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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REPLY BRIEF OF AMERICANS FOR PROSPERITY AND FOUNDATION FOR GOVERNMENT ACCOUNTABILITY IN SUPPORT OF INITIAL BRIEF OPPOSING THE INITIATIVE PETITION

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SUMMARY OF ARGUMENT

The Proponent ignores the fact that the proposed initiative would deprive both the Legislature and the executive branch of control over, at minimum, 31 percent the state budget. In doing so, Proponent ignores the controlling precedent of Advisory Op. to the Att'y Gen. re Requirement for Adequate Pub. Educ. Funding, 703 So. 2d 446 (Fla. 1997), where this Court held a proposed initiative that would have deprived the Legislature and executive branch of control over 40 percent of the annual state budget violated the single-subject requirement of article XI, section 3 of the Florida Constitution because of the impact it would have on multiple branches of government. The Proposed Amendment would also substantially alter the function of the Legislature and the functions of the executive and local branches of government by "arbitrarily relegat[ing] the percentage of appropriations for all other functions of government to the remaining funds." Adequate Public Education Funding, 703 So. 2d at 449.

Rather than confront this fatal flaw head on, Proponent contends that the Agency for Health Care Administration is an arm of the legislative, rather than the executive, branch of government and that, as such, the single-subject requirement is not applicable here. This argument ignores the plain, unambiguous language of section 20.03 (3) and (11), Florida Statutes, which recognize departments and agencies (such as the Agency for Health Care Administration) as part of the

executive branch. Indeed, Chapter 20 of Florida Statutes is entitled "Organizational Structure of the ***Executive Branch***." (emphasis added). Passage of the Proposed Amendment would undeniably result in the diminishment of AHCA's discretionary and policy-making authority while at the same time restricting the Florida Legislature's ability to budget and appropriate funds.

Finally, while a ballot summary need not list *all* possible ramifications of the Proposed Amendment, voters should certainly be informed that they are being asked to define Florida's participation in Medicaid as a constitutional mandate no matter the cost. Likewise, it is critical to inform voters, particularly those in small fiscally constrained counties, of the likelihood that core services may have to be discontinued in order to fund Medicaid expansion.[1]

ARGUMENT

I. THE PROPOSED AMENDMENT VIOLATES FLORIDA'S SINGLE-SUBJECT REQUIREMENT BY SUBSTANTIALLY ALTERING OR PERFORMING THE FUNCTIONS OF THE EXECUTIVE, LEGISLATIVE, AND LOCAL BRANCHES OF GOVERNMENT.

[1] On December 18, 2019, in a 2-1 decision, the Fifth Circuit Court of Appeals held that the individual mandate provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), "is unconstitutional because it can no longer be read as a tax, and there is no other constitutional provision that justifies this exercise of congressional power." See Texas v. United States, No. 19-10011, --- F.3d ---, 2019 WL 6888446, at *1 (5th Cir. Dec. 18, 2019). Although not directly relevant for purposes of the present inquiry, it illustrates the consequences of constitutionalizing participation in the Federal Medicaid program, which is not disclosed to the voter.

Florida's single-subject requirement, which prohibits amendments that substantially alter or perform the functions of multiple branches of government, "is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." In re Advisory Opinion to the Att'y General—Save Our Everglades Trust Fund, 636 So. 2d 1336, 1339 (Fla. 1994). In advocating that the Proposed Amendment does not violate this limitation, Proponent ignores this Court's precedent and instead argues: (1) that the Agency for Health Care Administration ("AHCA") is part of the legislative–not the executive–branch; and (2) that AHCA would not be substantially affected by a proposal to constitutionalize Medicaid participation and expansion.

This argument is contrary to Florida law and ignores the realities of the impact the Proposed Amendment would have on state and local government operations. Florida law establishes state agencies, including AHCA, as part of the executive branch. See § 20.03(11), Fla Stat. The Proposed Amendment would have a substantial impact on this ***executive*** agency by altering its functions and diminishing its key discretionary and policy making authority. It was precisely this type of impact on multiple branch functions that this Court rejected in Adequate Public Education Funding, 703 So. 2d at 449.

a. Proponent Largely Ignores Adequate Public Education Funding.

Like the proposal considered in Adequate Public Education Funding, the Proposed Amendment would commit a large percentage of the state's budget for specific program areas—and do so in perpetuity. See 703 So. 2d 446. Proponent fails to cite, much less attempts to distinguish, that case. Although discussed at length in the initial brief, the relevant facts in Adequate Public Education Funding are worth repeating. The proponent of the amendment in that case argued that the proposed amendment only substantially affected the legislative branch, as the impact on other branches of government would be hypothetical or insubstantial. This Court disagreed:

> It is obvious that this 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
>
> Although the legislature performs the appropriations function, this function also directly affects agencies of the executive branch that depend upon legislative appropriations, as well as local governments and special districts which likewise depend upon appropriations. To arbitrarily limit agencies, local governments, and special districts to sixty percent of the State's appropriations would substantially alter the operation of the various requirements for finance and taxation in article VII 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. at 449.

Further, the Court noted that the proposed amendment would also substantially alter the Governor's constitutional-veto power, in that the Governor would be unable to veto any specific appropriation if the veto would reduce the education appropriation to less than the required 40 percent. Id. at 449. Accordingly, the Court determined that the proposed amendment substantially affected more than one function of government and therefore failed to comply with the single-subject requirement.

Here, the same result should follow. At minimum, the Proposed Amendment effectively mandates that the Florida Legislature appropriate nearly one-third of its budget, just to *maintain* current levels of Medicaid participation. See Ch. 2019-115, Laws of Fla. This does not account for the cost of future increases in Medicaid resulting from increases in Florida's population or for the cost of expanding Medicaid, which is also required by the Proposed Amendment, an amount currently unknown beyond a known minimum requirement of a 10 percent state contribution.

Critically, the Proposed Amendment mandates ***Medicaid*** coverage—not a broader term such as "health care coverage" or "health care." Thus, the Legislature is completely divested of the ability to make a policy determination as to how to provide and fund health care to Florida citizens. This would be a substantial diminution of the legislative function; the Legislature is—and should be—free to

choose to cease participation in, and funding for, Medicaid if it deemed another option more to be more effective in delivering health services.

The Proposed Amendment, as in Adequate Public Education Funding, would also substantially impact the legislative function by depriving the Legislature of the discretion to appropriate funds for other optional Medicaid recipients constitutionally prioritizing Medicaid coverage for low-income adults. The Proposed Amendment eliminates this discretion and mandates coverage for low-income adults, at the potential expense of other optional Medicaid-eligible populations such as certain categories of children, the elderly, and those with disabilities. Indeed, the mandatory nature of the appropriation requirement cannot be suspended in the event of a public necessity–making the Proposed Amendment ***even more*** restrictive than the proposal in Adequate Public Education Funding.

Moreover, much like in Adequate Public Education Funding, the Proposed Amendment substantially limits the authority of the executive branch and local governments. All executive agencies would be impacted by a limited and constrained budget, and the Governor would be prohibited from vetoing specific appropriations related to funding Medicaid. Likewise, twenty-nine small counties in Florida, including those immediately west and south of Leon county that are still devasted by Hurricane Michael, would face immediate budget challenges if this initiative was approved. Because many of these counties have reached the limit in

their taxing authority, mandatory payments for newly enrolled Medicaid recipients could not be met by tax increases, nor could counties operate in the red. The *only* solution, then, would be for counties to cut other services to meet the demands imposed by the Proposed Amendment. This is the epitome of usurping local control.

Rather than address Adequate Public Education Funding head on, Proponent relies on this Court's decision in In re Advisory Opinion to Att'y Gen. re Use of Marijuana for Certain Med. Conditions, 132 So. 3d 786 (Fla. 2014). In that case, a narrow majority approved an amendment that required the Department of Health to undertake additional administrative duties for licensing "medical marijuana." However, in that case the proposed amendment simply required the Department of Health "to register and oversee providers, issue identification cards, and determine treatment amounts to ensure the 'safe use of medical marijuana by qualifying patients.'" Use of Marijuana for Certain Medical Conditions, 132 So. 3d at 796. Here, the Proposed Amendment would likewise mandate regulatory oversight of the expanded Medicaid program by AHCA, but it would *also* limit AHCA's discretionary authority and primary policy decisions, as described above. Moreover, that case does not speak to the impact of the Proposed Amendment on the executive branch and local governments. As such, the case is inapposite to the facts here.

b. Proponent's Argument That An Executive Branch Agency Is Part Of The Legislative Branch Is Without Merit

In addition to substantially altering the executive and local branches of government by limiting the amount of appropriations the Legislature can apportion among these entities, the functions of the executive branch are further substantially impacted because the Proposed Amendment requires an executive branch agency (AHCA) to participate in and expand Medicaid. Knowing that this is fatal to the Proposed Amendment, Proponent instead argues that AHCA is not part of the executive branch. This contention cannot withstand the plain language of the Florida Constitution and Chapter 20, Florida Statutes.

It is axiomatic that statutes should be read according to their plain language. Article II, section three and article IV, section six, of the Florida Constitution establish AHCA as a department within the executive branch of government. AHCA was carved out of the former Department of Health and Rehabilitative Services–an executive agency–by the passage of Chapter 92-33, Laws of Florida. Originally housed for administrative purposes only in the Department of Business and Professional Regulation, AHCA's status as an executive agency was made clear with the enactment of section 20.42, Florida Statutes:

> Agency for Health Care Administration. —
>
> (1) There is created a department that, notwithstanding the provisions of s. 20.04(1), shall be called the Agency for Health Care Administration.

Further, section 20.42 expressly provides that the head of AHCA is the Secretary of Health Care Administration, who serves at the pleasure of and reports to the Governor. As such, based on the plain text of the statute, AHCA is unquestionably part of the executive branch.

There can be no debate as to whether AHCA's functions would be substantially affected by the Proposed Amendment. AHCA is the "chief health policy and planning entity for the state," responsible for, among other things, the administration of the Medicaid program. See § 20.42(3), Fla. Stat. Indeed, AHCA is the single state agency authorized to make Medicaid payments, see Fla. Stat. § 409.902, and likewise has the sole discretion to make certain optional payments under the Medicaid program. See § 409.904, Fla. Stat.; § 409.906, Fla. Stat.

The Proposed Amendment's primary purpose is to substantially alter both the Legislature's and the executive branch's ability to administer Medicaid. The Proposed Amendment explicitly requires AHCA to submit a State Plan Amendment and take "any additional necessary steps to seek required approvals" to expand Medicaid. "Any additional steps necessary" is undefined and would impede on AHCA's discretionary authority regarding the administration of the Medicaid program. The Proposed Amendment would also limit AHCA's ability to exercise its discretion as to the optional payments permitted under sections 409.904 and 409.906, Florida Statutes, by requiring the mandatory Medicaid coverage for low-

income adults. For the very simple fact that increased mandatory payments will undoubtedly result in limited funding for discretionary payments, the Proposed Amendment would substantially alter AHCA's ability to perform this function.

In addition, as described above with respect to the executive and local branches of government, and much like in Adequate Public Education Funding, the Proposed Amendment would substantially impact AHCA's budget and its ability to fund and perform its other functions. By carving out a huge pot of money exclusively for Medicaid participation, AHCA's other functions, such as health policy and planning, health facility licensure, inspection, and regulatory enforcement, the administration of the contracts with the Florida Healthy Kids Corporation, and the certification of health maintenance organizations and prepaid health clinics, will be severely impeded.

II. THE PROPOSED AMENDMENT FAILS TO GIVE VOTERS FAIR NOTICE OF THE CONSEQUENCES THEIR VOTES WOULD HAVE

By failing to disclose key ramifications of the Proposed Amendment and limiting the ballot summary to the *expansion* of Medicaid, the ballot title and summary fail to "give the voter fair notice of the question it must decide so that he may intelligently cast his vote." See In re Advisory Opinion to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient, 880 So. 2d 659, 665 (Fla. 2004) (quoting Advisory Opinion to the Att'y

Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 498 (Fla. 2002)). The analysis provided by Justice Polston in his dissent in Use of Marijuana for Certain Medical Conditions is instructive on the key point that "the ballot summary and title mislead voters and do not disclose the true purpose and effect of the amendment's text." 132 So. 3d at 810.

Proponent argues that it is not necessary or practicable for the ballot summary to list all possible ramifications. But that is not the question here–the law requires "fair notice of the question." See Physician Shall Charge the Same Fee, 880 So. 2d at 665 (quotation omitted). Our argument is that transforming Florida's participation in the Federal Medicaid program from the legislative ***option*** that Congress intended into a constitutional ***mandate*** is something that should be clearly disclosed to voters before they are asked to perpetually mandate one-third or more of state revenue be spent on Medicaid, no matter the impact on other programs.

The case cited by the proponent for the proposition that each potential ramification need not be included in a ballot summary is distinguishable, because it determined that concerns about "any indirect impact that could possibly touch upon government-sponsored insurance programs" or "future litigation" were not sufficient to render the ballot summary concerning a proposed amendment to limit a physician's ability to charge different fees misleading. See Physician Shall Charge the Same Fee, 880 So. 2d at 664-65. The Court noted the amendment provided that

"[a] physician shall charge all purchasers the lowest fee for health care which the physician has agreed to accept," whereas the summary stated that "[t]his amendment would require a physician to charge the same fee for the same health care service, procedure or treatment." Id. at 665.

Here, however, the Proposed Amendment fundamentally alters the way Florida participates in Medicaid. The purpose of the amendment is not simply to expand Medicaid, but also to constitutionally mandate participation by eliminating legislative control over appropriations. The Proposed Amendment also fails to convey the true extent of the amendment by failing to disclose that constitutionalizing Medicaid payment will have significant budgetary impacts, the extent of which is presently unknown, on both state *and* local government entities. Accordingly, the ballot summary is misleading.[2]

[2] With respect to the proponent's arguments concerning the phrase "maximizing federal financial participation," we respectfully adopt the positions taken by the House and the Senate in their respective initial and reply briefs.

CONCLUSION

For the reasons set forth above and in our initial brief, the Proposed Amendment should be invalidated.

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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 eFilng Portal which will serve all parties this 6th day of January 2020.

/s/ Richard E. Doran
RICHARD E. DORAN