IN THE SUPREME COURT OF FLORIDA

In Re:)	
)	
PETITION TO DETERMINE VALIDITY OF INITIATIVE TO AMEND ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.)	No. 71,701
)	

BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS
INCLUDING APPENDIX
OPPOSING VALIDATION OF THE PROPOSED INITIATIVE AND REFERENDUM

On initiative petition by the Attorney General
Sponsored by "Florida Committee for Liability Reform"

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BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS OPPOSING VALIDATION OF THE PROPOSED INITIATIVE AND REFERENDUM

Statement of the case and of the facts

For three reasons grounded in this Court's decisions construing Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes, we shall urge that the initiative sponsored by "Florida Committee for Liability Reform", a political organ of the Florida Medical Association, does not qualify for a referendum:

(1) The text of the proposed amendment, though itself deceptive or ambiguous by omissions, would purposefully and inevitably cap damages for physical impairment and for disfigurement. That effect is masked by a deceptive or ambiguous ballot summary, which vitiates the proposal.

(2) In Sections 1 and 2, the initiative embraces more than one subject and matter directly connected therewith: exercising both judicial and legislative functions; mixing subjects that are by the Sponsor's definition noneconomic and economic; fixing specific constitutional limitations then making them amendable by legislation.

(3) In Sections 1 and 2, on the one hand, and Section 3(A), on the other, the initiative embraces more than one subject and matters directly connected therewith: the purported severability clause in Section 3(A), misnomered "Schedule", affects only the judicial function, only in advance of any referendum that might give it force, and it tends to induce judicial editing or the appearance of Court approval of ballot propositions not edited.

The matter decided last week, In re: Advisory Opinion to the Attorney General, English - The Official Language of Florida, ___ So.2d ___, 13 FLW 67 (Feb. 4, 1988), auspiciously inaugurated the new species of advisory opinion. [1] The proposal was itself a model of stark uncluttered simplicity. Not coincidentally the decision had the same virtues, bearing little of the debate in earlier opinions about the proper constitutional and statutory standards for such initiatives.

Only through rigorous standards for ballot language and single-subject discipline, we shall urge, can this new process consistently yield reasonably stable and predictable results. The ease of any interest group now summoning the Court's constitutional opinion, Art. V, § 3(b)(10), Fla. Const., [2] and the formal and practical demands for "their written opinion expeditiously", will otherwise become problematic.

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[1] Art. IV, § 10, Fla. Const., adopted November 1986 by referendum on HJR 71:

> Section 10. Attorney general. -- 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. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously.

[2] Art. V, § 3(b)(10), Fla. Const., provides:

> (b) JURISDICTION. -- The supreme court:
>
> . . .
>
> (10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Chapter 87-363, Laws of Florida, enacting Sections 15.21 and 16.061, Florida Statutes, summons the Justices' opinion when a registered political committee such as the Florida Medical Association's "Florida Committee for Liability Reform" (A. 2-5) submits to the Secretary of State petition forms signed by electors numbering eight-tenths of one percent of those who voted in the last presidential election. [3] During the more than six months in which the Florida Medical Association has funded signature-gathering (A. 2-5), down to January 21, 1988, its petition was signed by 40,635 electors (A. 1).

The process then extracts from the Court a decisive hypothetical judgment: decisive though nominally "advisory" because the effect of the judgment is to grant or refuse the petition a ballot privilege that cannot effectively be revoked after it is exercised; but the judgment is hypothetical because the electors will not vote at all unless it remains on the Sponsor's political agenda to ask some three hundred thousand more to add their signatures to the 40,635, and they do so.

After counting the signatures the Secretary of State

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[3] The submission to this Court begins when the Division of Elections confirms to the Secretary of State that the county Supervisors of Elections have verified that the Sponsor has submitted "forms signed and dated equal to 10 percent of the number of electors statewide and in at least one-fourth of the congressional districts required by s. 3, Art. XI of the State Constitution" for a referendum. § 15.21(3), Fla. Stat. (1987) (emphasis added). That number is "eight percent of the votes cast" in each of half the congressional districts and in the state as a whole, in the last presidential election. Art. XI, § 3, Fla. Const. The number of elector signatures required to complete the submission to this Court is therefore .10 x .08 = .008, or .8 %.

handed this petition to the Attorney General, § 15.21, Fla. Stat. (1987), who shuttled same over to this Court, § 16.061, Fla. Stat. (1987),

> requesting an advisory opinion regarding the compliance of the text . . . with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161.

Since 1979, Section 101.161, Florida Statutes, has imposed duties on the Secretary of State which, had they been performed, would have screened this proposed ballot language for clarity and completeness. [4] That statute requires the Secretary to "approve" the "substance and ballot title" proposed by a Sponsor. Instead, the Secretary adopted Rule 1C-7.009(1), (5), Fla. Admin. Code, saying: "The division shall review as to the sufficiency of the format only" before the Sponsor seeks signatures; and "No review of the legal sufficiency of the text of the proposed amendment is to be undertaken by the Division"; and "The Division shall not review the accuracy or content of such material, but will review to determine that other information does not interfere with required material." Rule

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[4] Ch. 79-365, § 16, Laws of Fla., inserted the following language in what is now Section 101.161(2), Florida Statutes:

> The substance of an amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s. 120.54.

The Legislature in its 1980 regular session added "and the ballot title" to the Secretary's screening duties and enacted an explicit standard in what is now subsection (1): "the substance of such amendment" shall be printed "in clear and unambiguous language on the ballot[.]" Ch. 80-305, § 2, Laws of Fla. (codified at § 101.161(1), Fla. Stat. (1987)).

1C-7.0091 tells the Secretary only to count signatures.

Back in 1976, before the statute gave the Sponsor responsibility to prepare and the Secretary responsibility to approve "the substance and ballot title of a constitutional amendment proposed by initiative," § 101.161, Fla. Stat. (1987), Section 101.161 required the Secretary to furnish that "substance of the amendment" to the counties for printing on the ballot. § 101.161, Fla. Stat. (1975). The Secretary of State asked the Attorney General whether that meant he (the Secretary) had to prepare the adequate "substance" statement for the ballot. The Attorney General said Yes. 1976 Op. Att'y Gen. Fla. 076-189 (Sept. 14, 1976).

Now the Secretary neither prepares nor, despite the law, approves. In 1987 the Legislature took note [5] that the Secretary "has declined to assume an active role in revising either the ballot title or substance", and that his review "has been limited to ensuring that the number of words in the title and substance do not exceed the statutory maximum." A bill instructing the Secretary more explicitly in Section 101.161(2) was gutted before passage. [6]

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[5] Senate Staff Analysis to SB 209 (1987), at 2, 3 (A. 9-10), sponsored by the Senate Judiciary-Civil Committee (amending § 101.161, Fla. Stat.) See infra n.6.

[6] SB 209 (1987) was enacted in part, ch. 87-363, Laws of Fla., after striking Section 6 (A. 6-7), which would have amended Section 101.161(2), Florida Statutes, to add: "The Secretary of State shall recommend such changes to the substance and ballot title necessary to ensure compliance with the provisions of this section" -- meaning the "clear and unambiguous language" requirement of Section 101.161(1).

This Court has noted over the years, as it labored to enunciate principled doctrine for such cases, a certain combination of systemic dangers in adjudicating fast-track initiative proposals in fast-track judicial proceedings for injunctions and mandamus writs. The same holds true, only more so, in constitutionally mandated advisory opinions.

Justice Thornal said years ago that the initiative-and-referendum process requires vigilance against "precipitous and spasmodic changes in the organic law." Adams v. Gunter, 238 So.2d 824, 832 (Fla. 1970) (Thornal, J., concurring). Justice Terrell said, then Justice Roberts, then Justices McDonald and Shaw with apparent approval: "It is hard to amend the Constitution and it ought to be hard." Weber v. Smathers, 338 So.2d 819, 824 (Fla. 1976) (Roberts, J., dissenting); Fine v. Firestone, 448 So.2d 984, 994, 999 (Fla. 1984) (McDonald, J., Shaw, J., concurring). To resist "precipitous and spasmodic changes in the organic law" is now an article of the Court's faith. Fine, 448 So.2d at 993.

Fine v. Firestone, supra, points unerringly to the systemic causes of logrolling and deceptive ballot language in such petitions as this: they are crafted privately in the private interests of the Sponsor, independent of the "filtering legislative process" that affords "public hearing and debate not only on the proposal itself but also in the drafting . . . ." Fine, 448 So.2d at 988. "[T]he public has had no representative interest in drafting" what is laid before them for judgment. Id. See also Askew v. Firestone, 421 So.2d 151, 155 n.2 (Fla. 1982) (McDonald, J.).

It is not coincidental, then, that privately crafted initiative petitions tend to feature text and ballot language that sells better than it informs, suppresses any effect deemed too unpalatable for electors, or shrouds it in generalities. The tendency of Sponsors is to postpone revelation of harsh results, whether debatable from the text or inevitable, to another day and forum: "They want to leave this important choice regarding the application of the proposal to the total discretion of this Court." Evans v. Firestone, 457 So.2d 1351, 1356 (Fla. 1984) (Overton, J., concurring). See also Fine, 448 So.2d at 989 (Overton, J.). Such an "empty vessel" syndrome "serves to transfer power to the judiciary . . . contrary to the underlying purpose of citizen initiatives." Fine, 448 So.2d at 998 (Shaw, J., concurring).

Too, a Sponsor usually wants hasty judgment. This one, for example, says its "right to have a prior determination of the issues will be a hollow one" unless the Court speaks by March 1. Suggestion by Florida Committee for Liability Reform on Scheduling, etc., at 3. (Never mind that the 40,635 signatures gathered by the Sponsor, such as they are, are good for four years. § 100.371(2), Fla. Stat. (1987).) Such haste can affect judicial processes, as the Court has noted: "[T]he time available to develop arguments and resource material germane to this case was extremely limited"; "neither counsel nor the Court have had an opportunity to develop the case as thoroughly as they might choose." Weber, 338 So.2d at 822 n.2. (England, J., concurring).

Justice Thornal used the words only concerning the tendency of initiative petitions, but "precipitous and spasmodic" may aptly describe, as well, episodes of judgment upon a course of quick briefing, quick disheveled arguments as in a town meeting, and quick decisions. Weber, early in the series of "emergency" cases, 338 So.2d at 822, was held two years later to have depended on "analysis [that] has no place in assessing the legitimacy of an initiative proposal . . . ." Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337, 341 (Fla. 1978). Fine then recedes from that disapproval, 448 So.2d at 990. In likening the two constitutional one-subject limitations on legislation and initiatives, Floridians was also disapproved in Fine, 448 So.2d at 988-89.

The need to match sound judgment and a fast schedule influences what the Court may reasonably expect to do alone, and do well alone, on single-subject and ballot clarity issues. We say advisedly "do alone" because the other branches whom Askew v. Firestone, supra, [7] asked to help screen ballot language, a request made again by Evans v. Firestone, supra, [8] have

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[7] 421 So.2d at 157 (Overton, J., concurring): "It concerns me that the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language." "[T]he legislature and this Court should devise a process . . . ."

[8] 457 So.2d at 1358 n. (McDonald, J., concurring): "[T]he legislature might consider placing the responsibility of the preparation of a ballot summary on a third party, such as the Secretary of State"; id. at 1359 (Ehrlich, J., concurring): "The legislature . . . has not revisited section 101.161 to permit judicial correction of a defective summary"; id. at 1361 (Shaw, J., concurring) (agreeing with McDonald, J.).

seemingly given a negative answer.

If the Secretary of State will not "approve" or disapprove ballot language as required by Section 101.161(2) for ten years now, and the Legislature can do no more than acknowledge that state of affairs, the Court must simply hone its own tools for their most effective use.

Summary of the Argument

The ballot summary of this proposal violates Section 101.061(1), Florida Statutes, in that it does not state its effect in clear and unambiguous language. The summary would not advise electors that Article I, Section 21 of the Declaration of Rights, **Access to Courts**, is now to be qualified, and would not advise them that redress heretofore fully secured for physical impairment and disfigurement is now to be limited by a $100,000 cap on "noneconomic" damages.

The text of the proposal violates Article XI, Section 3 by embracing more than a single subject and matter directly related thereto. The proposal exercises, by hobbling it, the judicial duty described in Article I, Section 21, and the legislative function as well; the proposal incorporates what by definition are disparate subjects, "noneconomic" damages and economic statistics; and the proposal fixes a finite constitutional measure of damages that then it proposes to have changed by legislation.

Finally, the initiative text includes a purported severability clause which is not directly connected with any substantive subject in Sections 1 and 2. In light of the new

advisory opinion process for constitutional initiatives, the severability clause violates the single-subject rule of Article XI, Section 3.

ARGUMENT

1.

A deceptive or ambiguous ballot summary masks the text's effect of capping damages for physical impairment and for disfigurement, and so vitiates the proposal.

As shown again and again by its decisions, the Court does not lack either standards or a mandate to vitiate initiative proposals for misleading ballot language. For ten years, Section 101.161(1) has spoken to the Court as well as to the Secretary of State: "the substance of such amendment . . . shall be printed in clear and unambiguous language . . ." If further legislative warrant for judicial vigilance were required, [9] it was granted by the 1987 legislation requiring the Attorney General to inquire of the Court both about "compliance of the text of the proposed amendment . . . with s. 3, Art. XI" and "compliance of the proposed ballot title and

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[9] Justice Ehrlich observed in Evans, 457 So.2d at 1359 (Ehrlich, J., concurring), that "The legislature . . . has not revisited section 101.161 to permit judicial correction of a defective summary. We must fulfill our responsibility, but we must not exceed the authority vested in us." We respectfully suggest that the most effective "judicial correction of a defective summary" remains a stalwart refusal to admit same to the ballot. The Secretary of State has long had the power and the duty to correct defective summaries, and both the Attorney General and the Legislature know the Secretary refuses to perform that duty. All of them having forsworn any responsibility of their own, those officers probably would be delighted for the Court to undertake the "judicial correction of a defective summary." But the Justices should think about the drafting-session chaos the Court would invite to these advisory opinion proceedings, were the Court to take on that nonjudicial work.

substance with s. 101.161." § 16.061, Fla. Stat. (1987).

Askew v. Firestone, invoking the "clear and unambiguous" standard of Section 101.161(1), held that the ballot language must "be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." 421 So.2d at 155 (quoting Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954) (emphasis omitted)). That means, the Askew Court held, that a ballot summary which does not reveal the removal of "an existing constitutional provision" does not satisfy the law merely by declaring what protection it "grants". Id. at 156. The plurality opinion in Evans elaborated that standard:

> The summary states that it "establishes" citizens rights in civil actions. This is clearly inaccurate as applied to provision b, relating to summary judgment. This provision has long been established in Florida. The effect of the amendment is to elevate this procedural rule to the status of a constitutional right . . . . We do find . . . that the voter must be told clearly and unambiguously that this is what the amendment does.

Evans, 457 So.2d at 1355 (emphasis added).

And again: "The ballot summary should tell the voter the legal effect of the amendment . . . ." Id. (emphasis added). And finally, "We merely stand firm on the fundamental right of the voter to be given fair notice so that he or she may make an informed decision on the merits of the provision." Id. (emphasis by the Court).

The "substance" or ballot summary proposed in this instance by the "Florida Committee for Liability Reform" and 40,635 electors is deceptive or ambiguous because the amendment text, which the summary tracks, is also deceptive or

ambiguous. But though the text need not describe "what the amendment does," nor itself "clearly and unambiguously" describe "the legal effect of the amendment," the ballot summary must.

The proposal does not even advise the electors that what is proposed is to be a proviso to Article I, Section 21 of the Declaration of Rights, changing historic judicial functions embraced in the term **Access to courts.**

Beyond that deficiency, the ballot language does not advise the electorate of the intended effect of the textual amendment on distinct subclasses of noneconomic damages. The term "noneconomic damages" means in Florida law a class of damages for wrongful injury specifically including elements for physical impairment or disability, and for disfigurement. Instructing a jury, [10] the court's recital of those elements is substantively identical to the class of damages the Legislature defines by the term "noneconomic damages" in Section 768.80, Florida Statutes, entitled **Determination of noneconomic damages:**

> In any action to which this part applies, damages for noneconomic losses to compensate for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonpecuniary damages may be awarded to each person entitled thereto. ~~**Such damages may not exceed $450,000.**~~ (Emphasis added.)

The stricken sentence violates Article I, Section 21,

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10 Florida Standard Jury Instructions (Civil), No. 6.2:

> Any bodily injury sustained by (name) and any resulting pain and suffering, disability, disfigurement, mental anguish and loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for measuring such damage. The amount should be fair and just in the light of the evidence. (Emphasis added).

Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987); but the term "noneconomic damages" remains with its prescribed content, giving meaning where the term occurs in Section 768.77, **Itemized verdict** ("noneconomic losses" and "economic losses" meaning losses other than "noneconomic losses" as defined); and Section 768.78, **Alternative methods of payment of damage awards** ("economic losses" meaning other than "noneconomic losses"); and Section 768.81, **Comparative fault** ("economic and noneconomic damages").

The initiative proposal at hand would amend Article I, Section 21 to limit recoveries for "non-economic damages" to $100,000. The text gives the term an open definition:

> Section 1. Article 1, Section 21 of the Florida Constitution is amended by adding the following: provided that a person entitled to recover damages for bodily injury in any action brought after the effective date of this Amendment may not recover an aggregate of more than $100,000 for non-economic losses. Non-economic losses include pain and suffering, inconvenience, mental anguish, loss of capacity to enjoy life, loss of consortium and other non-pecuniary losses. (Emphasis added.)

The ballot summary conspicuously omits [11] any mention of the two most palpable, and readily comprehended elements of an injured person's "noneconomic damages" now to be capped at

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11 The ballot summary, quoted in relevant part from the Attorney General's advisory opinion request:

> Amendment provides that a person entitled to recover damages for bodily injuries in any action may not recover more than $100,000 for non-economic losses; defines non-economic losses to include pain and suffering, inconvenience, mental anguish, loss of capacity to enjoy life, loss of consortium and other non-pecuniary losses . . . . (Emphasis added.)

$100,000: her physical impairment, his disfigurement. That those elements should be omitted which are most painful to observe is telling evidence of the summary's deception or ambiguity. However the whole-bodied may doubt and depreciate another's claim of pain, inconvenience, anguish, loss of ability to enjoy life, or loss of consortium, none of us fails to comprehend another's **physical impairment** or his facial or body **disfigurement.** We indeed would avert our eyes; but existing law requires that the jury, and society, and the tortfeasor, not avert their eyes.

The ballot summary would avert the elector's eyes from the prospect of capping damages for **physical impairment** and for **disfigurement.** Or does the Sponsor intend by these omissions that the "noneconomic damages" for physical impairment and disfigurement, so classified by Section 768.80, not be capped? We presume the Sponsor agrees that its text and summary employ an open-ended definition -- "and other non-pecuniary losses" -- which a court would likely consider refers to all the common law elements, SJI 6.2, supra n.10, and all the statutory elements, Section 768.80, in the class.

On principles of ejusdem generis one would expect any court to honor a tortfeasor's claim that the term "noneconomic damages" should be given the same effect in all similar contexts of law, and that definitions of the same term not written inconsistently should be read consistently.

In practical terms also, what is included in or excluded from "non-economic damages" reported by the jury's verdict

affects the court's administration of Sections 768.77, .78 and .81. It is difficult to suppose that **physical impairment** and **disfigurement** damages will be reported and classed "noneconomic" for purposes of those statutes, but "economic" and excluded from the new Article I, Section 21 limitation. We doubt also that such is the Sponsor's intention, or that such is the designed effect of this text.

There apparently is no constitutional impediment to an amendment text concealing its known and purposeful effect from the electors (who in the scheme of things read the "substance," not the text). But in the "substance" or ballot language, Section 101.161 and this Court's decisions unequivocally condemn deception and ambiguity alike.

"It is totally incomprehensible," to use a phrase from Justice Overton's concurring opinion in Evans, 457 So.2d at 1356 (Overton, J., concurring), that the Sponsor doesn't suppose, as we do, that damages for **physical impairment** and **disfigurement** are capped by this proposal; doesn't consider that a natural reconciliation of this text with Section 768.80 has that effect; doesn't appreciate that to avoid same this Court would have to treat "noneconomic damages" as "an empty vessel" into which the judiciary pours or withholds any meaning it likes. Fine, 448 So.2d at 998 (Shaw, J., concurring).

We cannot imagine that the Sponsor will explain that its purpose is to exclude **physical impairment** and **disfigurement** from the cap, or that the Court would accept that explanation of the omissions. But should that come to pass, all are on notice that any $100,000 limitation on "noneconomic damages" will have no

effect. Any jury that would otherwise award adequate redress for "pain and suffering" will surely now award adequate redress, the cap notwithstanding, for "physical impairment".

And when those objecting look around for the responsible party, it will not be the Secretary of State, the Attorney General, or the Legislature. Sad to say, it will be the Court that has been led to hold that the capped "noneconomic damages" don't include damages for physical impairment and disfigurement.

For its deceptive or ambiguous ballot summary, the entire proposal is vitiated.

2.

Sections 1 and 2 embrace subjects not directly related: exercising both judicial and legislative functions; mixing definitionally separate noneconomics and economics; fixing constitutional limits amendable by legislation.

It is the single-subject limitation on initiatives, Article XI, § 3, Fla. Const., that should be honed to a rigorously simple standard in light of recent changes in the Constitution and general law easing the logistical tasks of prospective Sponsors.

When the reality is that the Secretary of State doesn't edit deceptive ballot language as required by Section 101.161, and the Legislature knows it, there is no reason whatsoever for this Court to be concerned about judicially solving "[t]he problem of misleading ballot language which now results in the removal of a constitutional proposal from the ballot . . . ." Evans, 457 So.2d at 1357 (Overton, J., concurring). See also id. at 1359 (Ehrlich, J., concurring).

Similarly, the reality now is that it is easy for any Sponsor to comply with any rigorous single-subject standard this Court can devise. All that is required is a true single subject on a petition and the signatures of some 40,000 electors -- the approximate population of Ocala -- in a State of several million; eight-tenths of one percent of the electors.

If a well-motivated Sponsor can't conceive of a true single-subject proposal and readily get the few signatures needed, the Sponsor has got problems the Court can't and shouldn't try to solve by generous interpretations of "one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. The Sponsor's price of admission to the initiative-and-referendum process is dirt cheap compared, say, to the "expeditious" effort demanded of the Court through a constitutionally mandated response to the Attorney General's request for an advisory opinion. Sponsors with good causes should be able to gather 40,000 signatures on half-a-dozen single-subject petitions in the time the judicial process properly requires to review any one of them.

In other words, the cost of losing a proposal due to deceptive ballot language or for logrolling is de minimus. The risk therefore of too rigorous a standard for single-subject adherence, or for clarity in ballot language, is gone; the danger is rather that unpredictably lenient standards will combine with ease of entry to the process, to make the circulation of constitutional changes commonplace.

Predictability in the standard means reducing leniency through simplicity. No single-subject standard will be "practically insurmountable" [12/] if all potential Sponsors come to understand, as they should, that "matter directly connected therewith" means matter directly in service of a "single subject" conceived as narrowly as it may reasonably be conceived; that any other "matter" will be judged presumptively extraneous, conclusively so if it does any detectable logrolling.

In other words, a rigorous single-subject standard will reconcile the saying, "It is hard to amend the Constitution and it ought to be hard," to what Justice Thornal called "an idealistic pronouncement 'to let the people decide.'" Adams, 238 So.2d at 832 (Thornal, J., concurring). When Sponsors become reconciled to presenting the electors "hard" amendment choices on unambiguous single subjects fully explained, then the Court will surely and properly "let the people decide."

This proposal fragrantly logrolls. Section 1 appeals to the electors (ambiguously) to fix at a definite amount the maximum allowable noneconomic damages; then Section 2 appeals to the same electors (ambiguously) to let the Legislature change the electors' decision by an amending process other than the electors' own, the Article XI referendum.

In double-subject terms this proposal may be conceived of as impacting both the organic judicial function, by Section

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12 Evans, 457 So.2d at 1360 (Shaw, J., concurring) (referring to the "function of government test").

1, and the legislative function, by Section 2; [13] or as addressing noneconomic subjects in Section 1 and definitionally opposed economic subjects (price indexes) in Section 2; or as establishing a fixed dollar amount by initiative-and-referendum pursuant to Article XI, in Section 1, and permitting its cancellation by legislation under Section 2.

Each of these analyses is true to this Court's several prior decisions on single-subject doctrine. And they all reflect the fundamental flaw in this initiative, its self-contradictory double dealing: first to offer the electors a hard choice; then to offer the palliative, evasion or escape. Such strategy no more comports with law than "enfolding disparate subjects within the cloak of a broad generality," Evans, 457 So.2d at 1353, which "does not satisfy the single-subject requirement."

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13 An initiative to amend Article I, Section 21, **Access to Courts**, to undermine the constitutional basis of Smith v. Department of Insurance, supra, "performs the functions" this Court performed in that decision, so it "performs the functions of different branches of government": judicial functions by Section 1 and legislative by Section 2. The initiative therefore "clearly fails the functional test for the single-subject limitation the people have incorporated into article XI, section 3, Florida Constitution." Evans, 457 So.2d at 1354. Evans characterized a dollar limitation on a defendant's liability as affecting legislative functions. Id. at 1353. But capping one defendant's liability does not necessarily cap all redress for injury, which Section 21, **Access to Courts**, reserving quintessential judicial functions, protects. Moreover, as this Court said in Smith, 507 So.2d at 1088, a cap impacting Section 21 also impacts Section 22, **Trial by jury**, another unequivocal judicial function. Evans is further distinguishable in that that initiative did not purport to amend Article I, section 21. Finally, to the extent of any inconsistency, the Evans "legislative" description was displaced by Smith's judicial action, carrying out Article I, Section 21.

3.

The initiative embraces other subjects not directly connected: the consolidated subjects of Sections 1 and 2; and the severability clause in Section 3.

Section 3 of the proposed initiative, entitled "Schedule", contains in part B a conventional schedule -- "This amendment shall take effect thirty days after the date of the election at which it is approved" -- and something else entirely in part A:

> A) If this Amendment is held invalid for containing more than one subject, this Amendment shall be limited to Section 1.

Such a provision is no proper part of a proposed initiative under the newly mandated advisory-opinion regime of revised Article IV, Section 10 and Article V, Section 3(b)(10) of the Constitution, and new Sections 15.21 and 16.061, Florida Statutes. It is not mere surplusage, nor is it anyone's significant expression of intent. To the extent it has meaning at all, it is subject to mischievous interpretation, and so should be regarded as a subject not directly connected with either Section 1 or Sections 1 and 2, violating Article XI, Section 3.

In Fine, 448 So.2d at 992, the Court spoke to "severability language contained on the petition form" which was in tone and purported self-executing effect quite similar:

> If any portion of this ballot title, summary and amendment is found to be invalid, the remaining portions shall not be invalidated. If this amendment is found to contain multiple subjects, all references to such additional subjects, found after the first subject, shall be invalid, but the remaining portions of the amendment shall not be invalidated.

The Fine Court had no need to classify this language as an offending extra "subject" not directly connected, or not, because as the Court stated, "This language is not part of the amendment and would not appear on the ballot." Id. The literal truth of that statement is borne out by the photocopy of the subject petition form, copied recently from the Court's record jacket in Fine, No. 64,739, which appears in our Appendix. (A. 11). The quoted language was part of an introductory recital "petitioning" the Secretary of State. "Further," Fine held:

> such language cannot circumvent this Court's responsibility to determine whether the proposed amendment may constitutionally be placed before the voters.

Fine, 448 So.2d at 992.

In Carroll v. Firestone, 497 So.2d 1204 (Fla. 1986), the Court approved part (b) of the lottery initiative, which appeared in the text of the proposed amendment as follows:

> (a) Lotteries may be operated by the State.
>
> (b) If any subsections of the Amendment of the Florida Constitution are held unconstitutional for containing more than one subject, this Amendment shall be limited to subsection (a) above.
>
> (c) This Amendment shall be implemented as follows:
>
> (1) Schedule [14] - On the effective date of this Amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education

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[14] The word "Schedule" does not appear in the Court's opinion at the head of quoted part (c)(1). It does appear in the proposed amendment as it appears in the record jacket, Carroll, Nos. 69,410 and 69,426.

> Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.

Id. at 1205-06 (footnote added).

The Carroll Court said this of part (b):

> Petitioners Carroll, et al., suggest that subsection (b) impinges on this Court's constitutional authority to interpret the Constitution and thus amends article V of the Constitution. We think not. Subsection (b) has no force unless we determine that subsections (a) and (c) contain more than one subject. Moreover, while we are charged with the ultimate responsibility for interpreting the Constitution, the intent of the drafters or adopters of a constitutional provision is a highly relevant factor. We see no constitutional infirmity, but much to commend, in a drafter attempting to make clear the intent of a constitutional provision.

Id. at 1206.

We do not repeat Carroll's assertion that the present severability clause "amends article V," though we do assert that Section 3(A) of this initiative purports to effect a certain result in the exercise of a judicial function that is entirely separate from any other, legislative or judicial, addressed by other parts of the initiative.

The Court's treatment of the severability clause in Carroll was twofold:

° First, that the subsection (b) clause "has no force unless we determine that subjections (a) and (c) contain more than one subject." Id.

° Second, that it was at any rate a valuable expression of someone's intent.

We respectfully request the Court to re-evaluate this analysis in light of the new advisory-opinion regime mandated by constitutional amendment and general laws.

That such purported severability clauses cannot readily find a comfortable home in initiative petitions -- in a prefatory petition to the Secretary of State in Fine, in what appears except for content as a subsection of substantive text in Carroll, and here in a misnomered "Schedule" [15] -- suggests in a very practical way that they are pigs in the parlor.

It is of course true that a severability clause "has no force unless we determine" that it is necessary to consider the severability of disparate and wrongly-joined provisions. Id. But in truth, Section 3(A) "has no force" at this juncture whatever the Court's views of Sections 1 and 2. In contrast to severability clauses in legislation which the Court examines from time to time, they have been enacted and have "force" as law; this severability clause will never have corresponding "force" until it has been ratified by the electors.

That is to say, the Court does not interrupt legislative sessions to render advisory opinions on the hypothetical constitutionality of pending bills which contain severability clauses and which may never be enacted. Rather, the Court awaits the enactment as law. Then, the savings clause has all the "force" it will ever have, which is not much. See State v. Williams, 343 So.2d 35, 38 (Fla. 1977) (collecting cases).

The constitutional mandate for advisory opinions on proposed initiatives makes it virtually certain that the

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15 Compare the true Schedules in Article XII of the Constitution: uniformly they are transitional devices, preserving past continuities until they are changed by conventional act of law.

"advisory opinions of the Justices" will be decisive of ballot entitlement and regularity: a decision so rendered will never, in practical terms, be resubmitted by another means.

After the Court has rendered that decision -- let us say approving Sections 1 and 2 for the ballot -- what is to become of Section 3(A)? What enlightenment will it impart to the electorate in referendum? It should then be permitted to give no comfort to the elector who reads and is reassured that the Court will yet pass judgment upon the matter. Nor should the clause be put in the elector's face with the ambiguous explanation, "The Court has already approved these propositions."

Yet for the Court (or the Secretary of State, should he perform his duty) to edit away Section 3(A) deprives the proposal of an element that presumably was of considerable inducement to those who signed the petition before it was officially edited.

To the extent that clause 3(A) may be considered anyone's expression of intent, it is only that of 40,635 electors out of the more than three hundred thousand whose intent and signatures have not yet been evidenced; less than one percent of the millions whose ratification is required to give "force" to any of this. Finally, if the Sponsor's intent as to severability is valuable, that may be stated in the Sponsor's brief or argument.

This, as the Court perceives, is again by way of urging a lean, simple single-subject standard that no prospective

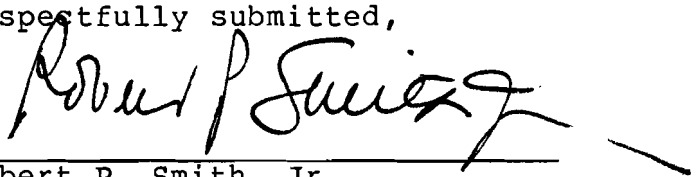
Sponsor can mistake or be tempted to offend -- one that rejects out of hand all superfluous material in the text and ballot language except a single subject, conceived narrowly, and matters of implementation and continuity directly connected therewith.

As long as the Court continues to receive such petitions as this, the Court will know its signal still is too inviting of "precipitous and spasmodic" initiatives, wreaking havoc on the Court, if not on the Constitution. See Evans, 457 So.2d at 1358 (McDonald, J., concurring).

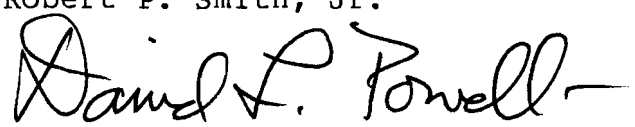
Conclusion.

By deceptive or ambiguous ballot language the proposed initiative violates Section 101.161(1), Fla. Stat. And by embracing more than a single subject and matter directly connected therewith, the proposed initiative violates Article XI, Section 3 of the Constitution. The proposal should be rejected as unsuitable for further circulation as a proposed initiative.

Respectfully submitted,



Robert P. Smith, Jr.



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Certificate of Service

I DO CERTIFY that a copy hereof was mailed this February 8, 1988, to Hon. Robert Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301, to Frederick B. Karl, Esq., 101 North Monroe Street, 950 Monroe-Park Tower, Tallahassee, Florida 32301, and to William H. Adams, III, Esq., 900 Barnett Bank Building, 100 Laura Street, Jacksonville, Florida 32202.

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