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IN THE  
SUPREME COURT OF FLORIDA

Case No. 88,696

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IN RE:

ADVISORY OPINION TO THE  
ATTORNEY GENERAL  
RE: PEOPLE'S PROPERTY RIGHTS

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REPLY BRIEF OF  
FLORIDA AUDUBON SOCIETY  
AND NATIONAL AUDUBON SOCIETY

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OPPOSING THE FOLLOWING PROPOSED AMENDMENTS:  
PEOPLE'S PROPERTY RIGHTS AND  
PROPERTY RIGHTS

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## ARGUMENT

I.    **THE INITIATIVE CLAUSE OF THE FLORIDA  
CONSTITUTION IS NOT A PROPER AVENUE FOR A  
PROGRAM OF SWEEPING CONSTITUTIONAL REFORM OF  
THE SORT SOUGHT BY THE TAX CAP COMMITTEE**

The **Tax Cap** Committee, sponsors of the proposed People's Property Rights Amendments (Multiple Subjects) initiative and the Property Rights initiative, seeks drastic changes in Florida's governmental process. Convinced that no sufficient protection is afforded to private property owners, the sponsors propose dual initiative amendments. The first, People's Property Rights Amendments, will bulldoze a path through the existing initiative process of Article XI, Section 3, and the second, multi-subject proposal will benefit from this newly created exception and bring reform to **all** areas of state and local government which touch private property rights. Regardless of the purpose or worth of this reform package, the mechanism chosen by sponsors, popular initiative amendment, is highly inappropriate, given the sweeping changes these amendments would bring to Florida's constitutional structure and in the balance of governmental authority between the branches.

The Florida Constitution contains five methods whereby it may be revised or amended. The Legislature has broad powers to propose the "[a]mendment of a section or revision of one or more articles, or the whole of this constitution." **Fla. Const.** art. XI, § 1. The constitution revision commission likewise has broad authority to propose revisions to the Constitution, as does the taxation and

budget reform commission with regard to the state's tax and budget process. Fla. Const. art. XI, §§ 2 & 6. The delegates to a constitutional convention called by the people may also propose revision of any part or all of the Constitution. Fla. Const. art. XI, § 4. Only in the **case** of initiative amendments are the sponsors constrained to limit their proposals to one single subject.'

The existence of the single subject rule prevents the initiative power from being hijacked by special interests intent on working a largescale revision of Florida's Constitution. Evans v. Firestone, 457 So. 2d 1351, 1358 (Fla. 1984) (McDonald, J., concurring). Writing for the Court in Save Our Everglades Trust Fund, Justice Shaw described the single subject rule as "a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." In re Advisory Opinion to the Attorney General - Save Our Everglades Trust Fund, 636 So. 2d 1336, 1339 (Fla. 1994).

sponsors of the two proposed amendments mischaracterize the nature of this Court's review when they claim great deference and cite the "**clearly** and conclusively defective" standard for initiatives. Brief of Sponsors, Property Rights, at 4. That highly deferential standard has, since 1984, only been applicable

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<sup>1</sup>The passage of the Revenue Limits initiative in 1994 modified this only with regard to those amendments "limiting the power of government to raise revenue." Fla. Const. art. XI, § 3; Advisory Opinion to the Attorney General Re Tax Limitation [Tax Limitation I], 644 So. 2d 486, 495-96 (Fla. 1994).

to review of ballot summary and **title.**<sup>2</sup> Far from simply deferring to sponsors of initiative proposals, this Court has insisted on "**strict** compliance" with the single subject rule. Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984). This interpretation is in keeping with the advisory opinion process, established by Article IV, Section 10.

The two instant amendments should rightly be considered part of a single reform package, and **one** with profound and disturbing implications for almost every aspect of Florida governance. The link between the two amendments is obvious because of the sponsor's behavior since 1994. In 1994, the Tax Cap Committee sponsored a similar property rights amendment, which this Court struck down as violative of the single subject rule. See Tax Limitation I, 644 So. 2d at 494-95. **Tax** Cap also sponsored the first, limited exception to the single subject rule in the Revenue Limits amendment, which was permitted by this Court and became part of Article XI, Section 3. Id. at 495-96. Subsequently, Tax Cap re-introduced another failed amendment, Tax Limitation II, which benefitted from the newly created exception. Tax Limitation II, 673 So. 2d at 866.

Sponsors have chosen the wrong path to bring about the reforms they seek. Trying to fit these far-reaching reforms into two

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<sup>2</sup>The sponsors cite the Court's 1996 Tax Limitation II opinion for the "**clearly** and conclusively defective standard." In re Advisory Opinion to the Attorney General Re Tax Limitation [Tax Limitation II], 673 So. 2d 864, 867 (Fla. 1996). The Court's review in that case dealt only with the amendment's ballot summary and title. Id. at 866-67.

awkwardly-crafted and cumbersome initiative amendments, the sponsors are unable, in either proposal, to present the voters with a single subject, as required by Article XI, Section 3. Furthermore, the ballot summary and title for both proposals are drafted so as to mislead and confuse the voters, and are clearly and conclusively defective. Accordingly, this Court should not permit the proposed amendments on the ballot.

II. THE PEOPLE'S PROPERTY RIGHTS (MULTIPLE SUBJECTS) AMENDMENT ITSELF PRESENTS MULTIPLE SUBJECTS TO THE VOTERS, AND THE BALLOT SUMMARY AND TITLE WILL BOTH MISLEAD AND CONFUSE VOTERS

A. People's property Rights Amendments initiative contains multiple subjects combining an exception to the single subject rule for future property rights amendments with the performance of a **judicial** function, and is distinguishable from the narrow exception created by the Revenue Limits amendment

Sponsors rest complacently on the precedent accorded by the Revenue Limits amendment. Brief of Sponsors, People's Property Rights Amendments, at 5 (citing Tax Limitation I, 644 So. 2d at 496). Apparently, sponsors assume that all review is foreclosed, and see that limited modification in the single subject rule allowed by this Court in 1994 as a complete **licence** to drastically curtail the protections accorded by the single subject rule and to except vast and undefined areas from this Court's Article XI, Section 3 scrutiny.

This is a bold, perhaps even rash assumption. While the simple "logical and natural oneness of **purpose**" explanation of the single subject test may be generally useful to describe the rule,



it is more accurate to inquire as to whether a proposed amendment performs, alters or substantially affects only a single function of government, **as** opposed to multiple, distinct functions. Save Our Everglades Trust Fund, 636 So. 2d at 1340 (quoting Fine, 448 So. 2d at 990).

The People's Property Rights Amendments initiative is distinguishable from the Revenue Limits proposal. True, People's Property Rights Amendments modifies the initiative function of Article XI, Section 3. To this point, it follows the precedent established by Revenue Limits. See Tax Limitation I, 644 So. 2d at 496. However, the sponsors rejected the simplicity characterized by the Revenue Limits proposals. In creating an exception to the single subject requirement, they seek also to create an exception to that exception (for so-called "common law nuisances"). Strictly construed, this proposal already has twice modified the initiative function. However the sponsors did not stop there. They further introduce language from traditional Fifth Amendment takings jurisprudence **"which** in fairness should be borne **by** the **public."** See, e.g., Dolan v. Tigard, 512 U.S. --, 114 S. Ct. 2309, 2316, 129 L.Ed.2d 304 (1994) (quoting Armstrons v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)); cf. Fla. Stat. § 70.001(3)(e) (Florida's private property rights protection act). The People's Property Rights Amendment initiative predetermines the standard of compensation any such future amendment **may set**, the **"fair market value"** standard, borrowed from takings and eminent domain jurisprudence. Introducing these

judicial standards as further modifiers for the newly created exception performs a further judicial function. Cf. Save Our Everglades Trust Fund, 636 So. 2d at 1340.

The exception created by the Revenue Limits initiative is instantly distinguishable from the instant proposal. That exception dealt with a conceptually simple and readily definable subject: limiting government power to raise revenue. Tax Limitation I, 644 So. 2d at 496. The People's Property Rights Amendments initiative, on the other hand, is cumbersome and flagrantly deals with several subjects, intruding on multiple functions.

B. The title and summary of **the** People's Property Rights Amendments initiative fall short of the **standard** of Section 101.161, Florida Statutes, because they are confusing in their use of technical legal terminology and misleading in their use of rhetorical language

The sponsors of these two initiatives have a difficult task in squeezing the entirety of their property rights reform package into two ballot title and summary sets. In yet another sign that the initiative function cannot properly be used for such drastic reform of Florida's constitutional structure, the sponsors fall awkwardly short of the standard set by Section 101.161, Florida Statutes.

The ballot title and summary of the proposed People's Property Rights Amendments initiative are defective both for what they say, and for what they do not tell the voters. Under the guise of "expand[ing] the people's rights to initiate constitutional changes" and providing "fairness," the summary cynically woos the

voter with rhetorical devices. Cf. Save Our Everglades Trust Fund, 636 So. 2d at 1342; Evans, 451 So. 2d at 1355. Furthermore, the amendment is misleading in that it implies that no mechanism currently exists whereby owners of real property may receive compensation for losses sustained due to government **action**. The Sponsors obviously believe these mechanisms to be flawed or insufficient, but that is vastly different from suggesting to the public that they do not exist.

Responding to the concerns raised by the Attorney General about the use of technical legal terminology, especially the term "**common** law nuisance," sponsors attempt to obfuscate by citing this Court's approval of other amendments which used such words as "incumbent," "homestead property," "**ad valorem** taxation," "**pardon**," "**clemency**," "**parole**," "**fee**" and "**abatement**." Brief of Sponsors, People's Property Rights Amendments, at 7-8. Yes, as this Court stated most recently in Tax Limitation II, voters have "**a** certain amount of common sense and knowledge." 673 So. 2d at 868. However, this common sense and knowledge certainly does not reach to the understanding of such technical legal terms as "**common** law nuisance" or even the modifier "**which** in fairness should be borne by the public." Another of this Court's roles is that of guardian of the practice of law. Fla. Const. art. V, § 15. Far from presuming everyone to be aware of the intricacies of the law of real property, takings and eminent domain law, the Court and the Bar recognize that this is a specialized field of knowledge.

Indeed, Sponsors admit that understanding of the terms "**common**

law **nuisance**" and "**which** in fairness should be borne by the **public**" requires a familiarity with the "established case law." See Brief of Sponsors, People's Property Rights Amendments, at 9. This is likewise true for the fairness standard, which the Sponsors describe as an "operative legal standard" or a "judicially created one, well recognized by federal and Florida **courts.**" Brief of Sponsors, People's Property Rights Amendments, at 11-12 (conceding that the fairness standard is **unpredictable**"). Writing their amendments for federal and Florida courts is all very well, but the ballot summary and title are written to a different, less sophisticated audience: the general public. No voter who has not sat through the first year of law school will be able to "**cast** an intelligent and informed **ballot**" on this initiative amendment. Advisory Opinion to the Attorney General - Fee On Everslades Sugar Production, 21 Fla. L. Weekly S394, S395 (Fla., Sept. 27, 1996) (citing Advisory Opinion to the Attorney General re Stop Early Release of Prisoners, 661 So. 2d 1204, 1206 (Fla. 1995)).

Yet for all their promise of fairness, compensation and expanded rights, the ballot title and summary of the proposed People's Property Rights Amendments initiative never clearly and unambiguously state the major purpose and true ramifications of the amendment: to circumvent the protection afforded by the single subject rule of Article XI, Section 3 and to legitimize logrolling for future amendments that may deal with private property rights. Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). The title and summary do not inform the voters what the Sponsors really want from

them: a blank cheque for future constitutional amendments which, given the two Property Rights amendments proposed by Tax Cap in 1994 and 1996, would drastically and negatively impact every level of governance in Florida. Cf. Tax Limitation I, 644 So. 2d at 494-95 (detailing the harmful effects of the 1994 Property Rights proposal). This Court should find that the title and summary of the proposed People's Property Rights amendment initiative are defective.

III THE PROPERTY RIGHTS INITIATIVE AMENDMENT  
SUBSTANTIALLY EFFECTS MULTIPLE GOVERNMENT  
FUNCTIONS AND SECTIONS OF THE FLORIDA  
CONSTITUTION, AND ITS TITLE AND SUMMARY ARE  
PATENTLY MISLEADING

The second of Tax Cap's proposed amendments, Property Rights, is even more obviously flawed under the single subject **analysis**.<sup>3</sup> Targeted at "any action or regulation by the state, its agencies, or political subdivisions," this amendment substantially affects the functions of all levels of Florida government, and all three branches of government. Such a far-reaching amendment clearly contains multiple subjects. Save Our Everglades Trust Fund, 636 so. 2d at 1340; Fine, 448 so. 2d at 990.

The amendment requires full compensation to be paid for any loss in fair market value due to such regulation, and requires a jury trial in circuit court without prior resort to any prior administrative remedies. On its face, therefore, the proposal

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<sup>3</sup>This is, of course, why the sponsors find it necessary to change the rules for initiatives laid out in Article XI, Section 3.

clearly affects executive agency and local government functions, and actually performs legislative and judicial functions of creating a remedy and prescribing trial procedure. As this Court wrote of the 1994 Property Rights proposal:

[t]his initiative not only substantially alters the functions of the executive and legislative branches of state government, it also has a very distinct and substantial affect on each local governmental entity. The ability to enact zoning laws, to require development plans, to have comprehensive plans for a community, to have uniform ingress and egress along major thoroughfares, to protect the public from diseased animals or diseased plants, to control and manage water rights, and to control or manage storm-water drainage and flood waters, all would be substantially affected by this provision. We agree with the opponents of the initiative that the ability of the legislature to comply with the directive in article II, section 7 . . . is substantially affected. We also note that the initiative transfers all administrative remedies . . . from the executive branch to the judicial branch. Given this substantial effect on the executive, legislative, and local branches of government, we find that the "Property **Rights**" initiative violates the single-subject requirement.

Tax Limitation I, 644 So. 2d at 494-95. This statement is no less true of the instant proposal.

Paradoxically, though the text of the Property Rights initiative would suggest that the drafters were otherwise unfamiliar with the 1994 decision, they did appear to read portions of Justice **Overton's** footnote noting that the 1994 proposal failed to give notice of provisions of the Constitution substantially affected. Tax Limitation I, 644 So. 2d at 495 n.3 (citing Fine, 448 so. 2d at 989). Accordingly, the intent language of the amendment, as well as the summary, state that the amendment has a "**substantial** affect [sic] on constitutional provisions, including Article II, Section 7."

The Sponsors backpeddle from this apparently damning admission by first claiming that the 1994 decision found a substantial effect only on Article II, Section 7. Brief of Sponsors, Property Rights, at 10. This is inaccurate, and, though Article II, Section 7 is the only specific clause mentioned in the text of the opinion, the footnote makes clear that the 1994 proposal substantially affected "numerous provisions of the constitution." Tax Limitation I, 644 So. 2d at 495 n.3. This was true in 1994, and is true in 1996.

Any proposal, like this one, which so dramatically affects the powers and functions of the executive (Article IV), legislative (Article III) and local government (Article VIII), will substantially affect multiple constitutional provisions. The "including" language contained in the proposal's intent clause and summary implicitly recognize these broad effects. However, the Sponsors cannot rely upon this Court - or much less the voters - to do all of their research for them. The reason it remains important to identify provisions substantially affected, is "to enable the public 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." Fine, 448 So. 2d at 989. This is a far cry from the sponsor's claim that they invite the voters to "consider whether other provisions are substantially affected in casting their ballot." Brief of Sponsors, Property Rights, at 11.

The Property Rights initiative is most easily compared to the initiatives disapproved by this Court in Fine v. Firestone, 448 So. 2d at 984, and Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994), both of which sought to present broad, multiple functions and subjects under one general heading. The Fine initiative cloaked, under the general term of revenue limits, limits on state or local government ability to tax, levy user fees, and funding through revenue bonds. 448 So. 2d at 990-91. The Court found this to be at least three subjects. Likewise, the Laws Related to Discrimination initiative used the broad term "**discrimination**" to cloak both basic civil rights, and limits on the power of all other state or local governmental entities, encroaching on home rule powers, executive rulemaking authority and the judiciary. Restricts Laws Related to Discrimination, 632 So. 2d at 1020. Because the Property Rights initiative proposal, under the broad general heading of "**Property Rights**" substantially alters or performs legislative, executive, judicial and local government functions, this Court should find that it does not comply with the single subject rule of Article XI, Section 3. Cf. Evans, 457 so. 2d at 1353 ("enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement").

As with the People's Property Rights Amendments proposal discussed above, the ballot title and summary of the Property Rights initiative fail to comply with the requirements of Section 101.161, Florida Statutes. That statute dictates that the



"substance of the amendment . . . shall be printed in clear and unambiguous language on the ballot . . ." Id. [emphasis added]. This Court has stated that the title and summary should "**clearly** communicate what the elector is being asked to vote **upon,**" without requiring the voter to infer meanings or consequences which are not described in the summary. Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992). The ballot summary must also "specify exactly what [is] being **changed**" so as to avoid confusing voters. Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992). 1992).

Far from accurately informing voters of the true effects of the amendment, the **summary** misleads and confuses the voters, and, as with the summary for the People's Property Rights Amendments initiative, requires a sophisticated legal knowledge to accurately understand the terminology employed by the summary.

The title and summary of the Property Rights initiative proposal are defective for omitting how exactly passage of the amendment will change the law. Takings law, eminent domain law, Florida's private property protection legislation, and agency rules all provide various means whereby owners are compensated for certain government restrictions on the use of property, a point made **clear** by the borrowing of much of the language of the amendment from takings and eminent domain law. Yet the voter reading the title and summary of the Property Rights initiative might well believe that no such mechanisms exist.

The omission of the likely collateral effects of the Property Rights amendment is also material. As with the amendment stricken in Restricts Laws Related to Discrimination, which failed to state that passage of the amendment would entail repeal of multiple inconsistent laws, rules and regulations, so both summary and title are silent as to the likely effects of the proposed amendment on all levels of government (saving only the reference to Article II, Section 7). Cf. Restricts Laws Related to Discrimination, 632 So. 2d at 1021. Such omissions leave Florida voters unaware of the likely far-reaching effects of the proposal and render the ballot title and summary of the Property Rights amendment defective.

#### CONCLUSION

This Court should reject the clumsy attempt of the Tax Cap Committee to implement a complete reform of Florida property rights law through the initiative process. The first of these proposals, People's Property Rights Amendments, will in effect destroy any protection from log-rolling amendments, and the second, having benefitted from the newly created exception, will then reach to permanently unsettle every aspect and level of governance. A reform scheme so large and so far-reaching should not be foisted on the people through the undistilled, undebated mechanism of the popular initiative. If such reform is necessary or desirable, more proper mechanisms exist for it to be debated and brought forward.

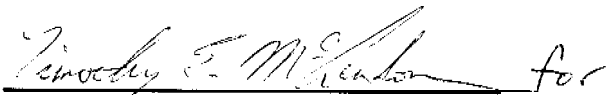
Both proposed amendments contain multiple subjects and affect multiple functions of state and local government. People's

Property Rights Amendments works two changes in the initiative function, while also performing a judicial function, and should be invalidated for performing multiple functions. The ballot title and summary are misleading and confusing, requiring of the voters a sophisticated legal knowledge to understand the effects of the amendment, leaving undisclosed substantial collateral effects adoption of the amendment will have on the initiative function.

The second proposal, Property Rights, contains the same flaws of the 1994 proposal invalidated by this Court. It would create new judicial remedies for government actions by the legislature, executive and local government entities. The proposal fails to disclose serious likely effects on multiple sections of the Florida Constitution, and should be invalidated as containing multiple subjects. The ballot title and summary of the Property Rights proposal are misleading and fail to comply with the requirements of Section 101.161, Florida Statutes.

For these reasons, this Court should invalidate both these proposed amendments.

Respectfully submitted,

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