IN THE

SUPREME COURT OF FLORIDA

Case No. 86,600

ADVISORY OPINION TO THE
ATTORNEY GENERAL
RE: TAX LIMITATION

INITIAL BRIEF OF THE FLORIDA AUDUBON SOCIETY, 1000 FRIENDS OF FLORIDA, INC., and COMMON CAUSE IN OPPOSITION TO INITIATIVE

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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 (1995), has proposed an initiative amendment to the Florida Constitution for placement on the ballot for the general election to be held on November 5, 1996. The initiative amendment 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 complied with Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes (1993). In an opinion delivered October 4, 1994, this Court found that the proposed amendment failed to comply with the single subject requirement of Article XI, Section 3 of the Florida Constitution and struck the petition from the November 8, 1994 ballot. *See Advisory Opinion to the Attorney General Re Tax Limitation*, 644 So. 2d 486 (Fla. 1994). The format of Article XI, Section 3 of the Florida Constitution having been amended in the November 1994 general election, this Court will reexamine whether this initiative petition complies with the current form of Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes (1995).[1]

[1]This is possible because the signatures obtained for the petition are valid for four years. **Fla. Stat.** § 100.371(2) (1995).

SUMMARY OF ARGUMENT

Proponents of the Tax Limitation initiative erroneously argue that, although the proposal violates the single subject rule, it falls within the newly created exception to that rule. The 1994 amendment exempts from single subject compliance only the class of initiative amendments dealing exclusively with "limiting the power of government to raise revenue." This Court defined the exception to be narrow and apply only to initiatives that "deal solely with limiting 'the power of government to raise revenue.' The single subject requirement would remain for all other types of initiative petitions and for petitions that combine revenue limitation with other subjects." *Advisory Opinion to the Attorney General Re Tax Limitation*, 644 So 2d 486, 496 (1994).

The current proposal falls outside the class of exceptions because it acts as a limit on voters' powers, not a limitation on government's revenue-raising powers. The plain meaning of the term "government" is "the body of persons that constitutes the governing authority of a political unit or organization."[2] The Florida Constitution in Article II, Section 3 states that "the power of state government shall be divided into legislative, executive and judicial branches." The narrow exception to the single subject rule applies only to proposals limiting the power of these types of governing bodies.

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[2]**Webster's Ninth New Collegiate Dictionary** 529 (1989).

The proposed amendment does not fall into this special exempt class. The amendment would not place any actual limits of governmental powers to raise revenue. The Tax Limitation initiative is directed towards limiting voters' Article XI powers to amend the state constitution, not toward limiting government's powers to raise revenue, as generally described in Article VII. In fact, the effect of the proposal is exactly contrary to the intent of the newly created single subject exception. That exception is intended to expand the power of voters to amend the constitution, but the Tax Limitation amendment reduces the power of voters.

There are other reasons to determine that the proposal has broad effects beyond any hypothetical limiting government's power to raise revenue, and that this initiative falls outside the narrow exception to the single subject rule. This proposed amendment will have multiple unannounced collateral effects. By requiring that amendments imposing State taxes or fees be approved by two-thirds of "voters voting in the election," rather than those voters who vote on the specific question, the proposed amendment may set a standard that is impossible for any future amendment to meet. The proposed amendment also contains inherent ambiguities in its definition of "new State tax or fee" that make it difficult to know with accuracy the extent of the new amendment's coverage. Finally, the amendment seeks to work retroactively to overturn any amendments imposing a tax or fee which might be lawfully adopted at the November 5, 1996 election. This attempted retroactive application could place this Court in the difficult position of

being forced to judge between two lawful, but contradictory amendments.

In summary, there are two reasons to conclude that this initiative falls outside the narrow exception to the single subject rule. First, the amendment does not fall within the defined exception in that it does not limit government's power to raise revenue. Second, even if there is some effect on limiting government powers, the initiative has other substantial impacts on voters' powers and other collateral impacts.

The ballot title and summary of the proposed amendment violate the statutory requirements found 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 which 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.

The proposed amendment is further misleading in what it does not say about its purpose, namely to restrict voters' power to amend their constitution. Neither title nor summary inform the voters about what taxes or fees may be affected by the amendment. Both create confusion as to whether the proposed amendment would apply only to taxes directly "imposed" by the constitution. 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.

Finally, the summary is also misleading about the amendment's retroactive application. The amendment, on its face, would apply to any new taxes voted upon since the November 1994 election, and may well affect amendments voted upon at the November 5, 1996 election. However, the summary does not disclose the constitutional implications of this conflict, 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 5.

ARGUMENT

Issue I

THE TAX LIMITATION AMENDMENT DOES NOT FALL INTO THAT CLASS OF AMENDMENTS EXEMPTED FROM COMPLIANCE WITH THE SINGLE SUBJECT REQUIREMENT.

The proposed Tax Limitation amendment would create a new Section 7 within Article XI, requiring that any new amendment to the state constitution which imposes a "tax or fee" be approved by "not fewer than two-thirds of the voters voting in the election in which such proposed amendment is considered." This provision would supersede Article X, Section 12(d) of the Florida Constitution, which provides that "vote of the electors" (as required to amend the constitution by Article XI, Section 5(c)) means the "majority of those voting on the matter in an election."

1. The Primary Target of the Tax Limitation Amendment is Constraining the Power of Voters, not Limiting the Power of Government to Tax.

The Tax Limitation initiative places no actual limits on governmental powers to raise revenue. Rather, the target of the proposed amendment is the people themselves when they act as voters in referenda on certain types of constitutional amendment.

This Court has restricted the exemption from compliance with single subject rule of Article XI, Section 3 to only those "initiatives that deal solely with limiting 'the power of government to raise revenue'," recognizing that "[t]he single-

subject requirement would remain for all other types of initiative petitions and for petitions that combine revenue limitation and other subjects." *See Advisory Opinion to the Attorney General Re Tax Limitation*, 644 So. 2d 486, 496 (Fla. 1994).

Although an ancillary effect of the Tax Limitation amendment's new restriction on popular sovereignty may be to limit governmental power to raise revenue that might be granted *through constitutional amendment* (though not by any other means, including simple statute), the primary effect of the proposal is to limit the power of the voters themselves to approve certain amendments to the state constitution. The very location of the proposed amendment, in Article XI, indicates that its focus is not on government, or limiting its revenue-raising powers. The proponents include every form of constitutional change within the bounds of the new amendment, whether it originates in the legislature (Article XI, Section 1), revision commission (Article XI, Section 2), tax and budget reform commission (Article XI, Section 4) or popular initiative (Article XI, Section 3). Yet all traditional and usual forms of taxation remain untouched and unaffected by the initiative. Because the Tax Limitation initiative does not solely limit the power of government to raise revenue, this initiative is not exempt from compliance with the single subject rule.

The effect of this proposal is contrary to the intent of the 1994 "Revenue Limits" amendment and its exemption to the single subject rule. That amendment sought to broaden popular power to amend the constitution. This initiative reduces that power.

2. The Tax Limitation Initiative will result in Multiple Unannounced Collateral Effects Unrelated to Revenue Limitation.

Even if the proposed amendment dealt directly with "limiting the power of government to raise revenue," it would still fall outside the class of exceptions because it does not deal *solely* with limiting government revenue. Indeed, the initiative will have other undisclosed results with no relation to limiting government's revenue-raising powers. The requirement of approval by two-thirds of those "voters voting in the election," rather than those voters "voting on the question" (as used in Article XI, Section 4(b)) or those voters "voting on the matter" (Article X, Section 12(d)), means that a proposed amendment could be defeated even if *every* voter who actually voted on the issue favored its passage. If a substantial number of voters in the election did not vote on a specific amendment, the proposal's reference to "voters voting in an election" could actually result in a mathematically impossible number of votes being required for passage of an amendment. This possible effect is hidden from the voter.

Unannounced collateral effects are also created by the ambiguous terms contained in the proposed amendment subjecting to the two-thirds voting requirement any constitutional amendment imposing a "new State tax or fee." The Tax Limitation initiative defines this phrase to mean "any tax or fee which would produce revenue subject to lump sum or other appropriation by the Legislature . . . which tax or fee is not in effect on November 7, 1994." The proposal is unclear as to precisely what kind of

constitutional amendment would be subject to the initiative's two-thirds voting requirement -- amendments requiring the imposition of new taxes, amendments authorizing the legislature to impose new taxes, amendments repealing or diminishing an existing constitutional tax exemption or prohibition, or amendments increasing an existing constitutional tax cap. Such ambiguity is heightened because the initiative applies to constitutional amendments which *impose* state taxes or fees. Generally, the constitution *authorizes* certain taxes which the legislature may then choose to *impose* at its discretion. The resulting ambiguity will give the courts "broad discretionary authority in determining the effect of [the] proposed amendment." *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984). Yet the Court has stated that it will not be "placed in the position of redrafting substantial portions of the constitution by judicial construction." *Id.* The ambiguity inherent in the new tax or fee definition would require the Court to do just that.

3. The Proposed Amendment's Retroactive Application Introduces a Dangerous Precedent.

Drafted to appear on the 1994 ballot, the Tax Limitation initiative would apply to taxes or fees "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 amendment, to be voted on by electors in 1996, by retroactive application, seeks to become

effective as of the day before the 1994 general election!

Although Article XI, Section 5(c) allows an amendment to specify the date on which it becomes effective (failing which it would automatically take effect on the "first Tuesday after the first Monday in January following the election"), this amendment is so crafted as to invalidate properly adopted amendments in 1996 which have the effect of imposing a "new State tax or fee."[3] Yet the introduction of such retroactive amendments into Florida's constitution could produce bizarre and unhealthy results. Could the proponent of a subsequent amendment to impose a "new State tax or fee" set an effective date of November 6, 1994 and so circumvent the Tax Limitation amendment? Arguably no, but the pernicious legal fiction of retroactive application makes such games of constitutional leapfrog theoretically possible.

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[3]As no amendments imposing a "new State tax or fee" were adopted at the 1994 general election, it is perhaps a moot issue whether this amendment could go back and invalidate them. Still, the admission of such an amendment to the Constitution makes such actions theoretically possible.

II

THE COURT HAS ALREADY FOUND THAT THIS AMENDMENT VIOLATED THE SINGLE SUBJECT REQUIREMENT. THUS, ITS SURVIVAL TODAY IS ONLY POSSIBLE IF IT FITS INTO THE NARROW CLASS OF AMENDMENTS EXEMPTED FROM SINGLE SUBJECT COMPLIANCE.

In a previous advisory opinion, the Court examined the Tax Limitation initiative amendment and, having weighed it in the balance, found it wanting. *Advisory Opinion to the Attorney General Re Tax Limitation*, 644 So. 2d 486 (Fla. 1994). In that opinion, the Court struck the initiative from the 1994 ballot because it violated the single subject requirement of Article XI, Section 3 of the Florida Constitution. *Id.* at 491 (citing *Fine*, 448 So. 2d at 990-91 (the combining of taxes and fees in the same amendment introduced two separate subjects).

The proponents of this amendment come before the Court with this same amendment. They suppose, in demanding that the Tax Limitation initiative be placed on the 1996 ballot, that the initiative fits within a newly created class no longer held to compliance with the single subject requirement. As amended in 1994, Article XI, Section 3 of the Florida Constitution provides that the people have the power to amend the constitution by initiative, "provided that, any such revision or amendment, *except for those limiting the power of government to raise revenue*, shall embrace but one subject and matter directly connected therewith." [words in italics added in 1994] Thus, any proposed initiative

amendment must comply with the single subject requirement unless the amendment itself limits government's power to raise revenue. All other amendments remain within the parameter of this Court's jurisprudence of the single subject requirement. Nor may an amendment attempt to combine some aspect of revenue limitation with some entirely different subject. As the Court said in *Re Tax Limitation*, the 1994 amendment eliminated the single-subject requirement "for initiatives that deal solely with limiting 'the power of government to raise revenue'" but "[t]he single-subject requirement would remain for all other types of initiative petitions and for petitions that combine revenue limitation and other subjects." 644 So. 2d at 496. Because the Tax Limitation initiative does not solely limit the power of government to raise revenue, this Court should reaffirm its prior decision to strike the proposed initiative amendment from the ballot.

III

THE PROPOSED AMENDMENT'S BALLOT TITLE AND SUMMARY ARE BOTH PATENTLY MISLEADING.

To avoid misleading voters, Section 101.161, Florida Statutes, requires the drafter of a proposed amendment to insure that the summary and title provide the electorate with fair notice of the "true meaning, and ramifications, of an amendment." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982); *In re Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020-21 (Fla. 1994). 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 should not be asked to vote on an proposal that appears to do one thing, but which 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, a ballot summary must communicate collateral effects of a proposed amendment, especially when these effects could seriously impact on other important aspects of Florida government and law. *Id.* at 1022 (Kogan, J., concurring).

The full title of this initiative is "Tax Limitation: Should Two-Thirds Vote Be Required For New Constitutionally-Imposed State Taxes/Fees?" The title is framed as a rhetorical and leading

question begging for a "yes" answer from the public. As with the *Save Our Everglades* initiative, 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." *In re Advisory Opinion to the Attorney General - Save Our Everglades Trust Fund*, 636 So. 2d 1336, 1342 (Fla. 1994). Not only so, but the proponents of this initiative come forth having been duly warned that the use of a question in the ballot title was often misleading. *See Re Tax Limitation*, 644 So. 2d 496 n.4 ("For future proposals, we note that the use of a question in the title or summary may place a proposal in jeopardy of being removed from the ballot because a question can convey a double meaning").

The title and summary fail to explain the purpose of the proposed amendment, namely to restrict the people's ability to amend the constitution. "This language is misleading not because of what it says, but what it fails to say." *Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995). The proposal limits no existing taxes, and those authorized but not imposed under the constitution may still be imposed. This failure to adequately explain is cloaked by the rhetoric and emotion generated by any amendment which terms itself "Tax Limitation."

The ballot title and summary also fail to disclose the impact that the proposed amendment will have on diverse government functions. The Tax Limitation initiative will profoundly affect the people's ability to amend their constitution by all of the

procedures established under Article XI. Yet the proposal nowhere discloses to voters the potential impact on these constitutional procedures. *See Re Tax Limitation*, 644 So. 2d at 490 n. 1.

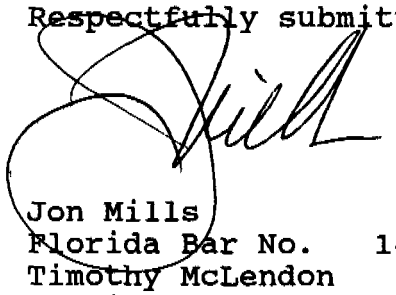
Finally, due to the retroactive application of the initiative, voters are left to speculate as to what will happen should an amendment providing for the imposition of new taxes is proposed on the November 5 ballot. This Court will be placed in the position of resolving a novel issue of constitutional interpretation. Specifically, it is possible that a majority of voters might vote to approve a constitutional amendment providing for a new tax and that a *different* majority of voters might vote to approve the Tax Limitation amendment. Both amendments would have been approved when the constitution allowed majority approval of amendments.

In such a case, this Court would be obliged to determine whether the majority which voted to adopt the Tax Limitation amendment can usurp the will of the majority that voted to approve a new tax amendment. Such legal ramifications of the retrospective application of the proposed amendment are not disclosed to voters either in the title or the summary. Accordingly, the ballot title and summary fail to give "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 Tax Limitation amendment does not fit into the narrow class of initiative amendments exempted from the single subject rule that limit "the power of government to raise revenue." Rather, the proposed initiative amendment limits the power of voters to choose constitutional change. Therefore, this Court should reaffirm its decision in *Advisory Opinion to the Attorney General Re Tax Limitation* and hold that the proposed amendment violates the single subject requirement. Because the ballot title and summary are both misleading and rhetorical, they fail to give the voters fair notice of proposed changes in violation of Section 101.161, Florida Statutes. For these reasons, this Court must strike the proposed amendment from the ballot.

Respectfully submitted,



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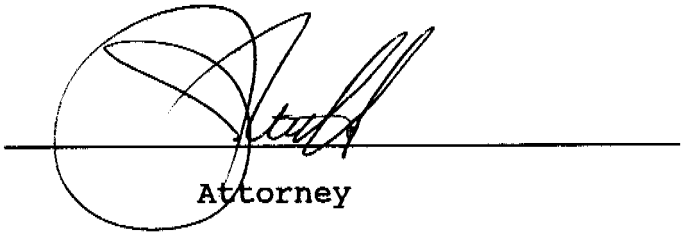
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following by U.S. Mail this 19th day of January, 1996.



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