

IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC19-1070

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**INITIAL BRIEF OF AMERICANS FOR PROSPERITY AND  
FOUNDATION FOR GOVERNMENT ACCOUNTABILITY  
IN OPPOSITION TO INITIATIVE PETITION**

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**IDENTITY AND INTEREST OF AMERICANS FOR PROSPERITY AND  
FOUNDATION FOR GOVERNMENT ACCOUNTABILITY**

Americans for Prosperity (AFP) is a nonprofit social welfare organization that exists to recruit, educate, and mobilize citizens to take an active role in building a culture of mutual benefit where people succeed by helping others improve their lives. AFP's activists nationwide advocate and promote policies that will advance that culture, including criminal justice reform, free expression, and constitutionally sound limited government. AFP has maintained an active chapter in Florida since 2008, with 11 offices in the state, approximately 30 full-time Florida employees, and approximately 160,000 activists across the State.

The Foundation for Government Accountability (FGA) is a Florida nonprofit corporation founded in 2011 that conducts research on health care, workforce, and welfare policy reforms. Medicaid expansion sits at the intersection of all three of these issue areas. FGA has conducted extensive research on the funding and outcomes of Medicaid reforms across the country and regularly lends its expertise on Medicaid law and policy to Florida's state and federal policymakers, as well as those in other states. FGA's headquarters is located in Collier County, Florida.

## **STATEMENT OF THE CASE AND FACTS**

This case concerns a proposed constitutional amendment that implicates the substantial functions of multiple branches of government, and, further, fails to inform Florida voters about the proposal's impact. The proposed amendment is entitled Medicaid Coverage to Eligible Low-Income Adults (the "Proposed Amendment") and is sponsored by Florida Decides Healthcare, Inc., a political committee. The Proposed Amendment expands Medicaid benefits to adults between the ages of 18 and 65 whose income is at or below 138% of the federal poverty level and who meet other eligibility requirements.<sup>1</sup> Medicaid is a federal-state government health insurance program that currently provides federal matching funds to states that have opted into the program. The federal government pays participating states matching funds equal to a percentage of the total amount spent by a state on its Medicaid program. See 42 U.S.C § 1396b.

Although states are not required to participate in the Medicaid program, those states that opt into the program are required to provide coverage for certain low-income and other eligible individuals, as defined by the governing federal laws and regulations. Pursuant to the Affordable Care Act, states may also choose to expand and, in partnership with the federal government, pay for Medicaid benefits to other low-income groups. The Proposed Amendment would mandate both a legislative

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<sup>1</sup> The full text of the Proposed Amendment is reproduced in full in the Attorney General's request for an Advisory Opinion and this Court's OA and Brief Schedule.

policy choice and executive action to implement an expansion of Medicaid benefits, with the federal government covering a portion of the cost and the State obligated to pay for the remaining costs of the program.

On May 28, 2019, the Secretary of State announced that the Proposed Amendment had met the requisite registration, submission, and signature criteria for review by the Attorney General. On June 27, 2019, the Attorney General petitioned this Court for an advisory opinion under article IV, section 10, Florida Constitution and section 16.061, Florida Statutes, regarding the validity of the initiative petition. On August 9, 2019, the Financial Impact Estimating Conference was unable to agree on the Proposed Amendment's financial impact. See Financial Estimating Committee, Financial Impact Statement Transmittal Letter (Aug. 9, 2019), <http://edr.state.fl.us/Content/constitutional-amendments/2020Ballot/MedicaidTransmittalLetters.pdf>.

### **SUMMARY OF THE ARGUMENT**

The Proposed Amendment should be declared invalid under article XI, section 3, of the Florida Constitution and section 101.161, Florida Statutes. The Proposed Amendment's ballot title and summary are affirmatively misleading, and the proposal itself violates the Florida Constitution's single-subject requirement by both mandating that the executive branch implement a program and that the legislative

branch obligate the money to pay for it. Given these defects, the Court should invalidate the Proposed Amendment and prohibit it from being placed on the ballot.

The Proposed Amendment violates the single-subject requirement of article XI, section 3, of the Florida Constitution because it substantially performs or alters the operation of multiple branches of government. The Proposed Amendment performs several legislative functions including: (1) making the public policy determination to permanently opt-in to the Medicaid program; (2) making the public policy determination to expand Medicaid coverage; and (3) eliminating the Legislature's discretion with respect to appropriations related to the Medicaid program. It also performs an executive function because it directs an executive agency to take the necessary steps to expand the state's Medicaid program. Finally, it substantially alters the functions of local government by eliminating spending discretion at the county level for a number of counties.

The Proposed Amendment is analogous to the proposed amendment at issue in Advisory Op. to the Attorney Gen. re Requirement for Adequate Pub. Educ. Funding, 703 So. 2d 446 (Fla. 1997), where the Court invalidated an initiative that required the Legislature to appropriate 40 percent of the budget for public education funding. In that opinion, the Court concluded that, in addition to performing executive and local government branch functions, the proposed amendment "would substantially alter the legislature's present discretion in making value choices as to

appropriations among the various vital functions of State government.” Id. at 449. The same is true here.

Further, contrary to the requirements of section 101.161, Florida Statutes, the ballot title and summary of the Proposed Amendment are affirmatively misleading because they do not fully convey the proposal’s true scope and impact. The ballot summary fails to disclose that the Proposed Amendment denies to the Legislature any ability to exercise its direction as to participation in the Medicaid program generally—no matter the future cost to Florida. Likewise, the ballot summary leaves voters with the misimpression that the costs of the proposed Medicaid expansion will be fully covered through federal funding, failing to mention that Florida will be responsible for at least 10% of the funding (and that such a figure could increase in the future).

Florida’s constitutional amendment process is not an appropriate vehicle for implementing a complex legislative policy change and detailed executive actions to implement a program with such momentous monetary and policy impacts across state and local governments, and even if it were, the Proposed Amendment lacks the detail to allow voters to make a deliberate and fully informed choice.

### **STANDARD OF REVIEW**

In determining the validity of a proposed constitutional amendment arising through the citizen initiative process, the Court’s “inquiry is limited to two legal

issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3, of the Florida Constitution; and (2) whether the ballot title and summary violate the requirements of section 101.161(1), Florida Statutes.” Advisory Op. to the Attorney Gen. re Voter Control of Gambling in Florida, 215 So. 3d 1209, 1213 (Fla. 2017) (quoting Advisory Op. to Attorney Gen. re Use of Marijuana for Certain Med. Conditions, 132 So.3d 786, 795 (Fla. 2014)).<sup>2</sup> The Court does not review the merits or wisdom of a proposed amendment but will invalidate a proposal if the record shows that it “is clearly and conclusively defective on either ground.” Advisory Op. to Attorney Gen. re Amendment to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 891 (Fla. 2000).

## **ARGUMENT**

### **I. THE PROPOSED AMENDMENT VIOLATES FLORIDA’S SINGLE-SUBJECT REQUIREMENT BECAUSE IT PERFORMS THE FUNCTIONS OF MULTIPLE BRANCHES OF GOVERNMENT.**

Article XI, section 3, of the Florida Constitution provides “[t]he power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith.” This single-

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<sup>2</sup> Florida law also requires that financial impact statements must be clear and unambiguous. Advisory Op. to the Attorney Gen. re Water and Land Conservation, 123 So. 3d 47, 52 (Fla. 2013). In this case, however, no financial impact statement has been developed because the Fiscal Estimating Committee could not agree on the how to estimate the cost of the measure.

subject limitation on citizen initiative amendments “exists because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing amendments.” Treating People Differently Based on Race in Pub. Educ., 778 So. 2d at 891. It was adopted in recognition of the nature of the citizens’ initiative process, which lacks the “filtering” inherent in the legislative joint resolution, constitutional revision commission, and constitutional convention processes. Advisory Op. to the Attorney Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply, 177 So. 3d 235, 242 (Fla. 2015). The single-subject requirement “is a rule of restraint designed to insulate Florida’s organic law from precipitous and cataclysmic change.” In re Advisory Opinion to the Atty. General—Save Our Everglades Trust Fund, 636 So. 2d 1336, 1339 (Fla. 1994).

**A. Proposed Amendments That Substantially Impact More than One Branch of Government Violate the Single Subject Limitation.**

The single-subject limitation prohibits proposed amendments that substantially alter or perform the functions of multiple branches of state government. Advisory Op. to Attorney Gen. re Use of Marijuana for Debilitating Med. Conditions, 181 So. 3d 471, 477 (Fla. 2015); Advisory Op. to the Attorney Gen. re Water and Land Conservation, 123 So. 3d 47, 50-51 (Fla. 2013). As discussed further below, the Proposed Amendment at issue violates the single-subject

requirement because it substantially alters or performs the functions of both the legislative and executive branches of government, as well as local government entities.

As this Court has explained, “[a]lthough a proposal may affect several branches of government and still pass muster, no single proposal can substantially alter or perform the functions of multiple branches.” Save Our Everglades, 636 So. at 1340 (emphasis in original); see also Use of Marijuana for Debilitating Med. Conditions, 181 So. 3d at 477; Water and Land Conservation, 123 So. 3d at 50-51. In such cases, this Court has not hesitated to find proposed amendments in violation of the single-subject requirement.

In Save Our Everglades, for example, this Court invalidated a proposed amendment related to the restoration of water quality in the Everglades because it performed the function of all three branches of government. The Court concluded that the establishment of a trust performed an essentially legislative function—a public policy decision of statewide importance—and that the amendment’s authorization of trustees to levy a tax on raw sugar and dictation of the use of the resulting revenues further implicated traditional legislative functions. 636 So. 2d. at 1340. The Court also held that the proposed amendment “contemplates the exercise of vast executive powers” because it authorized the trustees to acquire lands, expend funds, and operate water storage and sewer systems—all of which are essential

executive functions. Id. Finally, the Court concluded that the proposed amendment performed a judicial function by holding the sugar cane industry responsible for pollution, and, ultimately, rendering judgment of wrongdoing. Id.

Similarly, in Requirement for Adequate Public Education Funding, this Court invalidated a proposed amendment that required the Legislature to appropriate at least 40% of its total appropriations for public education. 703 So. 2d at 446. The single subject requirement was violated, the Court explained, because the proposed amendment “would substantially alter the legislature’s present discretion in making value choices as to appropriations among the various vital functions of State government, including not only education but also civil and criminal justice; public health, safety, and welfare; transportation; disaster relief; agricultural and environmental regulation; and the remaining array of State governmental services.” Id. at 449. Additionally, the Court held that the proposed amendment substantially impacted the operations and functions of the executive branch and local governments because the limitations on available appropriations “would substantially alter the operation of the various requirements for finance and taxation in article VII [of the Florida Constitution] in respect to bonded indebtedness and State mandates to local governments, thereby affecting the functioning of all State agencies, local governments, and special districts.” Id. Similarly, the Court stated that the executive branch would be further limited by the proposed amendment

because the Governor “would be unable to veto any specific appropriation within the forty-percent educational appropriation if the veto would reduce the education appropriation to less than the required forty percent.” Id.

The question of whether a proposed amendment substantially alters or performs the functions of multiple branches of government is not limited to state-level government entities; the impact on local government entities also must be considered. See Advisory Op. to the Attorney Gen. re Tax Limitation, 644 So. 2d 486, 494-95 (Fla. 1994). In Advisory Op. to the Attorney Gen. re People’s Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use May Cover Multiple Subjects, 699 So. 2d 1304 (Fla. 1997), this Court invalidated a proposed amendment to require voter approval for new taxes in part because it substantially altered the budgetary powers of both the Legislature and of local government entities. 699 So. 2d at 1311 (receded from on other grounds by Advisory Opinion to Attorney Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved, 2 So. 3d 968 (Fla. 2009)). In the same case, the Court also invalidated a proposal relating to property rights, holding that it would have an effect on more than one level of government including state, special districts, and local governments, which had various legislative, executive, and quasi-judicial functions affected by the proposal. Id. at 1308. Finally, the Court invalidated a proposed amendment addressing compensation for government restrictions on real property, concluding that it “not

only substantially alters the functions of the executive and legislative branches of state government, it also has a very distinct and substantial [effect] on each local governmental entity.” Id. at 1312 (quoting Tax Limitation, 644 So.2d at 494).<sup>3</sup>

**B. The Proposed Amendment At Issue Must Be Rejected Because It Substantially Impacts the Executive and Legislative Branches of State Government**

Here, the Proposed Amendment substantially alters or performs the function of multiple branches of government. Specifically, it performs functions of the executive branch while simultaneously encroaching on the legislative branch’s authority to appropriate funds and direct spending.

The choice of whether, how, and to what extent, the State of Florida should participate in the Medicaid program is a choice for the legislative and executive branches to make. The Proposed Amendment, however, eliminates these choices. It does this in three ways: (1) by directing an executive agency, the Agency for Health Care Administration (AHCA), to implement the Medicaid expansion; (2) by directing the Legislature to appropriate funds to pay for that expansion; and (3) by

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<sup>3</sup> See also In re Advisory Op. to the Attorney Gen.—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994) (invalidating proposal applicable to “any other governmental entity” because it encroached on “municipal home rule powers and on the rulemaking authority of executive agencies and the judiciary”); Treating People Differently Based on Race in Pub. Educ., 778 So. 2d at 896 (invalidating four proposed amendments addressing alleged discriminatory practices in public education, employment, and contracting, holding “the proposed amendments’ substantial effect on local government entities, coupled with its curtailment of the powers of the legislative and judicial branches, renders it fatally defective and violative of the single-subject requirement”).

mandating that the executive branch continue to participate in, and the legislature to continue to appropriate funding for, perpetual participation in the Medicaid program as a whole.

The Proposed Amendment performs the function of the executive branch by directing AHCA to submit the State Plan Amendment to the Centers for Medicare and Medicaid Services, “as well as take any additional necessary steps” to participate in Medicaid expansion at the federal level. At the same time, the Proposed Amendment performs the functions of the legislative branch. Much like the proposed amendment at issue in Save Our Everglades, the Proposed Amendment here makes a statewide public policy decision, that “[t]he State shall provide Medicaid benefits to Low Income Adults”—a function and decision reserved for the Legislature. Notably, the Proposed Amendment does not simply mandate that Florida provide health insurance or healthcare to certain low-income adults. Instead, it requires the State to continue and expand its participation in a specific program—Medicaid. This is significant because currently Florida’s participation in the Medicaid program is optional. Put differently, by constitutionally mandating that Florida expand Medicaid coverage pursuant to the federal law governing that expansion, the Proposed Amendment makes it mandatory for Florida to participate in the Medicaid program as a whole. This performs a legislative function by constitutionally requiring participation in an otherwise optional program, as well as requiring the

necessary appropriations that accompany participation in that program. In short, the Proposed Amendment usurps the role of the Legislature in Florida's constitutional structure by making a public policy decision of statewide importance, while simultaneously performing executive branch functions.

In addition, much like in Adequate Public Education Funding and People's Property Rights, the Proposed Amendment would compel the Legislature to allocate specific funds to the AHCA to pay for the expanded coverage. Under existing law, AHCA cannot induce the Legislature to make specific appropriations; the Legislature has the discretion to determine healthcare spending and coverage amounts. Similarly, under federal law, the Legislature currently has the option to opt-out of the Medicaid program, thereby eliminating Medicaid appropriations altogether. Under the Proposed Amendment, however, once AHCA files a state plan for coverage of low-income adults, the Legislature would be constitutionally obligated to appropriate funds and authorize expenditures to account for all Medicaid costs not covered by the federal government. This obligation is not subject to any limitation, provision, policy, or condition about what might happen should pending litigation, future legislation, or changing economic conditions impact the funding required from Florida.

For FY 2019, the federal government committed to pay 60.87% of Florida's Medicaid costs, which means that the state budget is obligated to fund 39.13% of

those costs. See Alison Mitchell, Cong. Research Serv., R43847, Medicaid’s Federal Medical Assistance Percentage (FMAP) 12 (Apr. 25, 2018), <https://fas.org/sgp/crs/misc/R43847.pdf>. This level of federal contribution represents roughly a one percent decrease in percentage amounts paid as compared to FY 2018. Id. This kind of fluctuation is not unusual because the federal contribution to a state is based on the state’s per capita personal income average as compared to the national per capita personal income average.<sup>4</sup>

For FY 2019-20, the Florida Legislature appropriated approximately \$28.4 billion, or 31% of the total state budget, to the Florida Medicaid program. See Ch. 2019-115, Laws of Fla.; see also Memorandum from Christa Calamas to Carol Gormley, (July 26, 2019), available at [https://s3.amazonaws.com/newsservice/florida/web/dist/downloads/2019/8/Christine\\_Scan.pdf](https://s3.amazonaws.com/newsservice/florida/web/dist/downloads/2019/8/Christine_Scan.pdf). Since Medicaid participation is optional, the Legislature currently appropriates funds to cover Medicaid costs as part of its budgeting process. It has the discretion on a yearly basis, based on its assessment of the fiscal impact of the program, to fund participation in Medicaid or to find alternative means of providing health care for Medicaid eligible populations.

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<sup>4</sup> Under Medicaid, the Federal Medical Assistance Percentage (FMAP) is a formula used to determine what share of a state’s Medicaid expenditures will be reimbursed by the federal government. See 42 U.S.C. § 1396d(b). It is designed so that the federal government pays a larger portion of Medicaid costs for states with lower per capita incomes relative to the national average. See Mitchell at 3. As such, the level of reimbursement from the federal government can and often does change year to year.

Under the Proposed Amendment, however, the Legislature would no longer have the authority to control the State’s Medicaid participation. “Put another way, while the Proposed Amendment would effectively require Florida to cover the people in the new eligibility category, it would effectively also require Florida to cover all the people currently in Medicaid mandatory populations—and all future growth in those populations—which the Florida Constitution does not currently require Florida to cover.” Calamas at 2.<sup>5</sup> At a minimum, the Proposed Amendment mandates that the Legislature appropriate approximately 30% of its budget simply to maintain the status quo of Medicaid participation—without considering the additional costs of expanding coverage to newly eligible low-income adults. Further, because there is no guarantee that federal reimbursements to Florida will continue at current levels, the Proposed Amendment, if enacted, will force the Legislature to appropriate funds to cover the gap—no matter how much that gap might increase in the future and no matter other state spending priorities.

But that is not all. The Proposed Amendment mandates that the Legislature appropriate additional funds to cover Florida’s share of the costs associated with the Medicaid expansion. Present federal law would set Florida’s share of such costs at 10 percent for 2020 and subsequent years,<sup>6</sup> but that percentage, of course, is subject

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<sup>5</sup> This crucial fact is not disclosed in the Proposed Amendment or its summary, which is an independent basis for challenging the proposal, as set forth in Section II below.

<sup>6</sup> Pursuant to the Affordable Care Act, states that expand Medicaid coverage to

to change. Moreover, the absolute value of Florida’s obligations is far from static—even if there is no change in the federal law. As one commentator has noted, Medicaid expansion is a countercyclical spending program. Nicholas Bagley, Federalism and the End of Obamacare, 127 Yale L.J. Forum 1, 10 (2017). That is, when a recession hits many people lose their jobs, and, correspondingly, their employee-sponsored healthcare, thus requiring them to enroll in Medicaid. Id. At the same time, a recession ordinarily leads to reduced tax revenues. Id. Although the federal government can manage economic downturns through deficit-spending, many states, including Florida, cannot because they are legally obligated to balance their budgets each year. Id. As such, the Medicaid appropriations the Legislature makes currently—both absolutely and as a percentage of the total budget—could pale in comparison to the appropriations the Legislature might be forced to make in years to come when economic conditions change.

Thus, the Proposed Amendment is similarly violative of the single-subject requirement as the one considered in Adequate Public Education Funding because it mandates the appropriation of billions of dollars and directs it to be spent on a specific program. Critically, under the Proposed Amendment’s requirement to participate in Medicaid and Medicaid expansion, the Legislature’s discretion to

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“newly eligible mandatory individuals” are eligible for an increased federal matching rate. Although that rate originally was set at 100 per cent, it has been reduced to 90 per cent for Fiscal Year 2020 and each year thereafter. 42 U.S.C. § 1396d.

increase or decrease appropriations based on the State’s economic climate would be severely restrained, and the executive and legislative branches’ ability to determine who should be covered and what services should be provided under Florida’s healthcare programs would suffer the same fate. Indeed, in addition to constitutionally committing the Florida legislature to participate in and pay for the mandatory Medicaid provisions, the Proposed Amendment would bind the Legislature to appropriate funds for Medicaid expansion at levels that could not be determined by the Fiscal Impact Estimating Conference precisely because that amount is subject to change based on future actions of the federal government and changing conditions within Florida. What is clear, however, is that funds subject to appropriation under the Proposed Amendment will occupy a substantial portion of the entire State budget for the foreseeable future. The Proposed Amendment therefore violates the single subject requirement and should be stricken.

**C. The Proposed Amendment Also Must Be Rejected Because It Substantially Impacts the Functions of Local Government**

The Proposed Amendment also violates the single subject requirement because of its potential impact on certain Florida counties. Under section 409.915, Florida Statutes, Florida counties are required to reimburse the state for a portion of Medicaid costs.<sup>7</sup> Because the proposed expansion of Medicaid eligibility will

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<sup>7</sup> “Although the state is responsible for the full portion of the state share of the matching funds required for the Medicaid program, the state shall charge the

increase Florida’s Medicaid expenditures, a portion of that increase will be passed on to local governmental entities. Accordingly, the Proposed Amendment could have substantial budgetary impacts on certain Florida counties, forcing them to eliminate or severely curtail spending on other services such as education, public safety, and public works. As it does with respect to the state Legislature, the Proposed Amendment would severely hamper the counties’ present discretionary authority to make policy choices as to appropriations among the various vital functions of government by mandating expenditures on Medicaid expansion. This burden is particularly acute given that, much like the State, counties are obligated to maintain a balanced budget. See § 129.01(2)(b), Fla. Stat. (2011). Thus, even in difficult economic times, counties will be obligated to contribute more to Medicaid at the expense of other vital services—eliminating their ability to prioritize and make difficult decisions through the legislative process.

As of this date, at least 29 counties are at or near a tax cap that limits the amount of revenue that can be collected through property taxes. See Christine Sexton, Small counties wary about expanding Medicaid, Sayfiereview (July 16, 2019), <https://www.sayfiereview.com/page/small-counties-wary-about-expanding-medicaid>. For these counties, the Proposed Amendment could cause them to re-allocate revenue from other critical services to fund the Medicaid expansion. Id. This

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counties an annual contribution in order to acquire a certain portion of these funds.” Sect. 409.915, Fla. Stat.

would result in blindly sacrificing valuable services needed by county citizenry, without the ability to weigh the policy decisions regarding where those limited funds are best spent.

In sum, the Proposed Amendment performs multiple functions of both the legislature and executive branches of state government as well as performing functions of local government, and therefore must be invalidated.

**II. THE PROPOSED BALLOT TITLE AND SUMMARY FAIL THE CLARITY AND INFORMATIONAL REQUIREMENTS OF FLORIDA STATUTORY LAW.**

**A. Florida Law requires ballot titles and summaries to be clear and to fairly inform voters of the chief purpose of a proposed amendment.**

When voting on a proposed amendment, voters see only its ballot title and summary. The ballot title and summary therefore must satisfy section 101.161(1), Florida Statutes, which requires this Court to consider “(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment; and (2) whether the language of the ballot title and summary, as written, will be affirmatively misleading to voters.” Use of Marijuana for Certain Medical Conditions, 132 So. 3d at 797. This Court has explained that the statute requires a summary which “must give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots.” Advisory Op. to the Attorney Gen. re Casino Authorization, Taxation and Regulation, 656 So. 2d

466, 468 (Fla. 1995) (quoting Smith v. Am. Airlines, Inc., 606 So. 2d 618, 620-21 (Fla. 1992)).

The ballot title and summary cannot “hide the ball” or “fly under false colors” as to the amendment’s scope of impact. Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000). This requires an evaluation of whether the ballot title and summary accurately reflect the amendment’s “true meaning, and ramifications.” Id. (quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)); see Advisory Op. to Attorney Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998) (finding a proposed initiative invalid because it “is vague and fails to completely inform voters of the impact that the initiative will have on existing laws and the Florida Constitution”).

**B. The ballot summary conceals the Proposed Amendment’s full scope and is affirmatively misleading.**

Here, the ballot summary is misleading and does not fairly inform voters of the chief purpose of the proposal because it disguises the Proposed Amendment’s true scope. “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.” Advisory Op. to Attorney Gen. re Term Limits Pledge, 718 So. 2d 798, 804 (Fla. 1998). Similarly, in 1.35% Prop. Cap, Unless Voter Approved, 2 So. 3d at 975–76, this Court held that a ballot summary that omits material facts is defective

where such omission makes the summary misleading. See also Firestone, 421 So. 2d at 156 (“The problem, therefore, lies not with what the summary says, but, rather, with what it does not say.”).

In Casino Authorization, the summary for the proposed amendment stated that casinos may be authorized “on riverboats [and] commercial vessels.” 656 So. 2d at 469. The court explained that voters may be led to believe that the amendment only allows casinos to operate on floating, operational boats and vessels. Id. However, the text of the amendment clarified that it applied to both stationary and non-stationary riverboats and commercial vessels. Id. As the Court explained: “[t]here is nothing in the text of the amendment that requires a riverboat to be a floating vessel. It is conceivable that the amendment could authorize a casino in a building constructed to look like a riverboat even though the structure is completely landlocked.” Id. The Court struck the proposed amendment because, without further clarification, “the summary of the proposed amendment [did] not accurately describe the scope of the text.” Id.

The summary of the Proposed Amendment at issue is misleading and hides the proposal’s full scope in at least two respects. First, the summary is silent as to the fact that a precondition underlying the Proposed Amendment is the mandatory and continuous participation in the overall Medicaid program —no matter the cost brought on by future changes in the economy, legislation, or litigation and no matter

the fact that Florida's current participation in Medicaid is voluntary. Cf. Florida Dep't of State v. Florida State Conference of NAACP Branches, 43 So. 3d 662, 669 (Fla. 2010) (finding that an initiative amendment was invalid where "neither the text of the amendment nor the explanatory statement ... inform the voter that there is currently a mandatory contiguity requirement" that could be diluted by the amendment).

Second, the Proposed Amendment and the ballot summary mislead with respect to funding. The summary states that the Agency for Health Care Administration is directed to maximize federal financial participation, whereas the text of the Proposed Amendment suggests that funds for the cost of coverage of newly eligible individuals will be provided by the federal government (because the only mention of funding references federal financial participation). As described, however, federal contributions only cover a portion of Florida's current Medicaid expenses and would not cover all of the costs associated with Medicaid expansion. The gap between a state's total Medicaid costs and the federal contribution is left to the state to fund. Without clarifying that Florida must cover a certain percentage of the costs of expanded coverage as well as its portion of the costs of current Medicaid coverage, the summary of the Proposed Amendment does not accurately describe the scope of the Proposed Amendment's fiscal impact.

Indeed, the Proposed Amendment relies on the fact that many voters will not be familiar with the nuances of applicable federal law or recent changes thereto. Failure to disclose the significant facts that (a) the Proposed Amendment effectively eliminates Florida’s present ability to opt out of the federal Medicaid program; and (b) the federal government will provide only 90 percent, not 100 percent, of Medicaid costs for expanded populations (and that this figure is not guaranteed in perpetuity<sup>8</sup>) results in the ballot summary being affirmatively misleading.

The Proposed Amendment also fails to disclose the long-term fiscal risks of committing Florida to Medicaid expansion through the constitutional amendment process. Many healthcare leaders in states who have expanded Medicaid have indicated that they would not be able to afford continued coverage for newly eligible Medicaid recipients if the federal government were to reduce its reimbursement rate. See Harris Myer, If GOP repeal bill becomes law, most states likely to end their Medicaid expansion, Modern Healthcare (May 4, 2017), <https://www.modernhealthcare.com/article/20170504/NEWS/170509923/if-gop-repeal-bill-becomes-law-most-states-likely-to-end-their-medicaid-expansion>. One healthcare expert

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<sup>8</sup> A potential decrease in the level of federal funding for expansion populations is hardly speculative. In a 2013 survey of Medicaid directors who were expanding Medicaid, 73 percent of respondents indicated that it was “possible,” “somewhat likely,” or “nearly certain” that the federal government will cut its percentage of funding because of budget pressures., et. al, Medicaid on the Eve of Expansion: A Survey of State Medicaid Officials on the Affordable Care Act, Am. J. Law Med., 40: 253–279 (2014).

indicated that his state would have to “come up with \$2 billion to \$3 billion a year in state funds to replace the lost federal dollars.” Id. Another lawmaker suggested that keeping the expansion in place would cost an additional \$7.8 billion per year if the federal reimbursement rate changed. Id. At least eight states—Arkansas, Arizona, Illinois, Indiana, Michigan, New Hampshire, New Mexico, and Washington state—have laws requiring them to reduce or eliminate Medicaid eligibility and/or benefits for the expansion population if the federal government reduces its reimbursement rate. Id.

Under the Proposed Amendment, by contrast, Florida would be required to continue participating in both Medicaid and Medicaid expansion, no matter the cost, because the amendment as written constitutionally mandates that participation. This makes the concern over future increases in Florida’s Medicaid obligations not only real, but also an important consideration for voters considering the Proposed Amendment.

In addition to the silence on the impact of the Proposed Amendment to the State’s budget, neither the title nor the summary adequately explains the effect of the Proposed Amendment on local government funding. As described, pursuant to section 409.915, Florida Statutes, Florida counties are subject to a mandatory Medicaid contribution. As such, the Proposed Amendment, if enacted, will require counties to increase their spending to cover the higher budgetary needs that Medicaid

expansion will entail. Despite this, the title and summary are silent as to the impact that expanding Medicaid coverage will have on local county budgets and their ability to continue to provide local services. To omit that information is misleading, particularly for voters in those counties that already are at or near the cap on allowable property taxation.

In sum, the Proposed Amendment would eliminate legislative control over significant decisions of public healthcare policy, budgeting, and services. Such a change in the Florida Constitution should be made by the voters deliberately and with full awareness of the consequences of their decision. The Proposed Amendment fails this test, misinforming voters about its direct effect and omitting critical information about its full scope.

## CONCLUSION

For the reasons set forth above, the Proposed Amendment should be invalidated. The Proposed Amendment substantially performs functions of the legislative and executive branches and of local governments, in violation of the single-subject requirement of article XI, section 3 of the Florida Constitution, and, in violation of section 101.161(1), Florida Statutes, the proposed ballot title and summary do not convey the chief purpose of the Proposed Amendment and are affirmatively misleading.

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**CERTIFICATE OF TYPE SIZE AND STYLE**

This Brief is typed using Times New Roman 14 point, a proportionately spaced font.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing has been filed electronically via the Florida eFiling Portal which will serve all parties this 14<sup>th</sup> day of November 2019.

/s/ Richard E. Doran  
RICHARD E. DORAN (Fla. Bar #0325104)