OA 8-23-94

IN THE

SUPREME COURT OF FLORIDA

Case No. 83,969

ADVISORY OPINION TO THE
ATTORNEY GENERAL
RE: TAX LIMITATION

INITIAL BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., 1000 FRIENDS OF FLORIDA, INC., COMMON CAUSE, THE FLORIDA AUDUBON SOCIETY, and AMERICAN PLANNING ASSOCIATION, FLORIDA CHAPTER IN OPPOSITION TO INITIATIVE

Alan C. Sundberg
Gary L. Sasso
F. Townsend Hawkes
Warren H. Husband
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
500 First Florida Bank Tower
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585
(904) 222-0398 (Fax)
Attorneys for Opponents

Of Counsel
Jon Mills
Post Office Box 2099
Gainesville, Florida 32602
(904) 378-4154

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STATEMENT OF THE CASE AND FACTS

Pursuant to Article XI, Section 3 of the Florida Constitution, the Tax Cap Committee, a political committee registered with the state under Section 106.03, Florida Statutes (1993), has proposed four initiative amendments to the Florida Constitution for placement on the ballot for the general election to be held on November 8, 1994. Among these four is an initiative amendment which appears in the initiative petition as follows:

PROPOSED FLORIDA CONSTITUTIONAL AMENDMENT

Article XI of the Florida Constitution is hereby amended by creating a new Section 7 reading as follows:

Notwithstanding Article X, Section 12(d) of this constitution, no new State tax or fee shall be imposed on or after November 8, 1994 by any amendment to this constitution unless the proposed amendment is approved by not fewer than two-thirds of the voters voting in the election in which such proposed amendment is considered. For purposes of this section, the phrase "new State tax or fee" shall mean any tax or fee which would produce revenue subject to lump sum or other appropriation by the Legislature, either for the State general revenue fund or any trust fund, which tax or fee is not in effect on November 7, 1994 including without limitation such taxes and fees as are the subject of proposed constitutional amendments appearing on the ballot on November 8, 1994. This section shall apply to proposed constitutional amendments relating to State taxes or fees which appear on the November 8, 1994 ballot, or later ballots, and any such proposed amendment which fails to gain the two-thirds vote required hereby shall be null, void and without effect.

Ballot Title: **TAX LIMITATION:** SHOULD TWO-THIRDS VOTE BE REQUIRED FOR NEW CONSTITUTIONALLY-IMPOSED STATE TAXES/FEES?

SUMMARY: Prohibits imposition of new State taxes or fees on or after November 8, 1994 by constitutional amendment unless approved by two-thirds of the voters voting in the election. Defines "new State taxes or fees" as revenue subject to appropriation by State Legislature, which tax or fee is not in effect on November 7, 1994. Applies to proposed State tax and fee amendments on November 8, 1994 ballot and those on later ballots.

Having received certification from the Secretary of State pursuant to Section 15.21, Florida Statutes (1993), and under the authority of Article IV, Section 10 of the Florida Constitution and Section 16.061, Florida Statutes (1993), the Attorney General petitioned this Court for an advisory opinion as to whether the initiative petition complies with Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes (1993). Pursuant to Article IV, Section 10 and Article V, Section 3(b)(10) of the Florida Constitution, this Court entered an order on July 12, 1994, inviting interested parties to file briefs.

SUMMARY OF ARGUMENT

Article XI, Section 3 directs that a constitutional amendment proposed by initiative petition "shall embrace but one subject and matter directly connected therewith." This limitation applies only to amendments by initiative petition -- as distinguished from amendments by legislative proposal, revision commission, constitutional convention, or proposal by the taxation and budget reform commission. As this Court has recognized, the single-subject requirement is confined to amendment by initiative petition because, unlike the other procedures for amending the constitution, there is no opportunity for deliberation and debate as part of the process of developing and proposing an initiative petition.

This Court has construed and applied the single-subject requirement to bar initiative petitions that may involve more than one governmental function, multiple sections of the constitution, discrete policy choices, or undisclosed collateral impacts. The proposed amendment in this case tramples on all of these concerns.

The proposed amendment, on its face, deals with at least two distinct subjects: (1) taxes and (2) fees. The proposal also involves numerous, potentially diverse subjects because it attempts to establish a procedure that will apply in the future to the adoption of a wide variety of state taxes and fees, which are not disclosed and cannot be fully anticipated. Each of these taxes and fees may present voters with very different policy issues and choices.

Further, the amendment does not make clear whether it would apply to future amendments that would "authorize" new taxes -- much like provisions in the existing constitution -- or just to amendments that would actually "impose" new taxes. It is equally unclear whether the amendment would apply to amendments that would eliminate or reduce existing constitutional tax exemptions, caps, or prohibitions. In this regard, the proposed amendment will place upon the voters and ultimately this Court the burden of deciphering its undisclosed potential application and impact. Also, the proposed amendment may have a substantial impact on diverse governmental functions, including the power of the people to amend their constitution, the ability of government to raise tax and bond revenues, and the ability of the legislative, executive, and judicial branches to provide essential services.

The ballot title and summary of the proposed amendment violate the statutory requirements in Section 101.161 that fair notice be given of the amendment's legal effects. The ballot title is framed as a question, which inherently does not constitute a statement of legal effect. More significantly, the title is a rhetorical question that impermissibly lobbies for a "yes" vote. Further, the title is calculated to alarm voters by suggesting that new taxes are currently being proposed or that they are imminent, without identifying any.

In addition, neither the title nor the summary informs the voters about <u>what</u> taxes or fees may be affected by the amendment. The amendment may apply in the future to a wide variety of taxes or

fees that are not described. Both the title and summary create confusion about whether the proposed amendment would apply only to taxes which are directly "imposed" by the constitution. The ballot title and summary also fail to disclose the impact the amendment may have on diverse governmental functions and services. The proposal's super-majority requirement of voters voting in the election could also have the unforeseen effect of requiring more than 100 percent of voters voting on an issue to pass a specific amendment.

The summary is also misleading for the reason that it suggests that new taxes may be imposed at the November 8 election, without identifying any. The amendment applies to any taxes voted upon at the November 8 election, but the summary does not disclose the constitutional ramifications of this feature, including the issue of whether the proposed amendment can override the adoption of a new tax amendment of equal dignity adopted by a majority of the electorate on November 8.

ARGUMENT

ISSUE I

THE PROPOSED TAX LIMITATION AMENDMENT VIOLATES THE SINGLE-SUBJECT RULE SET FORTH IN ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.

Introduction

The Florida Constitution reserves to the people the right to propose an amendment or revision to any portion or portions of their constitution through a people's initiative process. This initiative process is subject to just a single rule of restraint imposed upon the drafter of an initiative proposal-- the amendment or revision "shall embrace but one subject and matter directly connected therewith."[1/] Art. XI, § 3, Fla. Const. (hereinafter "the single-subject rule"). The initiative process was placed in the Florida Constitution "to allow the citizens . . . to propose and vote on singular changes in the functions of our governmental structure." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). The initiative process cannot be used to effect multiple changes in state government or law, and it cannot be used to implement a fundamental revision of the Florida Constitution. *In re Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1022 n.6 (Fla. 1994) (Kogan, J., concurring). Constitutional revisions may only be proposed through one of the other appropriate amendment procedures. *Id.*; *Fine*, 448 So. 2d at 995 (McDonald, J., concurring). The framers of Florida's

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[1/] All emphasis appearing in quotations contained in this brief is supplied unless otherwise noted.

Constitution intended the initiative process to be the most restrictive and most difficult method of amending the constitution. *Evans v. Firestone*, 457 So. 2d 1351, 1358 (Fla. 1984) (McDonald, J. concurring); *Fine*, 448 So. 2d at 994 (McDonald, J., concurring).

Recognizing that the initiative procedure is the only method of amending the Florida Constitution in which the people of Florida are not represented in the process of drafting a proposed amendment, the authors of Article XI imposed the single-subject rule only on this particular amendment procedure.[2/] *Fine*, 448 So. 2d at 988. This constitutional safeguard is primarily designed to eliminate the danger that the drafter of an initiative amendment may seek passage of an unpopular measure by including it with a more popular one in the same proposed amendment. *Id.*; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20; *Evans*, 457 So. 2d at 1354. Since the voter is faced with an "all-or-nothing" decision in the voting booth, this tactic, commonly referred to as "logrolling," forces the voter into a situation where he must vote for part of an amendment which he finds repugnant in order to secure passage of another part of the amendment which he supports.

[2/] The other four constitutional amendment processes all contain a "built-in" legislative drafting process. First, an amendment to an individual section or a revision of one or more articles, including the whole, may be proposed by a joint resolution agreed to by a three-fifths vote of each house of the Legislature. Art. XI, § 1, Fla. Const. Second, a revision of the constitution may be proposed by a periodically convened constitution revision commission. *Id.* § 2. Third, a revision of the constitution may be proposed by a specially convened constitutional convention. *Id.* § 4. Last, a revision of the constitution concerning taxation or the state budgetary process may be proposed by a periodically convened taxation and budget reform commission. *Id.* § 6.

Fine, 448 So. 2d at 988; *In re: Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund*, 19 Fla. L. Weekly S276, S277-78 (Fla. May 26, 1994); *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20. To protect voters against the use of such ploys in unscrupulous efforts to amend the Florida Constitution -- the fundamental document controlling Florida's laws and government -- this Court requires strict compliance with the single-subject rule. *Fine*, 448 So. 2d at 989.

In addition to the dangers of logrolling, an initiative proposal is not subject to the refinements made possible through the mechanisms of amendment, public debate, and legislative vote which are all integral parts of the other constitutional amendment procedures. *Evans*, 457 So. 2d at 1357 (Overton, J., concurring); *Fine*, 448 So. 2d at 988-89. Further, the participants in these "filtering" mechanisms who are responsible for the drafting of proposed amendments are all individuals with considerable expertise and experience in legal and governmental affairs. *See* Art. XI, §§ 1, 2, 4, 6, Fla. Const. The refining processes inherent in these other constitutional amendment procedures insure that a proposed amendment is precisely crafted, so as to avoid unintended collateral effects on other aspects of Florida government and law and to harmonize any proposed amendment both within the context of the rest of the Florida Constitution and within the broader context of our federal system. *See Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1022 (Fla. 1994) (Kogan, J., concurring).

Because such public "filtering" mechanisms do not exist in the initiative process, the single-subject rule seeks to fill this void by requiring the drafter of a proposed initiative amendment to direct and focus the electorate's attention on "a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution." *Fine*, 448 So. 2d at 988. Absent such a requirement, this Court, rather than the drafters of a proposed amendment, would be left to deal with the unanticipated collateral effects of an adopted amendment without the traditional aids to judicial construction (legislative history, etc.) necessary for this purpose. *Fine*, 448 So. 2d at 989. Without the single-subject rule, this Court would be granted sweeping discretionary authority to essentially redraft substantial portions of the constitution through judicial fiat, a result clearly counter to the very premise of a people's initiative. *Fine*, 448 So. 2d at 989. For this reason as well then, this Court has required strict compliance with the dictates of the single-subject rule. *Id.*

In determining whether the single-subject rule is violated by a proposed amendment, this Court has considered four principal factors, all of which must be examined with an eye toward the purposes of the single-subject rule. First, the Court must determine whether the amendment performs, alters, or substantially affects multiple, distinct functions of government, as opposed to only a single function. *Save Our Everglades*, 19 Fla. L. Weekly at S277; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020;

Evans, 457 So. 2d at 1354; *Fine*, 448 So. 2d at 990. In analyzing this first factor, the Court looks to determine whether the amendment affects a function of more than one branch of government, whether it affects multiple functions of a single branch, or whether it affects a function performed by more than one level of government -- state, county, municipal, etc. *See Save Our Everglades*, 19 Fla. L. Weekly at S277-78; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020; *Evans*, 457 So. 2d at 1354; *Fine*, 448 So. 2d at 990-92. Merely expressing the subjects of an amendment in a broadly-worded phrase will not pass judicial scrutiny. "[E]nfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Evans*, 457 So. 2d at 1353; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020.

Second, the Court must consider whether the amendment will substantially affect other sections of the constitution. *See Save Our Everglades*, 19 Fla. L. Weekly at S277-78; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020; *Evans*, 457 So. 2d at 1354; *Fine*, 448 So. 2d at 990-92. The articles or sections of the constitution substantially affected by the proposed amendment must be expressly identified in the initiative proposal. *Fine*, 448 So. 2d at 989. This is necessary not only for the public to understand the changes that a proposed initiative amendment will make in their constitution, but also to prevent unbridled discretion in judicial construction of the proposal. *See Fine*, 448 So. 2d at 989; *id.* at 995 (McDonald, J., concurring).

Third, the Court must determine whether the very breadth of the amendment will necessarily result in multiple unannounced or unanticipated collateral effects on a myriad of topics far removed from the amendment's stated subject matter. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022 n.6 (Kogan, J., concurring); *Fine*, 448 So. 2d at 995 (McDonald, J., concurring); *Restricts Laws Related to Discrimination*, 632 So. 2d at 1023 (Kogan, J., concurring). The existence of such hidden effects amounts to *de facto* logrolling, "because the electorate cannot know what it is voting on." *Fine*, 448 So. 2d at 995 (McDonald, J., concurring). The impact of an amendment's "domino effect" on single-subject concerns is particularly keen where such collateral effects could seriously disrupt other important aspects of Florida government and law. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022, 1024 (Kogan, J., concurring). The initiative process cannot be used to substantially alter "part of Florida's legal machinery regardless of the consequences to the rest of our governmental system." *Id.*, 632 So. 2d at 1022 (Kogan, J., concurring). The drafters of a proposed amendment cannot ask the voters to vote on a proposal that appears to do only one thing, but which also results "in other consequences that may not be readily apparent or desirable to the voters." *Id.* at 1023.

Last, the Court will examine whether the proposed initiative actually asks the voters multiple questions, instead of just one. For example, a proposed amendment that asks voters to approve the amendment's effects on more than one object is invalid. This asks

voters separate questions, forcing them to cast an all-or-nothing vote with regard to all of the proposed objects of the amendment. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20 (amendment violated single-subject rule as it asked voters to vote "yes" or "no" on ten different classifications); *see Fine*, 448 So. 2d at 990-92 (amendment violated single-subject rule as it asked voters to impose limitations on three different revenue sources -- taxes, user fees, and revenue bonds). The single-subject rule prevents voters from being trapped in such a predicament. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020.

On the drafters of an initiative amendment rest "[t]he decisions which determine compliance with the requirements" of the single-subject rule. *Evans*, 457 So. 2d at 1360 (Ehrlich, J., specially concurring). This Court reviews the proposed amendment for compliance with the law. *See Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners*, 19 Fla. L. Weekly S368 (Fla. July 7, 1994). "If drafters of an initiative petition . . . choose to violate the one-subject requirement, this Court has no alternative but to strike it from the ballot." *Evans*, 457 So. 2d at 1359 (Ehrlich, J., specially concurring).

The Proposed Tax Limitation Amendment

At the threshold, it is important to recognize that the proposed amendment intrinsically concerns numerous, diverse subjects because it attempts to establish a procedure that will apply in the future to the adoption of a wide variety of state taxes and fees. By its terms, the amendment will apply to the

approval of "any tax or fee which would produce revenue subject to lump sum or other appropriation by the Legislature, either for the State general revenue fund or any trust fund . . . ." Although, on the surface, it might be argued that the proposed amendment addresses a single-subject -- approval of "any" state taxes or fees -- actually the amendment impermissibly "enfold[s] disparate subjects within the cloak of a broad generality." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020.

In *Restricts Laws Related to Discrimination*, this Court struck down a proposed amendment under the single-subject requirement where the amendment "enumerate[d] ten classifications of people that would be entitled to protection from discrimination if the amendment were passed." *Id.* at 1020. "Looking beyond the surface" of the proposed amendment, the Court specifically rejected the contention that the amendment satisfied the single-subject requirement because, on its face, "discrimination is the sole subject of the proposed amendment." *Id.* The Court held that "[t]he voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions." *Id.* As the Court explained, "[f]or example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status." *Id.* The Court held that "[r]equiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the

classifications listed in the amendment, defies the purpose of the single-subject limitation." *Id.*

On its face, the proposal here directly affects at least two separate subject matters: (1) all types of state taxes and (2) user-fee services. This distinction between taxes and fees was precisely drawn by this Court in *Fine*. *Id.* at 991. State taxes affected include those under the general taxing power (Article VII, Section 1), estate and inheritance taxes (Article VII, Section 5), and motor vehicle tax (Article XII, Section 9(a)). State user-fee services affected by the proposal include, for example, environmental permitting fees, state highway and bridge tolls, and state park fees. As this Court held in *Fine*, taxes and fees involve two separate and distinct governmental functions:

> General tax revenue, utilized for general governmental operations, and user-fee revenue, primarily utilized to fund services received by the paying consumers, do not have a natural relation and connection as component parts or aspects of a single dominant plan or scheme and, therefore, are clearly separate subjects under this proposal.

Id. at 991.

Likewise, the proposed amendment can apply to innumerable other amendments adopting new state taxes or fees either for the benefit of the state general revenue fund or any trust fund. It is a matter of public record that the state currently has myriad state taxes, fees, and trust funds. Indeed, the constitution itself currently authorizes numerous taxes addressing a whole host of discrete subjects. *See, e.g.*, Article VII, Section 1(b) (license taxes on the operation of motor vehicles, boats, airplanes,

trailers, trailer coaches, and mobile homes); Article VII, Section 4 (taxation of agricultural land, land producing high water recharge to Florida's aquifers, land used for non-commercial recreational purposes; tangible personal property held for sale as stock in trade and livestock; and homestead property); Article VII, Section 5 (estate, inheritance, and income taxes). These and other diverse taxes and fees that may be proposed in the future each present very different policy considerations and choices for the electorate.

For example, voters may be inclined to subject an amendment involving an income tax to greater scrutiny than an amendment involving a cigarette or alcoholic beverage tax. Voters may also feel differently about taxes used to raise revenues for the benefit of the general revenue fund as distinguished from fees that are used for a trust fund for education, government services, or environmental protection.

In this vein, this Court in *Fine* struck down a proposed amendment requiring a popular vote for taxes and user fees on the ground that the proposed amendment violated the single-subject requirement of the constitution. The Court held that user fees presented very different policy considerations and implications from those associated with taxation for general governmental operations. Here, too, the proposed amendment calls upon voters to cast a single "yes" or "no" vote to a procedure that voters may favor in the case of certain taxes or fees but disfavor in the case of other, very different taxes or fees.

The mischief in such amendments is even greater here than was true in *Fine* and *Restricts Laws Related to Discrimination*, because the proposed amendment in this case relegates voters to guessing about the myriad taxes or fees to which it will apply. Inevitably, "logrolling" will occur as voters are placed in the position of focusing on those particular taxes or fees that may alarm them and of "having to choose which subject they feel most strongly about." *Fine*, 448 So. 2d at 988. In these circumstances, "[t]he very broadness of the proposed amendment amounts to logrolling because the electorate cannot know what it is voting on -- the amendment's proponents' simplistic explanation reveals only the tip of the iceberg." *Id.* at 995 (McDonald, J., concurring).[3/]

In addition, it is important to recognize that the proposed amendment applies to "constitutionally-imposed" state taxes and fees. Generally, the current constitution authorizes certain taxes, prohibits certain taxes, imposes caps on certain taxes, and authorizes certain exemptions. *See, e.g.*, Article VII. Normally, the Legislature actually imposes most taxes. It is unclear whether it is the intent of the proposed amendment to apply to constitutional amendments that would merely authorize new taxes, in the manner of the existing constitution. It is equally unclear whether the proposed amendment would apply to constitutional amendments that would eliminate existing constitutional exemptions,

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[3/] In collectively promoting another initiative petition which creates an exemption from the single-subject rule for initiatives limiting the government's power to raise revenue, the sponsors of this revenue-limiting proposal tacitly recognized its multi-subject nature.

prohibitions, or caps on taxes. The proposed amendment, therefore, may have in the future a significant -- but undisclosed -- impact on attempts to amend numerous provisions of the existing constitution, all involving discrete subjects and policy choices.

As this Court held in *Fine*, it is critical that an initiative petition "identify the articles or sections of the constitution substantially affected." 448 So. 2d at 989. "This is necessary for the public to be able to comprehend the contemplated changes in the constitution and to avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal." *Id.* The initiative petition in this case fails to satisfy this critical condition and for this reason, too, it violates the single-subject requirement.

The proposed amendment may have a substantial impact on diverse governmental functions. By imposing a super-majority requirement with respect to certain tax amendments to the constitution, the proposed amendment would effect a fundamental change in the ability of the people to amend their constitution. This change would apply to efforts to amend the constitution by legislative proposal (Article XI, Section 1), revision commission (Article XI, Section 2), initiative (Article XI, Section 3), constitutional convention (Article XI, Section 4), and proposal by the taxation and budget reform commission (Article XI, Section 6). All of these methods of amending the constitution would become much more difficult if they involved a "new state tax or fee."

In addition to this serious impact on the constitutional amendment process, the whole point of the proposed amendment is to prevent the adoption of new taxes by a constitutional amendment which the majority of voters believe to be warranted. It is a matter of common knowledge that Florida is a large and fast-growing state that is outstripping its funding sources. This amendment will inevitably be invoked to defeat an important tax proposal that has the support of either the legislature, a revision commission, supporters of an initiative petition, a constitutional convention, or the taxation and budget reform commission, together with a majority of the electorate.

Unforeseeable collateral effects of the proposed amendment develop from the proposal's requirement that "two-thirds of the voters voting in the election" must approve an amendment imposing a new state tax or fee. This requirement of a super-majority of the voting electors changes the fundamental principle that the political power is vested in the people, as established in Article I, Section 1:

> It is beyond question that the initiative process does not exist as a method for yanking away or substantially altering part of Florida's legal machinery regardless of the consequences to the rest of our governmental system. The various parts of the constitution require a harmony of purpose both internally and within the broader context of the American federal system and Florida law itself. Any initiative that tends to undermine that harmony most probably will violate the single-subject and ballot summary requirements, because the initiative is proposing to do something that may have a broad and unstated "domino effect."

Restricts Laws Related to Discrimination, 632 So. 2d at 1022 (Kogan, J., concurring). Since a majority vote would no longer control, an amendment would be defeated by a one-third plus one vote, resulting in tyranny of the minority. This fundamental restructuring of the rule by majority would also affect Article VI, Section 1, which establishes a "plurality" of voters as the constitutional standard.

The proposal's use of the words "voters voting in the election" rather than voters "voting on the question", as in Article XI, Section 4(b), exacerbates this problem. Historically, many voters in a general election do not vote on each question posed on the ballot. *See, e.g., Stoliker v. Waite*, 101 N.W. 2d 299 (Mich. 1960) (distinguishing vote of electors on an issue from vote of electors voting in an election). The proposal's requirement of two-thirds of the voters voting in an election to pass an amendment could actually result in an impossible number of votes being required if a substantial number of voters in the election did not vote on a specific question. For example, if 1,000 voters voted in a general election but only 600 voted on a particular amendment with all voting favorably, the initiative proposed here would require 666 votes to pass a particular amendment, in excess of 100 percent of the voters actually voting on the amendment. Thus, an amendment could be defeated even if every voter who actually voted on the issue favored its passage. Certainly, this impossible voting requirement arising in certain circumstances is not a

foreseeable result of the proposed initiative, and one that is hidden within the language of the proposal.

In this light, the proposed super-majority requirement may well impede the ability of the legislative, executive, and judicial branches of state government to obtain revenues needed to provide essential services in their respective branches. These services include such matters as university education, roads and other infrastructure, funds needed to conduct elections, and operation of the courts and the criminal justice system. *See, e.g., Rose v. Palm Beach County*, 361 So. 2d 135, 139 (Fla. 1978) (the "[e]xpenditure of public funds" is "required to protect the rights of the defendant" and concerns "one of [the courts'] essential judicial functions").

The proposed amendment would also limit the ability of state government to issue full faith and credit bonds that must be supported by state tax revenues, as authorized by Article VII, Sections 11, 13, 14, and 17 of the constitution. In *Fine*, this Court struck an initiative petition from the ballot, as violative of the single-subject rule, based on such impacts on the various functions of government.

ISSUE II

THE BALLOT TITLE AND SUMMARY OF THE PROPOSED TAX LIMITATION AMENDMENT VIOLATE SECTION 101.161, FLORIDA STATUTES (1993).

Introduction

Pursuant to Section 101.161, Florida Statutes (1993), only the ballot title and summary of a proposed constitutional amendment actually appear on the election ballot presented to voters. As a result, Section 101.161 requires the drafter of a proposed amendment to set forth in clear and unambiguous language the chief purpose of the proposal in the amendment's ballot title and summary. *Save Our Everglades*, 19 Fla. L. Weekly at S278; *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982). Section 101.161 insures that the ballot title and summary will not mislead the voter as to the amendment's purpose and will give the voter sufficient notice of the issue contained in the amendment to allow the voter to cast an intelligent and informed vote. *Save Our Everglades*, 19 Fla. L. Weekly at S278; *Askew*, 421 So. 2d at 155.

To avoid misleading the voting public, the drafter must ensure that the summary and title provide the electorate with fair notice of the "true meaning, and ramifications, of an amendment." *Askew*, 421 So. 2d at 156; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020-21. The voter "'must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.'" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)). Voters cannot be asked to vote on a

proposal that appears to do one thing, but that will actually result "in other consequences that may not be readily apparent or desirable to the voters." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1023 (Kogan, J., concurring). Thus, the summary must communicate the collateral effects of a proposed amendment, particularly when these effects could seriously disrupt other important aspects of Florida government and law. *Id.* at 1022 (Kogan, J., concurring).

In communicating the true meaning and effect of a proposed amendment, the drafter of the summary and title must make clear how the proposed amendment will change the existing state of affairs. *Wadhams v. Board of County Comm'rs*, 567 So. 2d 414, 416 (Fla. 1990); *Evans*, 457 So. 2d at 1355; *Askew*, 421 So. 2d at 155-56. The summary and title must expressly state any substantial modification or significant collateral effects on other existing portions of the constitution. *Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners*, 19 Fla. L. Weekly at S368-69 (Fla. July 7, 1994) (summary made no mention of essential elimination of constitutionally-created parole and probation commission); *Askew*, 421 So. 2d at 155-56 (summary indicated that amendment would create a new limitation on former state legislator's ability to appear before state government bodies, while text actually amended then-existing constitutional prohibition to create an exception which would allow such appearances). Where appropriate, the summary must also point out the scope of the current laws which will be affected, and whether the amendment constricts or expands existing

governmental authority. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022.

Moreover, the drafter must ensure that the ballot title and summary accurately reflect the contents of the amendment itself. *Stop Early Release of Prisoners*, 19 Fla. L. Weekly S368-69 (Fla. July 7, 1994) (summary stated that amendment would "ensure" that state prisoners serve at least 85% of their sentence, while text made clear that this would not be true in cases of pardon and clemency); *Save Our Everglades*, 19 Fla. L. Weekly at S278 (text indicated that sugar industry would bear full cost of Everglades clean up, while summary stated that sugar industry would only "help" pay for the clean up); *Evans*, 457 So. 2d at 1355 (summary stated that amendment would "establish" citizen's rights in civil action, including allowance of full recovery of economic damages, when in fact amendment only addressed limiting right to recover non-economic damages). The summary and text must also use clearly defined terms that are not subject to ambiguity. *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 620-21 (Fla. 1992); *Stop Early Release*, 19 Fla. L. Weekly at S369 (Overton, J., specially concurring).

Finally, the summary and title should be an "accurate and informative synopsis of the meaning and effect of the proposed amendment," not an opportunity for the drafter to engage in political rhetoric which advocates the adoption of the amendment. *Save Our Everglades*, 19 Fla. L. Weekly at S278; *see Evans*, 457 So. 2d at 1355. The drafter of the summary and title must also avoid

emotional language designed to sway voters or language which seeks to convey a false sense of urgency, as such tactics may mislead a voter as to the contents and purpose of a proposed amendment. *Save Our Everglades*, 19 Fla. L. Weekly at S278.

The Proposed Tax Limitation Amendment

The proposed initiative petition in this case is entitled, "Tax Limitation: Should Two-Thirds Vote Be Required For New Constitutionally-Imposed State Taxes/Fees?" This title is phrased as a question, not as a definitive statement. By its very nature, it is incapable of communicating to voters the legal effects of the proposed amendment. The title does not make clear to voters how or if the proposed amendment would resolve the question posed.

Indeed, far from informing voters of the legal effects of the proposed amendment, the ballot title is framed as a rhetorical and leading question which begs for a "yes" answer from a tax-shy public. Here, as in *Save Our Everglades*, the ballot title "more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *Save Our Everglades*, 19 Fla. L. Weekly at S369.

Further, the title suggests that new taxes are currently being proposed or that they are imminent, without identifying any. Thus, the title is crafted to alarm voters about taxes that may be of special concern to them, when in fact such taxes may never be proposed, and when in fact the initiative might apply to <u>other</u> taxes outside the contemplation of the electorate.

The title and summary are grossly misleading because the proposed amendment may apply in the future to a wide variety of taxes or fees -- each involving significantly divergent policy issues -- that are not described in the summary and that cannot be anticipated by the voters. Further, both the title and summary create confusion about whether the proposed amendment would apply only to taxes that are directly "imposed" by the constitution, or whether it would also apply to taxes that are authorized by the constitution, in the manner of the tax provisions of the existing constitution. The title and summary are ambiguous as to whether the amendment would apply to attempts to eliminate or alter exemptions, prohibitions, or tax caps contained in the current constitution. Voters, and this Court, are thus left to conjecture about the potential impact the initiative petition would have on amendments to important provisions of the existing constitution.

The ballot title and summary also fail to disclose the impact that the proposed amendment will have on diverse governmental functions and services. The proposed amendment will have a profound impact on the ability of the people to amend their constitution by each of the several procedures specified in the constitution. Yet, the potential impact on each of these constitutional procedures and provisions is not disclosed either in the ballot title or the summary.

Further, the proposed amendment could substantially affect and impair a variety of governmental functions, in each of the branches of state government, by potentially limiting important funding

sources. The amendment may well be invoked in the future to thwart the will of the majority to adopt taxes (or to eliminate exemptions, tax caps, or tax prohibitions) that will permit state government to meet the growing needs of the people of this state. Voters are nowhere informed that an amendment could be defeated even if all the voters voting on the amendment favored its passage. The electorate is nowhere informed in the ballot title or summary of the significant impacts the proposal may have on these matters.

The summary is misleading because it indicates that the amendment would apply even to proposed state tax and fee amendments on the November 8 ballot, without identifying any such amendments. The summary thus creates the impression that the proposed amendment must be approved to stave off the adoption, at least in the near future, of some unidentified new taxes or fees. Thus, both the title and the summary are calculated to alarm voters and to create in voters a sense of urgency about approving this amendment.

In the event that amendments providing for the imposition of new taxes were proposed on the November 8 ballot, voters would be left to speculate about what ground rules would apply to adoption of those tax amendments. This Court will also be placed in the position of resolving a difficult issue of constitutional interpretation. Specifically, it is quite possible that a majority of the voters might vote to approve a constitutional amendment providing for a new tax and that a <u>different</u> majority of the voters may vote to approve the proposed amendment involved in this case. Both amendments would have been approved at a time when the

constitution permitted amendment by means of a majority vote of the electorate. Both amendments would have equal dignity.

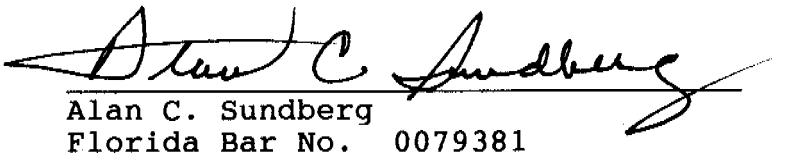
In these circumstances this Court will be called upon to determine whether the majority that voted to approve the amendment in the instant case can usurp the will of the majority that voted to approve the new tax amendment. These legal ramifications of adoption of the proposed amendment are not disclosed either in the title or the summary. Thus, voters must cast their votes while in the dark about the legal effect of adoption of the instant amendment on contemporaneously adopted tax amendments.

This Court has made clear that it will be loathe to uphold initiative petitions that do not fully disclose to the voters the interplay that the initiative will have with other provisions of the constitution. As this Court explained in *Fine*, "[t]he problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict." 448 So. 2d at 989. The constitutional dilemma is all the more severe when conflicting provisions are adopted contemporaneously. Accordingly, the ballot title and summary, fail to afford "the public . . . 'fair notice' of the meaning and effect of the proposed amendment." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1021.

CONCLUSION

The proposed amendment attempts to establish a super-majority voting requirement for constitutional amendments imposing new state taxes or fees. However, because the proposal affects so many revenue sources as in *Fine*, the proposal inevitably affects many different governmental functions throughout the state, and contains multiple subjects. Because the ballot title and summary are misleading and rhetorical, they fail to give voters fair notice of the proposed changes. For these reasons, the proposal must be stricken from the ballot.

Respectfully submitted,



Alan C. Sundberg
Florida Bar No. 0079381
Gary L. Sasso
Florida Bar No. 0622575
F. Townsend Hawkes
Florida Bar No. 0307629
Warren H. Husband
Florida Bar No. 0979899
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
500 First Florida Bank Tower
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585
(904) 222-0398 (Fax)
Attorneys for Opponents

Of Counsel
Jon Mills
Florida Bar No. 148286
Post Office Box 2099
Gainesville, Florida 32602
(904) 378-4154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to **ROBERT BUTTERWORTH**, Attorney General, The Capitol, Tallahassee, Florida, this 29th day of July, 1994.

Attorney