IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2422

Upon Request From the Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

ADVISORY OPINION
TO THE ATTORNEY GENERAL

RE: PROTECT PEOPLE FROM THE HEALTH HAZARDS OF SECOND-HAND TOBACCO SMOKE BY PROHIBITING WORKPLACE SMOKING

ANSWER BRIEF OF THE SPONSOR, SMOKE-FREE FOR HEALTH, INC.

HOLLAND & KNIGHT LLP
Stephen H. Grimes
Susan L. Kelsey
P.O. Drawer 810
Tallahassee, FL 32302
(850) 224-7000

Counsel for the Sponsor

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Title, Ballot Summary, and Text Of the Amendment

For convenient reference, the title, ballot summary, and text of the amendment are set forth again here:

> PROTECT PEOPLE FROM THE HEALTH HAZARDS OF SECOND-HAND TOBACCO SMOKE BY PROHIBITING WORKPLACE SMOKING.
>
> To protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor workplaces. Allows exceptions for private residences except when they are being used to provide commercial child care, adult care or health care. Also allows exceptions for retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars. Provides definitions, and requires the legislature to promptly implement this amendment.
>
> BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:
>
> WHEREAS, second-hand tobacco smoke is a known human carcinogen (contains cancer-causing agents) for which there is no safe level of exposure, and causes death and disease;
>
> WHEREAS, exposure to second-hand tobacco smoke frequently occurs in the workplace; and
>
> WHEREAS, ventilation and filtration systems do not remove the cancer-causing substances from second-hand smoke;
>
> NOW, THEREFORE, to protect people from the health hazards of second-hand tobacco smoke, the citizens of Florida hereby amend Article X of the Florida Constitution to add the following as section 20:

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SECTION 20. Workplaces Without Tobacco Smoke.-

(a) Prohibition. As a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke, tobacco smoking is prohibited in enclosed indoor workplaces.

(b) Exceptions. As further explained in the definitions below, tobacco smoking may be permitted in private residences whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof; and further may be permitted in retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments; and stand-alone bars. However, nothing in this section or in its implementing legislation or regulations shall prohibit the owner, lessee, or other person in control of the use of an enclosed indoor workplace from further prohibiting or limiting smoking therein.

(c) Definitions. For purposes of this section, the following words and terms shall have the stated meanings:

"Smoking" means inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product.

"Second-hand smoke," also known as environmental tobacco smoke (ETS), means smoke emitted from lighted, smoldering, or burning tobacco when the smoker is not inhaling; smoke emitted at the mouthpiece during puff drawing; and smoke exhaled by the smoker.

"Work" means any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not. "Work" includes, without limitation, any such service performed by an employee, independent contractor, agent, partner, proprietor, manager, officer, director, apprentice, trainee, associate, servant, volunteer, and the like.

"Enclosed indoor workplace" means any place where one or more

persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include uncovered openings, screened or otherwise partially covered openings; or open or closed windows, jalousies, doors, or the like. This section applies to all such enclosed indoor workplaces without regard to whether work is occurring at any given time.

"Commercial" use of a private residence means any time during which the owner, lessee, or other person occupying or controlling the use of the private residence is furnishing in the private residence, or causing or allowing to be furnished in the private residence, child care, adult care, or health care, or any combination thereof, and receiving or expecting to receive compensation therefor.

"Retail tobacco shop" means any enclosed indoor workplace dedicated to or predominantly for the retail sale of tobacco, tobacco products, and accessories for such products, in which the sale of other products or services is merely incidental.

"Designated smoking guest rooms at public lodging establishments" means the sleeping rooms and directly associated private areas, such as bathrooms, living rooms, and kitchen areas, if any, rented to guests for their exclusive transient occupancy in public lodging establishments including hotels, motels, resort condominiums, transient apartments, transient lodging establishments, rooming houses, boarding houses, resort dwellings, bed and breakfast inns, and the like; and designated by the person or persons having management authority over such public lodging establishment as rooms in which smoking may be permitted.

"Stand-alone bar" means any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and that is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross

revenue.

> (d) Legislation. In the next regular legislative session occurring after voter approval of this amendment, the Florida Legislature shall adopt legislation to implement this amendment in a manner consistent with its broad purpose and stated terms, and having an effective date no later than July 1 of the year following voter approval. Such legislation shall include, without limitation, civil penalties for violations of this section; provisions for administrative enforcement; and the requirement and authorization of agency rules for implementation and enforcement. Nothing herein shall preclude the Legislature from enacting any law constituting or allowing a more restrictive regulation of tobacco smoking than is provided in this section.

SUMMARY OF THE ARGUMENT

The two opposing briefs take opposite tacks, the Tobacco brief asserting a single attack against the ballot summary of the smoke-free workplace amendment, and the Restaurant Association asserting several superficial attacks against the amendment, with inappropriate emphasis on its merits rather than on the limited legal issues before the Court. Both briefs share the common error of taking a sentence out of context from a non-analogous previous initiative decision, and then trying to stretch that borrowed sentence to fit the smoke-free workplace amendment. Neither opponent succeeds in establishing any clear and conclusive defect in the smoke-free workplace amendment. The amendment's title, ballot summary, and text satisfy every legal test that applies to them, and therefore it should be approved for submission to the voters.

The Court's review extends only to whether the ballot title and summary of the smoke-free workplace amendment fairly inform the voter as to the chief purpose of

the measure, and whether the amendment embodies but a single subject. If the opponents disagree with the amendment on its merits, they must take their viewpoint to the public, not to this Court. If the opponents want to challenge any particular application of the amendment on legal grounds, they must await passage of the amendment and then attempt to state a case in court. Neither type of attack on the amendment is appropriate in this forum, but must await a later forum. The Court in this proceeding may pass on only the two identified questions: ballot title and summary requirements, and single-subject rule.

Both opposing briefs incorrectly assert that the ballot title and summary of the smoke-free workplace amendment should not use the introductory phrase "To protect people from the health hazards of second-hand tobacco smoke." The introductory phrase is in precisely the same form and has precisely the same kind of function as the introductory phrase that this Court approved in the High-Speed Rail amendment last year, and in fact was modeled after that Court-approved summary. Several other initiatives have used similar language to explain to the voter the factual basis for the amendment or what it is intended to accomplish. Contrary to the opponents' assertions, the Court has never forbidden the use of such language, and has never stated a rule such as that the opponents attempt to create here. To the contrary, the Court has expressly approved previous amendments utilizing language indistinguishable in form and effect as that utilized by the smoke-free workplace

amendment. The problem infecting the prior initiatives upon which the opponents rely is not present here; the cases are not in the least analogous.

The introductory phrase in the smoke-free workplace amendment is part and parcel of the chief purpose of the measure, and thus helps to implement the chief informative requirement of a ballot summary. The ballot title and summary fairly and accurately express the chief purpose of the amendment. No law prohibits this; to the contrary, the law requires it.

The brief of the Restaurant Association also asserts that the ballot summary does not include enough of the full details that are set forth in the text of the amendment itself. The ballot summary, however, fully complies with the requirements of law by disclosing the chief purpose and key features of the amendment. It probably includes more detail than is strictly required, but which the drafters added in an attempt to be thorough and fair. No more detail is required. The Court has always said it is not necessary to explain every detail and ramification of an amendment in its summary, and the Court has consistently recognized that it would not be logistically possible to include every detail and ramification. The ballot summary of the smoke-free workplace amendment discloses the chief purpose of the amendment and is not misleading.

The smoke-free workplace amendment also satisfies the single-subject rule. Neither Tobacco nor the Attorney General challenges the amendment's compliance

with the single-subject rule. The Restaurant Association takes a scattershot approach, asserting various well-worn single-subject attacks against the amendment, but none withstand scrutiny. The operative terms of the amendment effectuate the chief purpose and set forth matters directly connected therewith, which is expressly authorized in the Florida Constitution and which are necessary to ensure that the voter understands the nature of the amendment. The amendment is not guilty of logrolling, does not substantially alter or perform the functions of multiple branches or levels of government, and does not substantially alter other provisions of the Florida Constitution. Accordingly, the amendment complies with the single-subject rule, and should be approved for submission to the voters.

ARGUMENT

I. THE BALLOT TITLE AND SUMMARY FAIRLY AND UNAMBIGUOUSLY DISCLOSE THE CHIEF PURPOSE OF THE AMENDMENT.

The opposing brief of Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, et al. (collectively, "Tobacco") attacks the smoke-free workplace amendment solely on the grounds that its summary begins with the phrase "To protect people from the health hazards of second-hand tobacco smoke." Tobacco does not dispute that this phrase fairly and accurately discloses the reason for the amendment, what the amendment is intended to accomplish, and the legitimate and compelling state interest at issue. Tobacco does not challenge the language as ambiguous. Rather,

Tobacco disagrees with it on the merits, and in order to secure the Court's de facto allegiance to the Tobacco position, invites the Court to make a new rule. The new Tobacco rule would prohibit a constitutional initiative from stating any facts or any explanation of why it is being proposed or what it intends to accomplish. The new rule that Tobacco proposes is that "[a]ny factual assumption included in a title or summary, whether direct or implicit, is inherently misleading." [Tobacco In. Br. at 4.] Tobacco's novel interpretation and extension of the Court's past initiative cases is utterly unsupported by an unbiased examination of those cases, and departs from the rule that the Court consistently applies to ballot summaries and upon which the drafters of this amendment relied.

A. The Introductory Phrase of the Summary is Permissible and is Supported By Directly Analogous Precedent.

The rule to which the Court has always adhered is the requirement of section 101.161(1), Florida Statutes, that a ballot summary must "state in clear and unambiguous language the chief purpose of the measure." Section 101.161 does not prohibit the inclusion of the factual basis for the initiative or an explanation of what the sponsor intends to accomplish. Indeed, it may be difficult, if not impossible, to distinguish between that and the "chief purpose" of a measure, so that omission of the intended goal could in itself render the summary misleading. Section 101.161 does not create a dichotomy between the bare legal operation of an amendment and the goal that it seeks to accomplish, or the evil that it intends to remedy – i.e., its "chief

purpose." Nevertheless, that is the new rule that Tobacco asks the Court to adopt. The Court should decline Tobacco's invitation to create a new rule for ballot summaries, and adhere to its longstanding precedents, under which the ballot summary of the smoke-free workplace amendment was drafted, and under which it must be approved.

Approval of the smoke-free workplace ballot summary is consistent with the Court's past approval of initiatives whose ballot summaries included facts (subject to dispute on the merits) about why the amendment was being proposed and what it sought to accomplish. Most recently, the Court approved the High-Speed Rail initiative even though its ballot summary and text included the factual basis of the amendment and what it was intended to accomplish, and even though the vigorous campaign debate illustrated that the facts were the subject of disagreement and dispute:

> Ballot summary: "To reduce traffic and increase travel alternatives, this amendment provides for development of a high speed monorail . . . ."
>
> Text: "To reduce traffic congestion and provide alternatives to the traveling public, it is hereby declared to be in the public interest . . . ."

Advisory Op. to the Atty. Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System, 769 So. 2d 367, 368 (Fla. 2000) (emphasis added). These statements of the factual basis and intent of the amendment were disputed and debated throughout the campaign. Some politicians and

commentators did not believe, and perhaps still do not believe, that a high-speed rail system would alleviate highway traffic congestion at all. Others did. It was a classic case of a political question going before the voters, who could research and debate the issues, believe what they wanted to believe, and vote accordingly. That is what an initiative does.

To strike an initiative from the ballot because it comes right out and says in clear and direct language what it is trying to do would subvert the very foundations of the initiative process. Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986) ("We see no constitutional infirmity, but much to commend, in a drafter attempting to make clear the intent of a constitutional provision."). The whole point of the ballot summary is to provide fair and unambiguous notice of the chief purpose of an initiative. This ballot summary does that. The fact that Tobacco disagrees with it is irrelevant.

If the new rule that Tobacco now espouses were valid, the Court would have been required to strike the High-Speed Rail summary and other previous ballot summaries. The Court did not, however, because no such rule has ever existed. The Court should not create such a new rule now. The fact is, the Court approved the introductory statement of what the High-Speed Rail amendment was intended to accomplish, and the drafters of the smoke-free workplace amendment modeled their introductory statement after the one the Court approved in High-Speed Rail. The two are indistinguishable in legal effect, and therefore the Court should approve the

smoke-free workplace amendment just as it did the High-Speed Rail amendment – and others.

The sugar tax and related amendments that the Court ultimately approved in 1996 also included factual statements of their purposes in their ballot summaries. Those factual statements were strikingly similar to the language used in the smoke-free workplace ballot summary, and had no adverse impact on the validity of the amendments. The 1996 sugar tax amendment stated in the summary as well as in the text that it was "for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades." Advisory Op. to Atty. Gen.—Fee On Everglades Sugar Production, 681 So. 2d 1124, 1127 (Fla. 1996). That statement of the purpose of the amendment embodied several implicit factual assumptions: that the natural resources of the Everglades needed to be conserved and protected, that water pollution existed in the Everglades, and that it needed to be abated. According to the rule that Tobacco espouses now; i.e., that "[a]ny factual assumption included in a title or summary, whether direct or implicit, is inherently misleading," [Tobacco In. Br. 4], the Court would have had to strike the 1996 sugar tax amendment from the ballot. But to the contrary, the factual language explaining why the amendment was being proposed was one of the express reasons the Court gave for approving the summary. Id. at 1129 ("There is no confusion relative to … the general purpose of the payment."). Whereas the 1996 sugar tax amendment used the phrase "for the purposes

of," the smoke-free workplace amendment uses the single word "to," but both phrases have the effect of indicating the purpose of the amendment. The usage in the smoke-free workplace amendment is just as valid as was the usage in the 1996 sugar tax amendment, which the Court approved. The Court should approve the smoke-free workplace amendment as well.

A companion of the 1996 sugar tax amendment, the Everglades Trust Fund amendment, utilized the same factual statement of its purpose: "for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades." Id. These statements were in the ballot summary as well as in the text. They reflected the sponsor's intent and beliefs, raised for public debate the underlying factual question of whether the Everglades' natural resources needed to be conserved and protected, and whether there existed in the first place water pollution, and if so whether it needed to be "abated." The Court will recall that the public debate was vigorous. Voters who agreed with these statements of fact and purpose were free to vote for the amendments, and those who disagreed were free to vote against them. The Court approved the inclusion of factual statements in the ballot summary of these prior amendments, and should do so again here because the factual statements accurately and unambiguously disclose to the voter the chief purpose and intent of the smoke-free workplace amendment.

The statements that the Court approved in the High-Speed Rail, 1996 sugar tax,

and 1996 trust fund amendment cases are indistinguishable in effect from the statements that Tobacco challenges in the smoke-free workplace amendment, as is illustrated in the following chart:

FACTS IN BALLOT SUMMARIES

Smoke-Free Workplace	**Court-Approved** High-Speed Rail	**Court-Approved** Everglades Sugar Tax	**Court-Approved** Everglades Trust Fund
"To protect people from the health hazards of second-hand tobacco smoke"	"To reduce traffic and increase travel alternatives "	"for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades"	"for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades"

In all of these cases, the ballot summary fairly and accurately discloses the chief purpose of the amendment and is not ambiguous or misleading. In all of the prior cases, the Court has not recognized any distinction between the bare legal operation of the amendment and what the sponsor intended to accomplish through the amendment, regardless of whether explicit or implicit factual assumptions were presented. The Court has never even suggested a rule such as Tobacco's proposed rule that no facts are allowed, or that no statement of the goal of the amendment is allowed.

The ballot summary of the smoke-free workplace amendment is entirely consistent with the requirements of law and precedent, and therefore the Court should approve the ballot summary.

B. The 1994 Sugar Tax Case Is Inapposite.

The Tobacco Brief stretches and strains to invalidate the ballot summary of the smoke-free workplace amendment by forcing it to fit into the niche carved for the first, invalidated, sugar tax amendment of 1994. [Tobacco In. Br. 7-9.] The foundation for Tobacco's argument on this point is a statement inappropriately borrowed out of context. In Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984), the Court struck down a proposed amendment that, among several other things, purported to constitutionalize the summary judgment rule. 457 So. 2d at 1353. The ballot summary of that amendment stated that it "establishes citizens' rights in civil actions." Id. The summary proceeded to list its various legal effects, including that it "requires courts to dispose of lawsuits when no dispute exists over the material facts thus avoiding unnecessary costs." Id. The full text of the amendment, which was only five words longer than the summary, stated instead that "the Court shall grant a summary judgment on motion of any party, when the Court finds no genuine dispute exists concerning the material facts of the case." Id. The Court criticized the ballot summary for tacking on the phrase "thus avoiding unnecessary costs":

> The summary …, after describing the legal effect of summary judgment, ends with the editorial comment, "thus avoiding unnecessary

> costs." We note in passing that the validity of this statement was hotly contested. But whether it be accurate or not, no logical explanation was given of how a constitutional summary judgment rule would be more effective in avoiding costs than is the existing summary judgment rule. Moreover, the ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth.

Id. at 1355. The Court struck the ballot summary in that case for several reasons, none of which is present here: the offending phrase bore no apparent connection to either the letter or the spirit of the corresponding text of the amendment; and it bore no apparent connection to the purported goal of the amendment, to improve the status quo in civil actions (where cost savings, if any, were already available in summary judgment procedures). Further, the phrase went beyond the chief purpose of the amendment to throw in as a bonus an additional – and collateral – reason to support the amendment. Id. The Court found several other fatal defects in the amendment and removed it from the ballot. Id.

The Court's explanation of the reasons why the offending phrase was improper was very fact-specific to its context. Tobacco improperly advocates applying Evans in a completely different context here. The introductory phrase of the smoke-free workplace amendment, in contrast to that in Evans, not only reflects but embodies the chief purpose of the amendment. It is not collateral to the chief purpose; rather, it is inseparable from the chief purpose. It accurately reflects the text of the amendment. It suffers from none of the flaws that the Court specified in Evans. Evans does not

apply on these facts.

The Court quoted the language from Evans v. Firestone in the subsequent case upon which Tobacco relies heavily, the 1994 sugar tax case. Again, that context is demonstratively different from that currently before the Court. In the first sugar tax case in 1994, the Court had for review a single initiative that purported to accomplish in one fell swoop what the sponsor ultimately split into three separate initiatives. Compare Advisory Op. to Atty. Gen. – Save Our Everglades, 636 So. 2d 1336 (Fla. 1994) (one amendment) with Advisory Op. to Atty. Gen. – Fee On Everglades Sugar Production, 681 So. 2d 1124 (Fla. 1996) (three separate amendments). The ballot summary of the 1994 sugar tax amendment provided as follows:

> Creates the Save Our Everglades Trust to restore the Everglades for future generations. Directs the sugarcane industry, which polluted the Everglades, to help pay to clean up pollution and restore clean water supply. Funds the Trust for twenty-five years with a fee on raw sugar from sugarcane grown in the Everglades Ecosystem of one cent per pound, indexed for inflation. Florida citizen trustees will control the trust.

636 So. 2d at 1338. The Court noted several flaws in the summary that rendered it materially misleading, such as its suggestion that entities other than the sugarcane industry would "help pay" for clean-up efforts, whereas no such shared financial responsibility was even mentioned in the text. Id. at 1341. The Court concluded with the quotation from Evans, stating that "the summary more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect

of the proposed amendment." 636 So. 2d at 1342.

Tobacco relies heavily on the Court's criticism of the 1994 sugar tax ballot summary as "political rhetoric," but Tobacco omits a critical step in its reasoning: what part of the sugar tax summary was "political rhetoric," and what part did the Court later approve (thus eliminating the possibility that the approved parts were the impermissible rhetoric)? Tobacco asserts that Save Our Everglades means the Court will not countenance factual statements in a ballot summary nor statements of the goal to be achieved by the amendment. [Tobacco In. Br. 4.] As already noted, Tobacco's assertion would extend the rule of Evans far beyond its context and in fact create an entirely new restriction on ballot summaries not present in any statute and not previously established in any initiative case. More specifically, Tobacco misstates the holding of Save Our Everglades, because Tobacco fails to acknowledge what part of the ballot summary there the Court found to resemble political rhetoric. The Tobacco Brief simply skips this part of the analysis. [Tobacco In. Br. 8.]

Tobacco argues that the ballot summary of the smoke-free workplace amendment is invalid under the rule of Evans as applied in Save Our Everglades because it includes a factual statement of the purpose of the amendment: "to protect people from the health hazards of second-hand tobacco smoke." Tobacco's argument, therefore, necessarily assumes that the Court disapproved of the part of the sugar tax summary that stated in factual terms the purpose of the amendment. That assumption

is wrong.

The 1994 sugar tax amendment stated in its summary that its goal was "to restore the Everglades for future generations," and "to clean up pollution and restore clean water supply." 636 So. 2d at 1338. Likewise, the text of the amendment as proposed in 1994 stated that its goal was "restoring the Everglades Ecosystem," and "to recreate the historical ecological functions of the Everglades Ecosystem" by "restoring water quality, quantity, timing and distribution … ." Id. The Court had no problem whatsoever with these statements of purpose in either the summary or the text of the original sugar tax amendment. To the contrary, the Court noted that "the text of the amendment clearly states that the purpose of the amendment is to 'restore' the Everglades to its original condition." Id. at 1341. The problem that the Court identified was not the presence of these statements of the purpose of the amendment, but rather that the title and summary did not reflect that same purpose, hinting instead at something different by using the rallying cry "Save Our Everglades," bearing a very different meaning and connotation. Id. Further, if the Court had disapproved the original sugar tax summary because it included the factual basis and intent of the amendment, then surely the Court would not have approved the revised amendments, both of which included precisely the same kind of factual statement of the goal of the amendment. See Fee on Everglades Sugar Production, 681 So. 2d at 1127, 1129 ("for purposes of conservation and protection of natural resources and abatement of water

pollution in the Everglades").

What did the drafters of the sugar tax amendments eliminate after 1994 in order to address the Court's concerns about "political rhetoric" as expressed in the 1994 case and secure the Court's approval of the revised amendments in 1996? They eliminated the language from the 1994 ballot summary stating the amendment was going to "save" something – replacing it with the factual goals of "conservation and protection" – and they eliminated the conclusory accusation that "the sugarcane industry … polluted the Everglades." Compare Save Our Everglades, 636 So. 2d at 1338 with Fee on Everglades Sugar Production, 681 So. 2d at 1124. The remaining concepts from the 1994 ballot summary reappear in the 1996 ballot summary, including the factual statement of the goal of the amendments: "for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades." 681 So. 2d at 1127, 1129. The Court approved the ballot summaries with these factual statements in them. Id. at 1129, 1130. Thus, it cannot be true, as Tobacco now claims, that this kind of factual statement is grounds to strike an amendment from the ballot. Instead, the problem that prompted the Court to strike the Evans summary and the Save Our Everglades summary was the use of imprecise inflammatory language about "saving" the Everglades, and collateral phrases "thus avoiding unnecessary costs" and "the sugarcane industry … polluted the Everglades." No such statements appear in the ballot summary of the smoke-free workplace

amendment. Far from purporting to "save" anything or anybody, the smoke-free workplace amendment recites that it intends to "protect" people's health – just as the revised sugar tax amendments recited that they intended to conserve and to protect the Everglades, which language the Court approved; and just as the Florida Legislature has already stated that the State may regulate smoking in order to protect the public health from the adverse effects of second-hand tobacco smoke. The Florida Legislature has already recognized that this proposition is true. See § 386.202, Fla. Stat. (2001) (legislative intent of Florida Clean Indoor Air Act is "to protect the public health by creating areas in public places and at public meetings that are reasonably free from tobacco smoke") (emphasis added); id. § 20.43(7)(b) (to "protect and improve the public health," the State Department of Health shall disseminate "health information and promotional messages that recognize that the following behaviors, among others, are detrimental to public health: … exposure to environmental tobacco smoke … .") (emphasis added).

Tobacco's conclusion that this amendment uses political rhetoric is based on nothing other than Tobacco's disagreement with it on its merits. The entire argument is utterly meritless, as is the Restaurant Association's assertion of the same argument. [RA In. Br. 46-48.] The ballot summary of the smoke-free workplace amendment satisfies the requirements of Florida law, and should be approved.

C. **The Ballot Summary Complies Fully With The Law.**

The Restaurant Association, in addition to asserting the same argument about the introductory phrase, attacks the ballot summary on several other grounds, not one of which is meritorious. Curiously, the Restaurant Association finds it necessary to fall back on old cases from Arkansas to make some of its points. [RA In. Br. 35, 37, 47, 48.] Smoke-Free For Health would merely note that this Court has a perfectly adequate body of caselaw upon which to draw in evaluating Florida initiative petitions. The drafters of an initiative in Florida should scarcely be expected to comply with the law of another state. In any event, measured under the law that does apply, the ballot summary of the smoke-free workplace amendment easily survives the Restaurant Association's attacks.

1. Current Statutes. The Restaurant Association incorrectly asserts that a constitutional amendment must disclose the current statutory laws that would be affected by the amendment or that address the same subject matter as the amendment. [RA In. Br. 39-41.] Opponents of other amendments have asserted the same argument many times, and the Court has held that the summary need not disclose its effect on existing statutes. Rather, those statutes simply give way to the superior force of the constitutional provision. Advisory Op. to Atty. Gen. Re: Prohibiting Public Funding of Political Candidates' Campaigns, 693 So. 2d 972, 975-76 (Fla. 1997) ("opponents argue that the language is misleading … [because] the amendment effectively

invalidates existing statutory law permitting the public financing of the campaigns for some of the offices at issue … [thus] has a significant collateral effect, of which many voters may be unaware. We reject this contention."); Advisory Op. to Atty. Gen. – Limitation of Non-economic Damages in Civil Actions, 520 So. 2d 284, (Fla. 1988) (amendment approved although not mentioning existing statutory law; "statutes and jury instructions which are inconsistent with the constitution, if it is amended, will simply have to give way. … [P]roposed amendments to the constitution are not required to be consistent with statutory law or jury instructions and may require modification in such law or instructions."). Disclosure of statutes addressing the same subject is not required.

The 1996 "polluter pays" amendment provides another good example supporting the validity of the present ballot summary despite its omission of any reference to the current Clean Indoor Air Act. Fee on Everglades Sugar Production, 681 So. 2d at 1130-31. The polluter pays amendment involved intricate policy issues already addressed at great length in Florida's statutory Everglades Forever Act, which was the result of a settlement agreement resolving years of litigation among state, federal, and private entities. Advisory Op. to Gov. – 1996 Amendment 5 (Everglades), 706 So. 2d 278, 279 (Fla. 1997). Yet the polluter pays amendment did not mention the Everglades Forever Act at all, neither in the text nor in the summary. Fee on Everglades Sugar Production, 681 So. 2d at 1130. The Court approved it nevertheless.

And when the polluter pays amendment, having been approved by the voters, came back before the Court for interpretation, the Court concluded that the Everglades Forever Act could not be construed as the amendment's implementing legislation, but rather that legislative action was required because "'all existing statutes which are consistent with the amended Constitution will remain in effect until repealed by the Legislature.'" 1996 Amendment 5, 706 So. 2d at 281-82. If the polluter pays amendment was not required to disclose the existence of, or its impact on, the intricate and sweeping Everglades Forever Act and related regulations, then clearly the smoke-free workplace amendment is not required to discuss the current Clean Indoor Air Act.

In addition, if an amendment involves a current state of law that is so well known to the average voter that specifying a citation to the law would add little or nothing to the process, it is unnecessary to disclose the citation. Advisory Op. to Atty. Gen. Re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996) (unnecessary to advise voter that current law required only majority vote and that supermajority requirement would change current law, because voters can be presumed to know the general principle that majority rules). Surely not a single voter (and scarcely any nonvoters) in Florida can be unaware that Florida currently has laws regulating smoking in certain buildings. Signage and public announcements and advertisements and employers' regulations and smokers' behavior make that fact utterly inescapable. To require the sponsor of an anti-smoking amendment to advise the voter in the ballot summary that there

currently exists other state regulation of smoking would be a pointless exercise that would not advance the purposes of a ballot summary, while consuming precious words better used to disclose something useful. Id.

The cases on which the Restaurant Association relies for this point are inapposite. [RA In. Br. 40.] In those cases, the amendments at issue used titles that the Court found to be misleading because they affirmatively suggested that their amendments wrote on a blank slate, when in fact a pre-existing provision of the Florida Constitution (not a statute) addressed the subject matter already. See Advisory Op. to Atty. Gen. re Amendment to Bar Government from Treating People Differently Based on Race in Pub. Educ'n, 778 So. 2d 888, 898 (Fla. 2000) (preexisting constitutional provision prohibited discrimination); Advisory Op. to Atty. Gen. re Casino Authorization, Taxation and Reg., 656 So. 2d 466, 469 (Fla. 1995) (preexisting constitutional provision outlawed casinos); Tax Limitation, 644 So. 2d at 494 (preexisting constitutional provision placed caps on taxes). These cases do not address what happens when a preexisting statute deals with the subject matter of a proposed amendment, and thus they do not control this issue. The law does not require the ballot summary of an initiative petition to inform the voter of existing statutes that would be affected by the amendment.

2. The Language Is Unambiguous. The Restaurant Association claims that the ballot summary is invalid because it does not incorporate the full definitions of

terms defined and used in the amendment. [RA In. Br. 41-46.] Specifically, the Restaurant Association claims that the ballot summary should have explained in greater detail how terms such as "enclosed indoor workplace" and "stand-alone bar" are used in the amendment, and should have given the details of the private residence exception as set forth in the amendment.

As a practical matter, there is not room in a 75-word ballot summary to spell out defined terms used in an amendment. The strict word limit is no cop-out, however, and the drafters of the smoke-free workplace amendment carefully composed the ballot summary for maximum efficient use of its 75 words. Within the word limit, the drafters disclosed each allowed exception using terms defined in the amendment, and advised the voter that the amendment itself provides definitions. No more than this is required.

The Court approved a virtually indistinguishable approach in the Net Ban case, in which terms of art from the commercial fishing industry were used in the summary. Limited Marine Net Fishing, 620 So. 2d at 998-99. The summary disclosed that the text "provides definitions," but the summary did not set forth the definitions themselves. Rather, the full text of the amendment set forth the full text of the definitions. Id. The Court approved this treatment of defined terms, which provided a model for the drafting of the smoke-free workplace amendment. The Court should likewise approve the instant ballot summary because it complies with the governing

requirements of law.

The law simply requires the ballot summary to disclose the chief purpose of the amendment. Advisory Op. to Atty. Gen. Re Limited Casinos, 644 So. 2d 71, 74 (Fla. 1994) (ballot summary must "state the chief purpose of the measure in clear and unambiguous language . . . so that the voter is put on fair notice of the content of the proposed amendment to enable the casting of an intelligent and informed vote"). A voter who sees particular terms used in the ballot summary, followed by the disclosure that the amendment itself "provides definitions," is on notice to investigate further if she wishes to do so. Carroll v. Firestone, 497 So. 2d 1204, 1207 (Fla. 1986) (Boyd, J., concurring) (immaterial to validity of summary whether voters choose to educate themselves or not, as long as the chief purpose of the measure is disclosed so that they have the opportunity to inform themselves). Whether any given voter who is advised that definitions are provided will proceed to read the definitions that are provided is beyond the sponsor's control and is legally immaterial. The Restaurant Association's speculation about what voters may or may not think a defined term means has no effect on these proceedings. The ballot summary more than adequately discloses the chief purpose of the measure in clear language, enabling the voter to make an informed choice.

One misinterpretation of the amendment by the Restaurant Association merits correction, and that is the assertion that the amendment would prohibit tobacco

smoking in a motor vehicle if work is ever performed there. [RA In. Br. 43.] That is an extreme interpretation of the phrase "enclosed indoor workplace." The amendment does not assign any special definition to the word "indoor" as used in the definition of "enclosed indoor workplace," and therefore the common sense definition applies, which the Court has noted may come from a dictionary. 1996 Amendment 5, 706 So. 2d at 282. The most common understandings and definitions of an "indoor" space contemplate a fixed place, not a regularly or frequently mobile one. E.g., Merriam-Webster Collegiate Dictionary OnLine (www.m-w.com/cgi-bin/dictionary) (2001) (defining "indoor" as "1: of or relating to the interior of a building; 2: living, located, or carried on within a building"); Webster's II New Riverside Dictionary (revised ed. 1996), at 353 (defining "indoor" as "of or within the inside of a building"). A motor vehicle would not commonly be understood to fall within the plain meaning of the term "indoor."

In addition, the amendment takes pains to preserve those areas in which citizens are most likely to expect privacy to behave as they please, such as private residences and rented hotel rooms, and one's vehicle conceptually falls within that same category. It would create an internal inconsistency of treatment to exempt some uniquely private areas but not one's vehicle. The Court should reject the Restaurant Association's extension of the phrase "enclosed indoor workplace" to include motor vehicles.

II. THE PETITION SATISFIES THE SINGLE-SUBJECT REQUIREMENT.

A. No Multiple Government Functions.

The Court has always recognized that a constitutional amendment may, and almost always will, affect multiple branches of government. E.g., Limited Casinos, 644 So. 2d at 74. Although at times it may be difficult to articulate a bright-line test for determining when an amendment crosses from permissible effect to impermissible usurpation of a government function, the Court's consistent standard is that an amendment must substantially perform or alter the function of a branch of government itself before it may be stricken. In other words, the threshold is set high; it takes a lot for the Court to conclude that an amendment crosses the line. Advisory Op. to Atty. Gen. re: Florida Transp. Initiative (High Speed Rail), 769 So. 2d 367, 369-70 (Fla. 2000); Advisory Op. To Atty. Gen. re Fish & Wildlife Conservation Comm'n, 705 So. 2d 1351, 1353 (Fla. 1998); Limited Casinos, 644 So. 2d at 74; Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984). This is as it should be, given the deference to which the Court has always held the exercise of the initiative process is entitled. See Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982) (applying standard of "extreme care, caution, and restraint"); Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958) (reviewing initiatives represents the "most sanctified" aspect of the Court's jurisdiction).

Implementing these standards, the Court has made it clear that if the branches

of government retain their core functioning, but are required to perform that function in a manner that complies with the amendment, that does not constitute a usurpation of the function itself. See, e.g., Term Limits Pledge, 718 So. 2d at 802; Public Funding, 693 So. 2d at 975; Limited Political Terms, 592 So. 2d at 227; In re Adv. Op. to Atty. Gen., English – The Official Language of Fla., 520 So. 2d 11, 13 (Fla. 1988); Carroll v. Firestone, 497 So. 2d at 1205-06; Smathers v. Smith, 338 So. 2d 825, 831 (Fla. 1976). This is necessarily true, because all constitutional amendments will require compliance, and if such compliance were sufficient to constitute the usurpation of the government function itself, then the citizens' right of initiative would be rendered illusory.

The smoke-free workplace amendment easily passes its legal tests. The Attorney General concluded that it satisfies the single-subject rule. Nevertheless, although the Attorney General and Tobacco do not challenge the smoke-free workplace amendment on single-subject grounds, the Restaurant Association asserts that the initiative performs the functions of multiple branches of government. [RA In. Br. 15-18.] The real message that the Restaurant Association seeks to convey in this argument is that the current Clean Indoor Air Act ought to be "good enough." That is an argument on the merits, perhaps appropriate for a campaign debate, but irrelevant here. The initiative does not violate the single-subject rule.

1. No Legislative Function. Contrary to the Restaurant Association's

argument, the Court has never held that an initiative usurps the Legislative function merely because it deals with a subject matter that is already addressed in statutory law (or could be so addressed). [RA In. Br. 17.] Many, if not all, constitutional initiatives deal with subject matters that the Legislature has also addressed or could exercise its discretion to address. The Everglades polluter-pays amendment is but one example, entering a field that had already been occupied quite extensively by the Legislature and by executive agencies. 1996 Amendment 5, 706 So. 2d at 279, 281-82. Nevertheless, the Court held that the amendment did not substantially alter or perform a legislative or executive function. To the contrary, the Court, after approving the amendment, made the point that preexisting legislation must simply yield if inconsistent with the terms of the amendment. Id. at 218-82. The same is true here. The existence of legislation regulating smoking does not mean the amendment substantially alters or performs the Legislative function itself.

The fact that a statute already regulates smoking is not material to whether the amendment complies with the single-subject rule. The smoke-free workplace amendment retains full Legislative authority to implement the amendment and to enact more restrictive regulations on smoking if it chooses to do so. The amendment does not substantially alter the Legislative function.

2. No Judicial Function. The Restaurant Association attempts, without success, to liken the smoke-free workplace amendment to the first sugar tax

amendment invalidated in 1994. [RA In. Br. 18.] The Court invalidated that sugar tax amendment because it assumed the role of judge and jury, determining liability by announcing that the sugarcane industry polluted the Everglades, and assessing damages by requiring the sugarcane industry to pay a tax to fund clean-up efforts. Save Our Everglades, 636 So. 2d at 1340-41. While the Court's colorful criticism of the 1994 Save Our Everglades amendment certainly tempts an advocate to find a way to use that case, the fact is that the context here is completely different and the analogy fails. The smoke-free workplace amendment does not assign fault to any individual, entity, or industry. It identifies a public health issue, the cause of it, and a remedy for it. The smoke-free workplace amendment does not assess damages of any kind against any person or entity. It does not substantially alter or usurp any judicial function. It raises a political issue for submission to the voters. It is allowed to do that. Any voter disagreeing with it may vote against it.

The Restaurant Association's argument quickly evolves into another argument on the merits, asserting disbelief that second-hand tobacco smoke is harmful. [RA In. Br. 18-20.] The Restaurant Association's professed skepticism is disingenuous in light of the fact that the Florida Legislature has already recognized that this proposition is true. See § 386.202, Fla. Stat. (2001) (legislative intent of Florida Clean Indoor Air Act is "to protect the public health by creating areas in public places and at public meetings that are reasonably free from tobacco smoke") (emphasis added); id. §

20.43(7)(b) (to "protect and improve the public health," the State Department of Health shall disseminate "health information and promotional messages that recognize that the following behaviors, among others, are detrimental to public health: … exposure to environmental tobacco smoke … .") (emphasis added). See also, e.g., Helling v. McKinney, 509 U.S. 25, 34-35 (1993) (allegations of exposure to secondhand tobacco smoke were sufficient to state an Eighth Amendment cause of action by a prisoner for deliberate indifference to his present and future health); Fagan v. Axelrod, 550 N.Y.S.2d 552, 557-58 (1990) (rejecting "the familiar specter that it has yet to be proven that secondhand smoke (or Environmental Tobacco Smoke) represents a significant health hazard to nonsmokers," because "[t]he weight of scientific evidence is overwhelmingly to the contrary … .") (emphasis added). The Restaurant Association's campaign of denial and diversion do not square with the law or with the facts. The Interested Parties supporting the smoke-free workplace amendment have the expertise to address this issue raised by the Restaurant Association, and have done so in their joint Answer Brief for the benefit of the Court.

After nevertheless purporting to disbelieve that second-hand tobacco smoke is a health hazard, the Restaurant Association ignores the fact that the only public health issue raised by the amendment is whether second-hand tobacco smoke is a health hazard at all. The Restaurant Association attempts to divert attention instead to whether second-hand tobacco smoke causes specific illnesses or diseases in specific

individuals – an issue not within the scope of, and not relevant to, the amendment or this proceeding. [RA In. Br. 18-21 & app. C, D, E.] Although these arguments and supporting appendix materials provided by the Restaurant Association are irrelevant here, they serve the useful purpose of revealing the Restaurant's Association apparent agenda, which is simply to persuade the Court to oppose the amendment on its merits in the hopes of coloring the Court's legal opinion. Once again, as with so many of the Restaurant Association's arguments, they may perhaps be appropriate for the campaign debate, but they have no place here.

To the extent that the Restaurant Association also argues that the preamble clauses that precede the operative text of the amendment constitute judicial "findings" [RA In. Br. 20-22], the argument is equally meritless. As the Attorney General and even the Restaurant Association acknowledge [RA In. Br. 22 n.5], the preamble clauses precede the operative text of the amendment. They will not appear in the constitution, just as identical "whereas" clauses commonly used in legislation do not appear in or become part of the text of the statutes they support:

> Such [whereas] clauses do not become part of the official law and are considered as explanatory or clarifying matter only--a sort of built-in committee presentation. They may, however, be considered by the courts in construing legislative intent. **The House Bill Drafting Service strongly recommends that legislative "findings and intent" provisions be written as "whereas" clauses.** Doing so greatly decreases the possibility of future challenge of the law in the courts and subsequent litigation.

2001 Guidelines for Bill Drafting, Fla. House of Reps., House Bill Drafting Service, at 48 (emphasis original). The preamble clauses state the intent of the sponsor, which

is relevant to subsequent interpretation, and not improper.

In any event, the sponsor is entitled to put additional material supporting an amendment on the petition form:

> (5) Additional materials supporting the proposed amendment or providing a method by which the petition form may be returned by mail may be printed on the form. The Division shall not review the accuracy or content of such material, but will review the petition to determine that other information does not interfere with required material.

Fla. Admin. Code R. 1S-2009(5) (emphasis added). The Court should not strike the smoke-free workplace amendment for stating the sponsor's intent in the form of "additional materials supporting the proposed amendment" as expressly authorized by rule, particularly not when the language is not part of the title, ballot summary, or operative text of the amendment. The Restaurant Association's attempt to bring the preamble into the amendment proper by arguing that it appears after the enacting clause [RA In. Br. 22 n.7] is unavailing, because the preamble ends with language clearly distinguishing the preamble from the subsequent, operative text.

The Court has approved other initiatives utilizing similar prefatory statements to explain the context and intent of amendments, without regard to whether the language was intended to become part of the amended constitution. See High-Speed Rail, 769 So. 2d at 368 ("To reduce traffic congestion and provide alternatives to the traveling public, it is hereby declared to be in the public interest that a high speed ground transportation system . . . be developed and operated in the State of Florida . . .

."); Advisory Op. to Atty. Gen. re Fish and Wildlife Conservation Comm'n, 705 So. 2d 1351, 1352 (Fla. 1998) ("The marine, freshwater and wildlife resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people and future generations."); Advisory Op. to Atty. Gen.—Ltd. Marine Net Fishing, 620 So. 2d 997, 997-98 (Fla. 1993) ("The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing, and waste."); Advisory Op. to Atty. Gen. -- Limited Political Terms In Certain Elective Offices, 592 So. 2d 225, 226 (Fla. 1991) ("The people of Florida believe that politicians who remain in office too long may become preoccupied with re-election and become beholden to special interests and bureaucrats, and that present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office."). Except for Limited Political Terms, all of these initiatives placed the factual findings language within the operative text of the constitution. The drafters of the smoke-free workplace amendment relied upon the Court's prior approval of these amendments, and the Court should approve this amendment as well.

Finally, the Court has noted in the past, addressing arguments that petition language was too promotional, that the petition forms must be, and are, clearly designated as paid political advertisements:

> We express no opinion on the accuracy of this promise [lottery revenues to be generated for education] but note that the petition form signed by the electors is prominently identified as a paid political advertisement. We decline to embroil this Court in the accuracy or inaccuracy of political advertisements clearly identified as such.

Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986). The initiative petition form of the smoke-free workplace amendment is identified as a paid political advertisement. [See Sponsor's In. Br. App. 1.] Its inherent nature is to assert political issues, which may be disputed. The Court has always said that it is not in the business of resolving disagreements on the merits of an initiative, and it should not begin to do so now.

B. No Unanticipated Collateral Effects.

The Restaurant Association's arguments about allegedly unanticipated collateral effects of the smoke-free workplace amendment [RA In. Br. 23-27] mirror the arguments about the ballot summary's treatment of definitions. The sponsor has already discredited these arguments. To recap: the summary tells the voter that the amendment utilizes defined terms, and thus the voter has every opportunity to read and think about the definitions and how they will work. The sponsor of an initiative cannot, and is not required to, spoon-feed the voter with every conceivable permutation or application of the amendment. The Court has always said that while

a ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, they need not explain every detail, ramification, or effect of the proposed amendment. Grose v. Firestone, 422 So. 2d 303, 305 (Fla. 1982). The amendment is more than sufficient and should be approved.

C. No Logrolling.

The Restaurant Association, although dutifully reciting past cases in which the Court has discussed the prohibition against logrolling, apparently misapprehends those cases. They do not stand for the proposition that the Restaurant Association advances [RA In. Br. 30-31]; i.e., that every detail or ramification of an amendment, or every "directly connected" provision of its implementation, creates a separate question and constitutes logrolling. If that were the test, no amendment containing any details of application or implementation could pass muster. Yet the Court consistently encourages – indeed, requires – the inclusion of sufficient details and directly connected matters to allow the voter to make an informed decision. To adopt the Restaurant Association's logrolling analysis would create a disincentive to the inclusion of such matters, and therefore the Court should reject the argument. The smoke-free workplace amendment asks the voter but a single question, and should be approved as satisfying the single-subject rule.

D. No Multiplicitous Impact on Constitution.

The Restaurant Association tosses in several superficial assertions that the

smoke-free workplace will substantially affect various sections of the Florida Constitution without identifying them, but the arguments are left undeveloped and in any event are meritless. [RA In. Br. 32-34.] The amendment does not substantially affect the right of privacy, because the right of privacy does not encompass smoking. See City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995) (under state law, job applicant has no reasonable expectation of privacy with respect to smoking habits, and "Clearly, the 'right to smoke' is not included within the penumbra of fundamental rights protected under that [federal] provision."). The related allegations that the amendment would affect the right to peaceably assemble, the rights of business owners to set their own smoking policies, and the right of collective bargaining, are meritless. Nothing in the Florida Constitution addresses or guarantees a right to be free from smoking regulations, and to the contrary, Florida already extensively regulates smoking and is free to regulate it more strictly at will. Any constitutional challenge to the amendment as applied is premature at this time. The amendment does not infringe the right of access to courts at all; any person with standing is, and will remain, free to challenge the constitutionality of the amendment facially or as applied, when a case or controversy is ripe for adjudication. The smoke-free workplace amendment will require compliance across the board and statewide, as do all constitutional amendments, but it does not substantially alter any other provision of the Florida Constitution.

CONCLUSION

The smoke-free workplace amendment satisfies the governing legal requirements for the title, ballot summary, and text of a citizens' initiative. The Court should approve it for placement on the ballot.

Respectfully submitted this 18th day of December, 2001.

HOLLAND & KNIGHT LLP

Stephen H. Grimes (FBN 0032005)
Susan L. Kelsey (FBN 772097)
P.O. Drawer 810
Tallahassee, FL 32302
(850) 224-7000

Counsel for the Sponsor,
Smoke-Free For Health, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail to following this 18th day of December, 2001.

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Attorney

Presentor
Office of the Attorney General
Louis F. Hubener, III
400 S. Monroe St.
Tallahassee, FL 32399-6536

American Cancer Society, Florida Division, Inc. and **AARP**
T. Elaine Holmes
3709 West Jetton Ave.
Tampa, FL 33629-5146

American Lung Association Of Florida, Inc.
Marshall Collins Deason, Jr.
3750 Gunn Highway, Suite 2C
Tampa, FL 33624-4905

American College of Physicians--American Society of Internal Medicine, Florida Chapter, Inc. and **Florida Public Health Association, Inc.**
Christopher Lawson Nuland
Law Offices of Christopher L. Nuland
1000 Riverside Ave., Ste. 200
Jacksonville, FL 32204-4103

Center for Florida's Children And **National Center for Tobacco-Free Kids**
Michelle Anchors
Anchors, Foster, McInnis & Keefe
909 Mar Walt Dr., Ste. 1014
Ft. Walton Beach, FL 32546-6757

American Heart Association, Inc. Florida/Puerto Rico Affiliate
Teresa D. Shelton
4830 Windmill Palm Terr. N.E.
St. Petersburg, FL 33703-6307

Florida Restaurant Association
Warren H. Husband
Metz, Hauser & Husband
P.O. Box 10909
Tallahassee, FL 32302

Lorillard Tobacco Company
R.J. Reynolds Tobacco Company
Associated Builders & Contractors Of Florida, Inc.
Cigar Association Of America, Inc.
Florida Hotel & Motel Association, Inc.
Florida United Businesses Association, Inc.
Florida Tobacco & Candy Association
Florida Petroleum Marketers
And Convenience Store Association
Florida Retail Federation
Barry S. Richard
Greenberg Traurig
101 E. College Ave.
Tallahassee, FL 32301

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

_____
Attorney

TAL1 #243978 v1