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IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1070

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

Reply Brief of THE FLORIDA SENATE; and BILL GALVANO, in his official capacity as President of the Florida Senate

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REPLY ARGUMENT

I. The Medicaid Coverage Initiative violates the Ballot Summary Rule

In assessing whether a ballot summary is defective, it is necessary for the Court to first determine, then analyze the legal effect of the proposed initiative to determine its chief purpose. *See Department of State v. Florida Greyhound Association, Inc.*, 253 So. 3d 513, 521 (Fla. 2018). Next, the Court must look to the ballot summary to determine if it clearly and unambiguously explains the chief purpose of the measure. *See* § 101.161, Fla. Stat. The ballot summary is required to be "an *explanatory statement*, not exceeding 75 words in length, of the chief purpose of the measure." *Id*. (emphasis added). Therefore, it must do more than simply restate the chief purpose; it must explain the substantial effects of such purpose.

The Sponsor states the chief purpose of the Initiative is "to cause Florida to participate in expansion of Medicaid coverage in a manner that will qualify for maximum federal financial participation in funding." Sponsor Br. at 7. The chief purpose of the measure is actually to provide Medicaid benefits to certain low-income adults, not to expand Medicaid in order to maximize federal financial participation. The Sponsor implies the Initiative is designed to provide the state with the most federal funding for Medicaid. However, if the state successfully expands Medicaid as required by the text of the Initiative, consequently the overall federal contribution to the state will increase, but it does not maximize federal funding.

There are other variables, such as reimbursement rates and optional programs which require legislative approval and funding which impact how much federal funding Florida receives. *See* Senate Int. Br. at 8-10. It is simply incorrect to say the Initiative maximizes federal participation.

The Sponsor contends it was necessary for the summary to include language referring to the maximization of federal financial participation, because "Florida could expand its coverage to the newly expanded class without qualifying for or accepting the additional federal contribution." Sponsor Br. at 9. This argument is directly contradicted by the text of the Initiative which requires the state to provide "Medicaid benefits" to low-income adults. The Sponsor's argument requires a re-drafting of the proposal. The entirety of the Initiative requires the state to submit a state plan for approval under the federal Medicaid program and, thereby, provide "Medicaid benefits" to newly eligible individuals. The text does not leave room for the state to provide healthcare coverage generally to individuals outside of the Medicaid program.

The Sponsor acknowledges there is no avenue for the state to increase the percentage of federal contribution beyond the amount set under federal law. *See Id*. However, the ballot summary misleadingly states the Agency for Health Care Administration (AHCA) is directed to implement the Initiative by maximizing

federal financial participation, implying there is a method by which AHCA can implement the Initiative which increases the percentage of federal funding.

Furthermore, the Sponsor fails to address the crux of why this statement is misleading. By mentioning federal financial participation, but failing to mention the requisite state financial participation, the Initiative implies only federal funding is required. However, the Initiative requires state financial participation in both the basic Medicaid program and the expanded program. Nowhere does the ballot summary hint at, let alone explain, the significant effect the Initiative will have on the state's budget. *See* Senate Int. Br. at 11-12. The Sponsor does not address the ballot summary's failure to provide the electorate with fair notice of this substantial and certain effect. The ballot summary omits material facts and, therefore, the problem lies in what it does not say. *See Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

The Sponsor's brief misconstrues the opponents' argument, stating the opponents would require a "ballot summary must list all ramifications perceived by opponents to be negative." Sponsor Br. at 11. While it is true that a 75-word ballot summary cannot list all possible ramifications of a proposed initiative, the law requires "the ballot to be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew* at 155 (quoting *Hill v. Milander*, 72 So. 2d 795, 798 (Fla. 1954)). A voter must be able to comprehend the sweep of the proposal

from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be. *Id*. (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976).

The Sponsor argues "[t]he proper forum for discussion of perceived ramifications, positive and negative, is the political campaign, not the ballot summary." Sponsor Br. at 11. However, this Court has made clear "[t]he burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do this." *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992) (quoting *Askew v. Firestone*, 421 So. 2d at 156). While voters may be presumed to have ability to reason and draw conclusions, the ballot summary must be written clearly enough for voters to understand its chief purpose. *Id*.

The Sponsor incorrectly states "[w]hether or not the Amendment would prohibit the Legislature from opting out of basic Medicaid in the future is an issue for post-election litigation." Sponsor Br. at 12. The answer to such question does not have to wait; it is clear. Passage of the Initiative explicitly requires the state to provide Medicaid benefits to low-income adults, which as the Sponsor agrees requires the state to provide basic Medicaid coverage as a prerequisite. It is unclear where the Sponsor sees ambiguity in the text which authorizes the Legislature to opt out of Medicaid if the state constitution requires such participation.

II. The Medicaid Coverage Initiative violates the Single Subject Rule

A. All elements of the Initiative are not designed to accomplish a singular purpose.

The Sponsor states "[t]he Amendment has a singular purpose: participation of Florida in the optional Medicaid expansion as provided for in the [Affordable Care Act] ACA. All elements of the Amendment are designed to implement that objective." Sponsor Br. at 12. This is not true. The Initiative prohibits the state from placing "any greater or additional burdens or restrictions on eligibility, enrollment, or benefits than on any other population eligible for medical assistance." Initiative at § 33(a). As pointed out in the Senate's Initial Brief the Initiative is "dictating policy decisions beyond the chief purpose of the measure, which is to provide Medicaid to low-income individuals." Senate Br. at 18. The Sponsor makes no effort to explain why this provision is necessary or incidental to what they claim the chief purpose is or why the chief purpose could not be accomplished without this clause. In fact, this clause contradicts the spirit of the ACA, which encourages flexibility among eligible population groups. This clause only exists to put limitations on the Legislature over and above what expansion requires. In and of itself, this clause is reason to strike this Initiative.

B. The Initiative substantially alters or performs the functions of more than one branch of government.

The Sponsor makes the ridiculous argument that AHCA is not part of the executive branch. They misconstrue the case law referring to executive agencies as "creates of statute" and refer to it as a "'Creature of the Legislature,' created by section 20.42, Florida Statutes, subject at all times to the will of the Legislature." Sponsor Br. at 13. The Florida Constitution provides:

> All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor…
>
> Art. IV, § 6, Fla. Const.

By general law AHCA is designated as one of the twenty-five departments under the control of the Governor. *See* § 20.42, Fla. Stat. AHCA is clearly and unambiguously part of the executive branch. In terms of rule-making AHCA is limited to what is authorized by general law and the Legislature is not free to redelegate it legislative power under the non-delegation doctrine.

In reference to the separation of powers and non-delegation doctrines this Court has held:

> Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of

> nondelegation of legislative power to be viable in this State. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.
>
> *Askew v. Cross Key Waterways*, 372 So.2d 913, 918 (Fla.1978).
>
> The legislative responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government. Moreover, the constitutional efforts to set forth a deliberate veto and enforcement mechanism for the executive branch would seem an elaborate exercise in futility if the Governor and Cabinet, by stroke of the executive pen, could excise whole portions of the appropriations act and totally restructure legislative priorities. To permit the Commission to reduce specific appropriations in general appropriations bills would allow the legislature to abdicate its lawmaking function and would enable another branch to amend the law without resort to the constitutionally prescribed lawmaking process.
>
> *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 265-266 (Fla.1991).

These fundamental principles would undergo an inversion if this Initiative were to pass. Instead of the Legislature deciding on primary policy decisions, including funding, an executive branch department would be crafting the state plan amendment. The amendment is more than a simple request. It extensively details the eligible groups and range of services the state seeks to cover, and, in turn, determines how much the Legislature has to fund. The Sponsor claims "[t]he Amendment simply requires one state agency to file qualifying documents one time." *See* Sponsor Br. at 15. This is a misleading construction of the Initiative. It is

clearly meant to have an ongoing effect. Expansion would have to be funded on an ongoing basis. It is doubtless the Sponsor does not believe the Legislature could in year two have AHCA file another plan amendment that undoes expansion.

The Sponsor also misapprehends the effect on the Governor's veto power. The Sponsor claims "[t]hose same proposed amendments necessarily also indirectly affect the governor's veto power since he cannot veto a constitutional amendment." *See Id*. No one argued that he could. In *Advisory Opinion to the Attorney General re Requirement for Adequate Public Educ. Funding*, 703 So. 2d 446 (Fla. 1997), the Court held the Governor's veto would be curtailed because of the requirement that a significant portion of the budget be dedicated to education. There would be a similar effect in this case. The Sponsor does not address that point. The Sponsor also does not address that the Legislature will have to spend billions more on Medicaid, thus altering "the legislature's present discretion in making value choices as to appropriations among various vital functions." *See Id*. at 449.

C. The Court has jurisdiction to review the constitutionality of initiatives.

The Sponsor argues that considering the constitutionality of citizen initiatives "would exceed the constitutional jurisdiction of the Court in this pre-election review." *See* Sponsor Br. at 16. The Constitution provides "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." Art. IV, § 10 Fla. Const. General law requires the Court's advisory opinion to address "the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution." *See* § 16.061, Fla. Stat.

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, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith." It should be readily apparent that a power cannot be reserved to the people if the power does not exist. The question then becomes: do the people have the power to propose amendments to the Constitution which do not comply with the U.S. Constitution?

This Court's long-standing precedent requires any proposed amendment to comply with the U.S. Constitution. *See Gray v. Winthrop*, 156 So. 270 (1934) (stating unconstitutional proposed amendments are "futile and nugatory"); *see also Gray v. Moss* 156 So. 262, 266 (Fla. 1934) (stating proposed amendments are "subject to applicable prohibitions and limitations of the Federal Constitution"). The Court has applied this principle to citizen initiatives. *See Weber v. Smathers,* 338 So. 2d 819, 821 (Fla. 1976) (stating citizens "have a right to change, abrogate or modify [the Florida Constitution] in any manner they see fit so long as they keep within the confines of the Federal Constitution.") It is clear a citizen initiative proposed under

Art. XI, section 3 of the Florida Constitution must comply with the U.S. Constitution to be valid. *See* Senate Int. Br. at 26-30.

The U.S. Supreme Court has also noted that "the Constitution is filled with provisions that grant Congress or the states specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes,* 393 U.S. 23, 29; 89 S.Ct. 5, 9; 21 L.Ed.2d 24 (1968). In overruling an Arkansas amendment to its constitution that imposed term limits on congressmen, the Court observed "we have frequently noted, 'the States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'" *United States Term Limits, Inc. v. Thornton,* 514 U.S. 779, 801, 115 S.Ct. 1842, 1854, 131 L.Ed.2d 881, 899 (1995) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549, 105 S.Ct. 1005, 1017, 83 L.Ed.2d 1016, 1033 (1985)).

Article IV, section 10 of the Florida Constitution and section 16.061, Florida Statutes, do not limit the Court's consideration to the single-subject restriction. The Constitution calls on the Court to consider an initiative's "validity" and the statute calls on the Court to look at its "compliance." If an initiative does not comply with the Federal Constitution, then it is not valid and does not comply with Article XI,

section 3 of the Florida Constitution. The Court must recognize the inherent restraints created by our system of government and the fundamental nature of our constitutional framework.

It is also helpful to look at the purpose of the Court's review. Article IV, Section 10 and Article V, section 3(b)(10) of the Florida Constitution were added because "[i]t was felt that fairness dictated that ballot sponsors be able to obtain an opinion with regard to the technical requirements prior to going to the great effort and expense of collecting all of the necessary signatures for ballot placement." *See Florida Statutes Annotated Art. IV § 10 Commentary* by William K. Buzzett and Deborah K. Kearney. This purpose is not served by the Court turning a blind eye to obvious defects that will prevent a citizen initiative from ever becoming a valid law.

So as argued in the Senate's Initial Brief, the text of the Florida Constitution and general law does not support limiting this Court's review merely to the single subject requirement but also, as historically understood by the Court, to consider whether an initiative violates the U.S. Constitution.

D. By arguing non-delegation principles apply to constitutional amendments the Sponsor effectively concedes the Initiative is void ab initio.

As argued in the Senate's Initial Brief because the Initiative writes Medicaid into the Florida Constitution it violates the non-delegation clause, Senate Br. at 23-

26, and the Guarantee Clause of the Federal Constitution, Senate Br. at 30-36. The Sponsor however argues that the Court need not be concerned:

> The Amendment requires the state to participate in the expanded Medicaid coverage as it currently exists and instructs AHCA to submit a state plan for federal approval. The Amendment says nothing about Florida's obligation to comply with any materially changed federal program.
>
> Sponsor Br. at 17.

However, Medicaid regulations change regularly and have changed since the Initiative was approved for signature gathering on December 12, 2018. *See* Att'y Gen. Adv. Op. Req. at 8. For example, 42 U.S.C. § 1396a, State Plans for Medical Assistance, has been amended numerous times in recent years with nearly annual changes since 2000. There were three amendments in 2018 alone. *See e.g.*, Jan. 22, 2018, 132 Stat. 34, 35, 37; Pub. L. No. 115–123, div. E, title I, § 50101(e), (f)(2), title XII, §§ 53102(a)(1), (b)(1), (d)(2), 53103(a), Feb. 9, 2018, 132 Stat. 174, 175, 298–300; Pub. L. No. 115–271, title I, §§ 1001(a), 1002(a)(1), 1004(a)(1), (2), 1006(b)(1), 1007(a), (b), Oct. 24, 2018, 132 Stat. 3900, 3902, 3909, 3914, 3915. Since the Initiative was approved for this Court's review, there was yet another change. *See* Pub. L. No. 116–16, § 7(a), Apr. 18, 2019, 133 Stat. 864. So if the contention is the "Amendment requires the state to participate in the expanded Medicaid coverage as it currently exists" the Medicaid program has already changed

and if history is any guide will change a number of times before this Initiative even gets to the ballot.

The Sponsors try two sleight of hand tricks to get around this problem. First, they try to argue the Initiative only deals with expanded Medicaid coverage. However, earlier in their brief they concede "federal law requires a state to continue to participate in basic Medicaid in order to take advantage of expansion to the newly eligible class." *See* Sponsor Br. at 10. Therefore, any changes to Medicaid will impact the Florida Constitution, not just changes specific to the expanded program.

The second trick they try is to insert the phrase "materially changed." The Sponsor, probably recognizing that any changes to Medicaid will basically invalidate the Initiative, subtly tries to introduce this concept of materiality. Non-delegation is non-delegation, there is no degree of delegation that is permissible. To avoid non-delegation, the court will apply the federal law in effect at the time of enactment. Therefore, the constant adjustments and tweaks to the Medicaid program create an impossible standard for this Court to keep up with in determining whether the Initiative is still effective or which version of federal law to apply.

Also, as noted in the Senate's Initial Brief, there is no provision in the Medicaid Act for a state to expand and then go back to the "original" Medicaid program. So the Initiative could have long lasting effects, even if it were technically invalidated. By conceding that changes to the Medicaid program do not obligate

Florida to implement such changes and comply with federal law, the Initiative is void ab initio. Already the program has changed and will continue to change on a regular basis. To remain eligible for funding, federal law requires the state to comply with the present version of the rules. The Initiative cannot survive by looking to a historical version of the law.

E. The Sponsor effectively concedes the Initiative violates the Guarantee Clause.

The Sponsor makes no effort to explain how the Initiative complies with the Guarantee Clause. They hand wave the argument away by stating the Initiative does not bind the state to future changes in Medicaid law. *See* Sponsor Br. at 17. Since the only way the state can continue to provide Medicaid benefits is by binding the state to future changes, the Sponsor concedes there is a Guarantee Clause problem. Again, if the state implements expansion, it is tied to a more robust program from then on, unless it drops Medicaid entirely or federal law changes. Therefore, by constitutionalizing Florida's participation in Medicaid, implicating over a third of the state's budget, this Initiative gives significant control to Congress and the Secretary of Health and Human Services in violation of the Guarantee Clause.

CONCLUSION

The Sponsor makes no real effort to contest the deficiencies pointed out by the opponents. On both of the main grounds the Court reviews, the ballot summary and the single-subject requirement, the Initiative fails. The ballot summary

affirmatively misleads voters about how the program will be funded. In violation of the single subject requirement, the Initiative substantially affects multiple levels of government and substantially alters the separation between the legislative and executive branches. Furthermore, the Initiative violates the Federal Constitution by delegating state sovereignty to the Federal Government and failing to comply with federal law. Based on all of these grounds the Initiative must not be allowed to proceed to the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed electronically with the Clerk of the Court via the Florida eFiling Portal which will serve all parties of record this 7th day of October 2019.

s/ Jeremiah Hawkes

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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