 1396c.

On the day the Act was signed into law, Florida and twelve other states filed a Complaint in federal court challenging the Medicaid expansion provision as exceeding Congress's constitutional powers. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540-42 (2012). The United States Supreme Court ultimately agreed with the states, with seven justices concluding that the federal government could not withdraw existing Medicaid funds based upon a state's decision not to expand Medicaid coverage as provided under the Affordable Care Act. *Id*. at 585. Key to that holding was the Court's description of the Act's dramatic alteration in the purpose of the Medicaid program:

> There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U.S.C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage.
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> * * *
>
> The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U.S.C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a

> program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.

Id. at 575, 583.

The ruling effectively made the expansion group a federally optional, rather than mandatory, eligibility group. *Id*. In the intervening years, freed from what Chief Justice Roberts described as the federal government's "gun to the head" threat to withdraw all Medicaid funds, *id*. at 581, Florida has not chosen to expand Medicaid coverage to the working-age, non-disabled, childless adult population that is addressed by the Initiative Proposal.

C. The Initiative Proposal

On June 27, 2019, the Attorney General petitioned this Court for an advisory opinion as to the validity of an initiative petition entitled "Provide Medicaid Coverage to Eligible Low-Income Adults." This Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const. The full text of the Initiative Proposal, which would create (another) new section within Article X of the Florida Constitution, is set forth in the Attorney General's Petition.

The Initiative Proposal includes the following ballot title and summary:

> BALLOT TITLE: Provide Medicaid Coverage to Eligible Low-Income Adults.

> BALLOT SUMMARY: 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.

On September 23, 2019, this Court issued an order establishing a briefing schedule. The Florida House of Representatives submits this brief as an interested party opposed to the Initiative Proposal.

SUMMARY OF THE ARGUMENT

The Initiative Proposal's ballot title and summary are misleading and fail to provide fair notice to voters of the measure's true chief purpose and effect. Although the ballot summary states that the Initiative Proposal directs AHCA to "maximize federal financial participation for newly eligible individuals," no such directive is contained within the proposal's test. Instead, the Initiative Proposal directs AHCA to submit a State Plan Amendment seeking federal approval to include the new population of Medicaid recipients, and to obtain FMAP funds. The terms "maximize" and "obtain" are not synonymous, and the ballot summary fails to accurately convey the substance of the proposal's text to the voter. By suggesting that the Initiative Proposal includes a provision to "maximize" federal revenue, the ballot summary engages in impermissible political rhetoric.

The ballot summary also fails to disclose to voters the chief purpose and most significant ramification of the Initiative Proposal: the imposition of a state constitutional requirement for Florida to participate in the federal Medicaid program. Under current law, Florida's participation in Medicaid is optional. Because federal Medicaid law requires coverage of mandatory populations as a prerequisite for the state to provide Medicaid benefits to federally optional populations, the Initiative Proposal's true scope is far broader than revealed by the ballot summary. The elimination of legislative discretion to make policy and to appropriate funds constituting 20 percent of the state's general revenue—and more than 31 percent of the total state budget in Fiscal Year 2019-20—is effectively concealed from the voter by the ballot summary's focus on the extension of coverage to a population that is optional under federal law.

The Initiative Proposal also violates the Florida Constitution's single-subject requirement by substantially altering and performing the functions of multiple branches of state government. The proposal alters the legislative function by establishing a policy decision of statewide significance: the extension of Medicaid coverage to a segment of the working-age, non-disabled, childless adult population. By mandating the provision of Medicaid benefits, the Initiative Proposal also significantly alters the role of the Legislature in the appropriations process through removing legislative discretion over the expenditure of nearly

one-third of the total state budget. For similar reasons, the Initiative Proposal substantially alters and performs the functions of the executive branch. The proposal directs in minute detail the specific manner in which the expansion of Medicaid coverage is to be implemented by AHCA, an executive branch agency. And the Initiative Proposal substantially interferes with the governor's exercise of the veto power by constitutionally mandating both Florida's participation in the federal Medicaid program and the expansion of Medicaid benefits.

Finally, the Initiative Proposal is invalid because its character is that of a direct exercise of the legislative power—a power not encompassed within the reserved power of the people to propose the "revision or amendment" of the Florida Constitution through an initiative that embraces "but one subject and matter directly connected therewith." Under Article III of the Florida Constitution, the legislative power—the power to establish the policy of the state of Florida on matters of public concern—is vested exclusively with the Florida Legislature and is carried out through the legislative lawmaking process. An initiative petition that strays from proposing "revisions or amendments" to the Constitution into an attempt to directly exercise the legislative power is not a valid initiative.

For any or all of these reasons, this Court should conclude that the Initiative Proposal is invalid and should be denied placement on the ballot.

ARGUMENT

I. THE BALLOT TITLE AND SUMMARY ARE MISLEADING AND DO NOT CLEARLY AND UNAMBIGUOUSLY PROVIDE FAIR NOTICE TO VOTERS OF THE INITIATIVE PROPOSAL'S CHIEF PURPOSE.

Florida law requires the sponsor of an amendment proposed by initiative to prepare a ballot summary not exceeding 75 words in length. § 101.161(1), Fla. Stat. The ballot summary is an explanatory statement in "clear and unambiguous language" of the "chief purpose of the measure." *Id*. When reviewing the validity of a ballot title and summary under section 101.161 of the Florida Statutes, this Court has asked two questions: 1) whether the ballot title and summary fairly and accurately inform the voter of the chief purpose of the amendment; and 2) whether the language of the title and summary, as written, is likely to mislead the public. *See*, *e.g.*, *Adv. Op. to Att'y Gen. re Water & Land Conservation*, 123 So. 3d 47, 50 (Fla. 2013); *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

The ultimate purpose of the ballot title and summary requirements is "to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citation omitted). "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an

amendment." *Slough*, 992 So. 2d at 147.

Here, the Initiative Proposal's ballot title and summary fail—in numerous ways—to satisfy these basic "truth-in-advertising" requirements.

A. The Ballot Summary falsely states that the Initiative Proposal would direct AHCA to implement the initiative "by maximizing federal financial participation for newly eligible individuals" when the initiative itself contains no such requirement.

The ballot summary misleads voters by falsely stating that the Initiative Proposal directs the Agency for Health Care Administration ("AHCA") to "maximize[e] federal financial participation for newly eligible individuals" when the text of the Initiative Proposal does not provide any such directive. Instead, the Initiative Proposal itself simply directs AHCA to implement the proposal's expansion of Medicaid coverage by submitting a State Plan Amendment for approval by the Centers for Medicare and Medicaid Services ("CMS")—the federal agency responsible for administration of the Medicaid program. In contrast to the ballot summary, the text of the Initiative Proposal contains no reference at all to "maximizing federal financial participation." This Court should find the Initiative Proposal invalid because its ballot summary affirmatively misstates the manner in which the text of the proposal directs its implementation by AHCA.

The Initiative Proposal provides for implementation by AHCA in subsection (c)(1), which states in its entirety:

> 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.

The text of the Initiative Proposal directs AHCA to perform only two discrete tasks to implement the proposal's expansion of Medicaid coverage. AHCA must "submit a State Plan Amendment and all other necessary documents." And AHCA must take "any additional necessary steps to seek required approvals" from CMS. AHCA must perform these two tasks within "90 days of voter approval[1] of this Section."

The Initiative Proposal itself does not contain any language mirroring the ballot summary's statement that AHCA must "implement the initiative by maximizing federal financial participation for newly eligible individuals." To be sure, the text of the Initiative Proposal states that the purpose of AHCA's submission of a State Plan Amendment is to "obtain Federal Medical Assistance Percentage funds" for the cost of providing Medicaid coverage. But "obtain" and

[1] The precise implementation timeline is unclear, as the Initiative Proposal fails to specify whether "voter approval" occurs on the date of the General Election, on the date the results of the election are certified by the Florida Elections Canvassing Commission, or on some other date.

"maximize" are not synonymous terms. The verb "obtain" means "[t]o bring into one's own possession; to procure, esp. through effort." *Obtain*, *Black's Law Dictionary* (11th ed. 2019). The term "maximize" means to "[m]ake as large or great as possible." *Maximize*, *Oxford University Press (Lexico.com)* (2019). A person may "obtain" a paycheck for his or her labor without "maximizing" the paycheck's value (by working extra hours, for example). In the same way, the statement in the Initiative Proposal itself regarding AHCA "obtain[ing] Federal Medical Assistance Percentage funds" is not synonymous with the ballot summary's assertion that the initiative "directs" AHCA to "maximize federal financial participation." Neither the summary nor the Initiative Proposal itself lay out any theory under which AHCA could attempt to "maximize" federal financial participation. As explained above, the Federal Medical Assistance Percentage is set by the federal government based on relative per capita incomes in each state compared to the national per capita income. The ballot summary's suggestion that AHCA has various methods for submitting a State Plan Amendment and that the Initiative Proposal requires AHCA to do so in a way that "maximizes" federal financial participation is entirely unsupported by the Initiative Proposal's text and substantive Medicaid law.

Because the Initiative Proposal itself does not contain any requirement that AHCA implement the initiative by "maximizing federal financial participation,"

the terminology used in the ballot summary serves no role other than as political rhetoric: a misleading suggestion to voters that the Initiative Proposal will require AHCA to implement its terms by securing a greater financial participation from the federal government than some other method of expanding eligibility. This Court has cautioned that a ballot title and summary should "tell the voter the legal effect of the amendment, and no more." *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). Misleading "political rhetoric" in a ballot title or summary designed to invite an emotional response from voters rather than providing an accurate "synopsis of the proposed amendment" is "improper." *Adv. Op. to Att'y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1238 (Fla. 2006). Because the Initiative Proposal here does not actually direct AHCA to "maximiz[e] federal financial participation for newly eligible individuals," its ballot summary is false, misleading, and is an example of impermissible political rhetoric. This Court should find the Initiative Proposal invalid because it contains an inaccurate and misleading ballot summary in violation of Florida law.

B. The Ballot Title and Summary fail to clearly and unambiguously disclose the Initiative Proposal's chief purpose and most significant ramification: the imposition of a state constitutional requirement that Florida participate in the federal Medicaid program.

The Initiative Proposal's ballot title and summary fail to clearly and unambiguously disclose that the true scope and effect of the proposal far exceeds

the extension of Medicaid coverage to a new category of "Low-Income Adults." By explicitly requiring the State to provide "Medicaid benefits" to the new population, the Initiative Proposal also requires Florida's continued participation in the federal Medicaid program for *other* Medicaid populations as a matter of state constitutional law. This elimination of legislative discretion to make policy and to appropriate funds constituting 20 percent of the state's general revenue—and more than 31 percent of the total state budget in Fiscal Year 2019-20—is effectively concealed from the voter by the ballot summary's focus on the extension of coverage to a population that is optional under federal law.

The Initiative Proposal specifically requires the State to provide "Medicaid benefits" to the referenced population, rather than a broader term such as "health care" or "health insurance." Under federal law, a state cannot offer Medicaid benefits to one group of people unless it first agrees to offer benefits to all federally mandated populations and meets all federal criteria for the program. 42 U.S.C. § 1396-1; 42 U.S.C. § 1396a; 42 U.S.C. § 1396b. Although not explicitly stated in the Initiative Proposal or its ballot summary, participation in the Medicaid program is a precondition that must be satisfied before the new obligation—Medicaid coverage of a federally optional population—can be met by the State. The Florida Legislature currently chooses to participate in the federal Medicaid program and to appropriate funds to that effect. But neither federal law

nor the Florida Constitution *requires* Florida to participate in Medicaid.

The Initiative Proposal removes the Legislature's discretion to opt out of Medicaid. Instead, it effectively requires the Legislature to enact policies—and to make billions of dollars in appropriations—to allow Florida to continue participating in Medicaid in order to ensure that "Medicaid benefits" are provided to the proposed expansion population. And this shift in policymaking authority from the state legislature to the federal government would appear to persist no matter what changes the federal government might make in the future to the terms of state participation in Medicaid. For example, if Congress were to dramatically reallocate the ratio of state to federal cost sharing in Medicaid to the detriment of the state, or to require states to cover additional medical services as a condition of participation in the Medicaid program, the Initiative Proposal would not permit Florida to reevaluate whether to provide health coverage to its needy population in some manner other than through Medicaid. As a matter of state constitutional law, Florida would appear to have no choice but to comply with even the most onerous terms imposed by the federal government.

The ballot title and summary fail to adequately explain this dramatic constitutional change. What the ballot summary characterizes as a limited extension of current Medicaid benefits to a new population has a far greater effect: the removal of legislative policymaking and appropriations authority over nearly

one-third of the state's total budget. And, in an economic downturn, the Initiative Proposal would provide a constitutional priority in Medicaid benefits to the new population of working-age, non-disabled, childless adults. If paying for the whole Medicaid population became untenable during a time of reduced state revenues, the Legislature would be required to apply budget cuts to other federally optional groups—including optional categories of children, pregnant women, the elderly, and those with disabilities—before reducing benefits to the group covered under the Initiative Proposal.

"When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken." *Dep't of State v. Hollander*, 256 So. 3d 1300, 1307 (Fla. 2018) (quoting *Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d at 804); *see also Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, *and ramifications*, of an amendment") (emphasis added). The ballot summary does not clearly and unambiguously disclose to voters the true scope, meaning, and most significant ramifications of the Initiative Proposal: the imposition of a new state constitutional requirement that Florida participate in the federal Medicaid program. Nor does the ballot summary adequately disclose to voters the scope of the Initiative Proposal's removal of legislative policymaking and appropriations

authority over a large portion of the state budget.

The Initiative Proposal's ballot summary is misleading and fails to fairly and accurately advise voters regarding its true chief purpose and ramifications. As a result of these defects, this Court should issue an Advisory Opinion declaring the Initiative Proposal invalid and prohibiting its placement on the ballot.

II. THE INITIATIVE PROPOSAL VIOLATES THE FLORIDA CONSTITUTION'S SINGLE-SUBJECT REQUIREMENT.

The Florida Constitution restricts constitutional amendments proposed by initiative petition to "one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. The single-subject requirement "is a rule of restraint" placed in the constitution upon the ballot initiative process to allow the people to propose and vote upon "singular changes in the functions of our governmental structure." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). By focusing the electorate's attention on "a change regarding one specific subject of government," the single-subject requirement "protect[s] against multiple precipitous changes in our state constitution." *Id*.; *see also In re Adv. Op. to Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (noting that single-subject requirement is "designed to insulate Florida's organic law from precipitous and cataclysmic change").

This Court requires "strict compliance" with the single-subject rule in the

initiative process because "our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." *Fine*, 448 So. 2d at 989. For that reason, this Court is called upon to provide "careful scrutiny" of an initiative proposal to ensure that it meets the single-subject requirement. *In re Adv. Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 242 (Fla. 2015).

As an analytical matter, one method by which this Court has evaluated compliance with the single-subject requirement is by determining whether the initiative substantially alters or performs the functions of multiple branches of state government. *Water & Land Conservation*, 123 So. 3d at 50. The Initiative Proposal here substantially alters or performs functions of both the executive and legislative branches. This constitutional violation constitutes additional grounds for this Court to declare the Initiative Proposal invalid and deny it a place on the ballot.

A. The Initiative Proposal substantially alters and performs the functions of multiple branches of state government.

Although an initiative may lawfully *affect* more than one branch of government, a ballot initiative violates the Florida Constitution's single-subject requirement where it "substantially alters or performs the functions of multiple branches" of government. *Adv. Op. to Att'y Gen. re Fish & Wildlife Conservation*

Comm'n, 705 So. 2d 1351, 1353–54 (Fla. 1998). The Initiative Proposal here fails to satisfy this standard and violates the single-subject requirement.

In *Save Our Everglades*, 636 So. 2d at 1340, this Court concluded that a ballot initiative violated the single-subject requirement by performing the functions of multiple branches of government. The initiative at issue would have "establishe[d] a trust for restoration of the Everglades" while "provid[ing] for funding and operation of the trust." *Id*. The court characterized this provision as implementing a "policy decision of statewide significance and thus perform[ing] an essentially legislative function." *Id*. The proposal would also have involved the exercise of "vast executive powers" to administer the trust and engage in capital projects and land acquisition. *Id*. Finally, the proposal would have performed a "judicial function" by making factual findings of liability and damages against the sugar cane industry. *Id*. By creating a "virtual fourth branch of government," the initiative fell "far short of meeting the single-subject requirement" of the Florida Constitution. *Id*. at 1340–41.

The Initiative Proposal similarly alters or performs multiple functions of state government in violation of the Florida Constitution's single-subject requirement. *See Evans*, 457 So. 2d at 1354 (when an amendment "changes more than one government function, it is clearly multi-subject"). First, the Initiative Proposal performs and alters the legislative function. As in *Save Our Everglades*,

the proposal here implements a "policy decision of statewide significance"—the extension of Medicaid coverage to working-age, non-disabled, childless adults—and "thus performs an essentially legislative function." 636 So. 2d at 1340. The Initiative Proposal leaves little policymaking to be performed by the legislative branch, even proposing to require in the Florida Constitution the use of a particular federal "income methodology provided for by the federal Medicaid statute at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)" and "non-financial eligibility conditions" set forth in a federal regulation.

By requiring Florida to participate in the federal Medicaid program as a matter of state constitutional law, the Initiative Proposal also substantially alters the role of the legislative branch in Florida's appropriations process. This Court has held that a "funding provision for an amendment may not substantially interfere with either the legislative appropriations function or the executive veto power." *Adv. Op. to 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). In *Protect People*, the Court found no violation of the single-subject requirement where an initiative proposal funded a tobacco education program from a specific percentage of tobacco settlement funds payable to the State annually. *Id*. at 1192-93. The Court distinguished its earlier decision in *Advisory Opinion to the Attorney General re Requirement for Adequate Public*

Education Funding, 703 So. 2d 446 (Fla. 1997), which invalidated a proposed amendment that (with minor exceptions) would have required the state to expend forty percent of its entire appropriations for public education funding.

Unlike *Protect People*, the Initiative Proposal here does not simply require the Legislature to allocate a small percentage of dedicated funds to a particular program. Under current law, the Legislature may choose to participate in the federal Medicaid program—and appropriate funds to that effect—or not. The Initiative Proposal removes that discretion and would effectively require the Legislature to enact policies and make appropriations that allow Florida to continue participating in Medicaid in order to provide "Medicaid benefits" to the federally optional population covered by the initiative. This decision's financial implications affect billions of dollars of the state's annual budget.

The Initiative Proposal also substantially performs and alters functions of the executive branch of state government. The proposal directs the specific manner in which its new statewide policy is to be implemented. The proposal requires AHCA, an executive branch agency, to submit particular documents for approval by a specific federal agency. And by constitutionally mandating both Florida's participation in the federal Medicaid program and the extension of Medicaid benefits, the Initiative Proposal substantially interferes with the executive veto power. *See Adequate Public Education Funding*, 703 So. 2d at 449 (finding

single-subject violation where proposal would limit governor's ability to veto specific appropriations); *see also Adv. Op. to Att'y Gen. re Fla. Transp. Init. for Statewide High Speed Monorail, Fixed Guideway, or Magnetic Levitation System*, 769 So. 2d 367, 372 (Fla. 2000) (Harding, dissenting) (concluding, in dissent, that proposal negating governor's right to veto legislation does not simply *affect*, but substantially *alters or performs* the constitutional functions of the executive branch).

Because the Initiative Proposal violates the single-subject requirement by substantially altering and performing the functions of multiple branches of state government, it is invalid and should be denied ballot placement.

III. THE INITIATIVE PROPOSAL IS INVALID BECAUSE IT REPRESENTS AN ATTEMPTED DIRECT EXERCISE OF THE LEGISLATIVE POWER THAT IS BEYOND THE SCOPE OF ARTICLE XI OF THE FLORIDA CONSTITUTION.

Finally, the House objects to the Initiative Proposal on the independent ground that the proposal exceeds the reserved power of the people to propose a "revision or amendment" to the Florida Constitution through Article XI's ballot initiative process. Instead of a constitutional amendment, the Initiative Proposal here represents an attempt by the Sponsor to enlist the electorate in the direct exercise of the legislative power to establish a policy of statewide significance. The exercise of "the legislative power" has been vested in the Florida Legislature

and is not encompassed within the power to propose the revision or amendment of the Florida Constitution. The Initiative Proposal is therefore invalid and should be denied ballot placement.

A. This Court has jurisdiction to determine the "validity" of an initiative petition.

The scope of this Court's authority to determine the validity of an initiative proposal derives from the interplay of two constitutional provisions and one statute. Under section 10 of Article IV, the Attorney General "shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." This Court then has mandatory jurisdiction under section 3(b)(10) of Article V to "render an advisory opinion of the justices, addressing issues as provided by general law." The Attorney General is statutorily required to petition this Court for an advisory opinion regarding "the compliance of the text of the proposed amendment or revision with s. 3, Art. XI, of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161." § 16.061, Fla. Stat.

This Court has frequently noted the limited nature of its review in rendering an opinion as to the "validity" of an initiative petition upon the request of the Attorney General. *See*, *e.g.*, *Adv. Op. to Att'y Gen. re Voter Control of Gambling*,

215 So. 3d 1209, 1212 (Fla. 2017) (stating that the Court's review "is confined to two issues": compliance with the Constitution's single-subject requirement and with the ballot summary requirements of section 101.161, Florida Statutes). The House respectfully suggests that this Court's review is broader than its more recent advisory opinions have suggested and extends to: 1) any question regarding the "validity" of the initiative petition; and 2) any question regarding the "compliance of the text" with section 3 of Article XI—a provision that embraces more textual limitations than the single-subject requirement alone.

An example illustrates this point. First, section 3 of Article XI provides that the single-subject requirement does not apply to initiatives "limiting the power of government to raise revenue." This Court's review of the "validity" of an initiative on single-subject grounds therefore necessarily includes the authority to evaluate the substance of an initiative to determine whether it falls within the constitutional exemption from the single-subject requirement. *See*, *e.g.*, *Adv. Op. to Att'y. Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968 (Fla. 2009) (assessing, under section 3 of Article XI, whether an initiative establishing a property-tax cap "directly limits the power of government to raise revenue" and is therefore exempt from the single-subject requirement).

In a similar manner, the House suggests that this Court's review of the "validity" of an initiative petition when requested by the Attorney General also

encompasses the authority to review the substance of an initiative to determine whether, as a matter of law, the initiative actually represents a proposal to "revis[e]" or "amend[]" a portion of the Constitution or is instead an attempt by the sponsor to enlist the electorate in the exercise of a separate constitutional "power" that is *not* reserved to the people under section 3 of Article XI. Such a review by this Court would also be consistent with section 16.061 of the Florida Statutes, which requires the Attorney General to petition this Court for an advisory opinion regarding "the compliance of the text of the proposed amendment or revision" with section 3 of Article XI. If the text of an initiative petition attempts to exercise a power other than the power to propose a true amendment or revision to a portion of the Florida Constitution, this Court should determine that the initiative petition is invalid and does not comply with section 3 of Article XI.

B. "The legislative power of the state" shall be vested in the Florida Legislature.

The Florida Constitution provides that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida," consisting of the Florida Senate and the Florida House of Representatives. Art. III, § 1, Fla. Const. This means that "the Legislature may exercise any lawmaking power that is not forbidden by the organic law of the land." *Stone v. State*, 71 So. 634, 635 (Fla. 1916). Under the Florida Constitution, it is the Legislature—and only the

Legislature—that wields the "power to enact laws or to declare what the law shall be." *Chiles v Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). "[F]undamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978). "[O]nly the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida." *Chiles*, 589 So. 2d at 267.

This vesting of legislative power is in full, and it includes all inherent policymaking power on all matters, not otherwise precluded by the federal constitution, without the need for any enumeration of specific powers. *See State v. Bd. of Pub. Instruction for Dade Cty.*, 170 So. 602, 606 (Fla. 1936) ("The power of the Legislature is inherent, though it may be limited by the Constitution"); *Amos v. Mathews*, 126 So. 308, 315 (Fla. 1930) (noting that the constitution "is a limitation voluntarily imposed by the people themselves upon their inherent lawmaking power, exercised under our Constitution through the Legislature"); *see also Stone*, 71 So. at 635 (noting that the Florida Constitution "does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the Legislature"); *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741–42 (Fla. 1961) (noting that the Florida Constitution is a limitation on power as distinguished from a specific delegation of powers, "particularly with

regard to legislative power") (citations omitted); *Bd. of Pub. Instruction for Sumter Cty. for & on Behalf of Special Tax Sch. Dist. No. 12 v. Wright,* 76 So. 2d 863, 864 (Fla. 1955); *cf Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (explaining that the federal constitutional provision vesting "[t]he executive Power" in the President of the United States "does not mean *some of* the executive power, but *all of* the executive power") (emphasis in original).

Not every state constitution vests the legislative power exclusively in its state legislature. The analogous provision of the Constitution of Arizona, for example, provides that:

> The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, *but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature*; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

Ariz. Const., Art. 4, § 1 (emphasis added). With this language, the people of Arizona have reserved a portion of that state's "legislative authority" to be exercised directly by the people at the polls. No provision of the Florida Constitution contains a similar exception to the exclusive vesting of the legislative power of the State of Florida in the Florida Legislature.

C. A valid initiative petition may propose the revision or amendment of a portion of the Florida Constitution, but may not attempt to directly enlist the electorate in the exercise of legislative, executive, or judicial power.

Although the Florida Constitution's vesting of legislative power in the Florida Legislature does not reserve any aspect of the "legislative power" to be exercised directly by the electorate, the people have reserved for themselves a separate and distinct constitutional power: "the power to propose the revision or amendment of any portion or portions of this constitution by initiative." Art. XI, § 3, Fla. Const. The words "revision," "amendment," and "constitution" have significance in construing the nature of the initiative power and in distinguishing it from the direct exercise of the legislative power.

Soon after the initiative power was adopted in the 1968 Constitution, this Court was called upon to determine the meaning of the terms "revision" and "amendment." Relying on debates among the framers of the 1968 Constitution, the dictionary definitions of "amend" and "revise," and a recognition that "[t]hroughout Article XI the words 'amendment' and 'revision' are used to denote entirely different things," this Court settled on a quantitative and qualitative distinction between changes brought about by revisions and amendments to the constitution. *Adams v. Gunter*, 238 So. 2d 824, 827–31 (Fla. 1970). The quantitative distinction is this: "where more than one [provision] of the

Constitution is to be amended it is called a revision." *Id.* at 829. The qualitative distinction is this: where a proposed change would "radically change the whole pattern of government in this state and tear apart the whole fabric of the Constitution," it too is a revision. *Id.* at 830.

In *Smathers v. Smith*, 338 So. 2d 825, 826 (Fla. 1976), this Court had another opportunity to expound on the significance of the words "revise" and "amend" when considering a legislatively proposed amendment. The analysis began with a recognition that "[t]he Constitution of Florida is a document of limitation by which the people of the state have restricted the forces of government in the exercise of dominion and power over their property, their rights and their lives." *Id*. at 827. This Court rejected attempts to blur the line between amendments and revisions, explaining that "different words in amendatory articles of the Constitution must be read differently, and each given vitality." *Id*. at 828. To guard against the Florida Constitution again becoming "a hodgepodge of disharmonious provisions . . . added over the years [that] ma[k]e governance complex, expensive and uncertain," *id*. at 829 n.14, this Court also found "[i]nherent in the amendatory process for the Constitution . . . the same notion of 'germaneness' which controls the amendatory powers for general legislation." *Id*. at 830. Germaneness—vigilance against "the addition of wholly unrelated provisions" to the constitution—was seen as "essential to accomplish harmony in

language and purpose between the articles and to produce as nearly as possible a document free of doubts and inconsistencies." *Id*.

Notably, in both *Adams* and *Smathers,* this Court recognized that the words "revise" and "amend" remain tethered to proposed changes to the "constitution." Constitutions are distinct from statutes. The power to propose changes to the "constitution" signals an inherent limitation in Article XI, section 3. This inherent limitation precludes the use of the initiative process to exercise legislative power. *Cf. Collier v. Gray,* 157 So. 40, 44 (Fla. 1934) (explaining that proposals for constitutional changes "are not the exercise of an ordinary legislative function").

Stated differently, statutory law "provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society." *Adv. Op. to Att'y General—Ltd. Marine Net Fishing,* 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., with three other justices, concurring). Easy modification and adaptability to the needs of the moments are hallmarks of statutory law. *Id.; see also* P.K. Jameson & Marsha Hoscak, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives,* 23 Fla. St. U. L. Rev. 417, 442 (1995).

By contrast, "[c]onstitutions are generally considered timeless documents that . . . transcend changes in the political scene, hot issues, and capricious motives." Jameson & Hoscak, *supra,* at 442 (citations omitted). They provide

"stability in the law and society's consensus on general, fundamental values" when actually "limited to fundamentals" and when "avoid[ing] all legislative matters." *Id.* at 419, 442, 458. "The legal principles in the state constitution inherently command a higher status than any other legal rules in our society." *Marine Net Fishing,* 620 So. 2d at 1000 (McDonald, J., with three other justices, concurring). This Court has said that any "proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation." *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912).

Article XI, section 3's express reference to proposing the "revision or amendment" of portions of the "constitution" thus recognizes the distinction between statutory law and constitutions. Just as a constitution differs in nature from a statute, the power to propose constitutional amendments must differ from the legislative power, which is the power to propose (and adopt) statutory law. Article XI, section 3 reserves to the people only the power to propose constitutional amendments. This is the power to propose alterations inherent to the State's fundamental charter such as a proposed reallocation of power, a proposed restructuring of an aspect of government, or a proposed creation (or elimination) of an individual right.

The distinction between the initiative power reserved by the people in

section 3 of Article XI and *other* constitutional powers vested *elsewhere* by the Florida Constitution becomes even more apparent when expanded beyond the context of the "legislative power." The reserved power of the people to propose an amendment or revision to the Florida Constitution by initiative likewise does not include the power to enlist the electorate in the direct exercise of the "supreme executive power" vested in the governor by Article IV, section 1, or in the direct exercise of the "judicial power" vested in the courts by Article V, section 1. And this is true even where the proposed usurpation of power not reserved to the people is presented in the form of an amendment or revision to the constitution.

Consider, for example, hypothetical initiative petitions proposing the amendment of Article X of the Florida Constitution to include a new section that imposes a criminal sentence on a particular named defendant, or a civil money judgment in favor of the Sponsor and against the State. Even setting aside federal constitutional objections, such an initiative petition would not be valid as an exercise of the *initiative power* because it proposes to directly exercise the *judicial power*. In like manner, an initiative petition cannot validly propose the direct commissioning of a particular person as a state officer because the executive power to "commission all officers of the state" is vested in the governor. The initiative power that is "reserved to the people" does not encompass the authority to propose the direct exercise of the legislative, executive, or judicial power, as

those separate powers are vested elsewhere by the Constitution itself.

These substantive limitations on the nature and scope of the powers that may be exercised by initiative petition exist even where the proposed measure addresses a single subject and is accurately and fairly presented to the voters in a ballot summary. The limitations are both structural and textual and may properly be evaluated by this Court in determining the "validity of any initiative petition" upon the request of the Attorney General under Article IV, section 10, of the Florida Constitution.

D. The Initiative Proposal is an invalid attempt to enlist the electorate in the direct exercise of the legislative power.

Assessed against this background understanding of the scope of the initiative power under Article XI, the Initiative Proposal here is invalid because it proposes the direct exercise of the legislative power. The Initiative Proposal would establish a "policy decision of statewide significance and thus performs an essentially legislative function." *Save Our Everglades*, 636 So. 2d at 1340. The essential legislative character of the Initiative Proposal is laid bare by its subsection (c)(2), which explicitly recasts the proposal in terms of a specific statutory amendment to a particular Medicaid statute. This Court should find the Initiative Proposal invalid and prohibit its placement on the ballot.

The Initiative Proposal states that it would be "consistent" with the proposal

for the Legislature to enact a law adding a new "subsection (9)" to section 409.903 of the Florida Statutes (entitled "Mandatory payments for eligible persons"), as follows:

> (9) A person over age 18 and under age 65 whose income is 138 percent of the poverty level or below.

Init. Prop. at (c)(2). If the Legislature may accomplish the chief purpose of an initiative petition by enacting a single amendment to a single subsection of a regulatory statute, that is at least strong evidence that the initiative in question does not embrace a true "amendment" or "revision" to the Florida Constitution as those terms are properly understood. There can be no question that the Initiative Proposal here does not propose any alteration inherent to the State's fundamental charter, such as a proposed reallocation of government power, a proposed restructuring of an aspect of government, or a proposed creation (or elimination) of an individual right. In all but its form, the Initiative Proposal effectively proposes the amendment of section 409.903 of the Florida Statutes. This attempted exercise of the legislative power is beyond the scope of the initiative power reserved to the people under section 3 of Article XI, and is therefore invalid.

CONCLUSION

This Court should issue an Advisory Opinion declaring the Initiative Proposal invalid and prohibiting its placement on the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a), and that a copy has been provided on the 14th day of November, 2019, through the Florida Courts E-Filing Portal to:

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