IN THE SUPREME COURT OF FLORIDA

Case No. SC 01 - 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 OPPONENT THE FLORIDA RESTAURANT ASSOCIATION, INC.

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STATEMENT OF THE CASE AND FACTS

For its Statement of the Case and Facts, The Florida Restaurant Association, Inc. ("FRA") refers the Court to FRA's Initial Brief.

For ease of reference, the following parties filing initial briefs in this proceeding shall be referred to in FRA's Answer Brief as indicated: Smoke-Free for Health, Inc. ("sponsor"); American Cancer Society, Florida Division, Inc., et al. ("ACS"); and American College of Physicians – American Society of Internal Medicine, Florida Chapter, Inc., et al. ("ACP").

All emphasis appearing in quoted material in FRA's Answer Brief is supplied unless otherwise noted. All references in FRA's Answer Brief to the Florida Statutes are to the Official Florida Statutes (2001), unless otherwise indicated.

SUMMARY OF ARGUMENT

Every interest group sponsoring an initiative amendment to the Florida Constitution must comply with two important legal requirements in order to earn a place on the ballot for their particular measure. First, the Florida Constitution directs that an amendment proposed by initiative petition "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. (hereinafter "the single-subject rule"). Second, because the amendment itself does not appear on the ballot, the sponsor is required to prepare a ballot title and summary that give fair notice to voters of the amendment's actual terms and effect. §101.161, Fla. Stat.

The smoking ban sponsor has crafted a proposed initiative amendment that violates the single-subject rule in a variety of ways, as discussed in FRA's Initial Brief. For example, in formulating its initiative, the sponsor has sought to improperly perform the functions of both the legislative and judicial branches of state government. Acting in a legislative capacity, the smoking ban sponsor seeks to nullify comprehensive state legislation that already protects the public from second-hand tobacco smoke. §§ 386.201-.209, Fla. Stat. Acting in a judicial capacity, the initiative sponsor has included in its proposed amendment several highly controversial "findings of fact," warning voters that a total ban on workplace smoking is needed because: "there is no safe level of exposure" to second-hand tobacco smoke; any

exposure to second-hand tobacco smoke "causes death and disease;" and no technology exists to alleviate this threat.

Beyond the fact that these statements are not scientifically supported, they have no place in an initiative amendment to be placed before Florida voters. The initiative sponsor obviously designed these statements of "fact"to prey upon voters' fears in an effort to convince voters to sign the initiative petition placing the matter on the ballot, as well as to help secure ultimate voter approval of the initiative. But this Court's consistent precedent makes clear that the smoking ban sponsor is not free to fashion its remedy – a ban on smoking in the workplace – and then rationalize that remedy with its own findings of "fact."

In an attempt to evade this Court's prohibition on such tactics, the sponsor has placed its statements of "fact" in the preamble to the amendment rather than the text of the section they seek to add to Article X of the Florida Constitution. In doing so, the sponsor argues that it has deprived the Court of jurisdiction to consider these statements. The sponsor is incorrect as a matter of law. The sponsor has presented these findings of "fact" in its initiative as an express part of the "FULL TEXT OF PROPOSED AMENDMENT" and as an express part of the proposed constitutional amendment to be "ENACTED BY THE PEOPLE OF FLORIDA." *See* Appendix A (Initiative Petition). This Court must consider the entirety of what the initiative

sponsor is calling upon voters to enact in determining whether a proposed amendment violates the single-subject rule. To hold otherwise would risk gutting the single-subject rule, allowing sponsors to place whatever findings of fact they choose, no matter how preposterous, in the preamble of their amendment and avoid the important limitations the single-subject rule was intended to place on initiative sponsors.

The initiative sponsor has also crafted a ballot title and summary that violate Section 101.161, Florida Statutes, by failing to give fair notice to voters of the amendment's actual terms and effect. The summary and title do not inform voters of the significant change that the amendment would make to existing law. Voters are not advised that smoking is already banned by law in all "places of employment" in common areas expected to be used by the public. §§ 386.203-.205, Fla. Stat. Nor do the summary and title advise voters that smoking areas in restaurants are currently restricted to just 35% of the seating capacity. Instead, the title and summary are designed to leave the impression that there are no legal mechanisms in place to reduce unwanted exposure to second-hand tobacco smoke.

The summary also fails to use clear and unambiguous terms that voters will understand uniformly. For example, in using the term "workplace," the title and summary suggest to most voters that smoking would be banned for workers in the typical office environment. These "workplace" references, however, do not make

clear that the ban on smoking would apply beyond workers to anyone visiting that workplace, including workplaces that are traditionally places of public accommodation like restaurants and most bars. Moreover, these references to "workplace" smoking do not inform voters that the initiative bans smoking at all times in any place in which work is performed, even if this work consumes only 5 minutes – resulting in a smoking ban in virtually all enclosed spaces, including all restaurants and most bars.

Finally, the summary and title are improperly infused with language designed to alarm voters and convince them that a vote against the initiative is a vote to affirmatively risk their health. The Court has long warned initiative sponsors that such rhetoric has no place in what is supposed to be an impartial and accurate description of a proposed amendment.

No matter how well-intentioned an interest group proposing an initiative amendment may be, they bear the burden of complying with the single-subject rule and ballot title/summary requirements. Because the sponsor of the smoking ban initiative has chosen to violate these requirements in preparing its proposed amendment, the proposed amendment may not be placed on the ballot.

ARGUMENT

The sponsor and proponents of the smoking ban initiative acknowledge in their initial briefs that the Court is not concerned in this proceeding with the relative wisdom or merits of the proposed amendment. Nevertheless, they spend much of their respective "Statement of the Case and Facts" discussing the public health benefits that they believe will flow from the smoking ban amendment. The sponsor also seeks to highlight the "enormous investment of time, thought, research, and resources" it has made in the initiative. *Sponsor's Initial Brief* at 10.

Of course, none of this is relevant to the Court's task in this proceeding. No one doubts that the sponsor and proponents of the smoking ban initiative truly believe that their proposed constitutional amendment serves the public good. But the important legal requirements that an initiative sponsor must satisfy before earning a place on the ballot for its proposed constitutional amendment are not affected by the sponsor's motivations. The legal bar is not lowered based upon a subjective assessment of whether an initiative sponsor's intentions are "good" or "bad." This Court has made abundantly clear that, in applying the controlling law to initiative amendments, it ignores such considerations.

The only questions that matter in this proceeding are as follows: (1) Does the initiative satisfy the constitutional single-subject rule; and (2) Does the initiative

satisfy the statutory ballot title and summary requirements? The answer to both of these questions is a resounding "no."

STANDARD OF REVIEW

While this Court will not prevent an initiative amendment from reaching the ballot without a sound legal ground to do so, the Court's review of such initiatives can hardly be described as "deferential," as claimed by the sponsor and proponents in their initial briefs. The framers of the Florida Constitution intended the initiative process to be the most restrictive and most difficult method of amending the constitution. *Evans v. Firestone*, 457 So. 2d 1351, 1358 (Fla. 1984) (McDonald, J. concurring); *Fine v. Firestone*, 448 So. 2d 984, 994 (Fla. 1984) (McDonald, J., concurring).

The initiative sponsor bears the burden of complying with the single-subject rule and ballot title and summary requirements. The sponsor makes "[t]he decisions which determine compliance with the requirements." *Evans*, 457 So. 2d at 1360 (Ehrlich, J., concurring). "If drafters of an initiative petition . . . choose to violate . . . [the legal requirements], this Court has no alternative but to strike it from the ballot." *Id.* at 1359 (Ehrlich, J., concurring).

Despite the Court's reluctance to keep an initiative from reaching the ballot, the passion of initiative sponsors for their cause has frequently overwhelmed their desire to remain within the boundaries of the single-subject rule and ballot title and summary

requirements. In fact, 20 out of the 39 initiative petitions that this Court has reviewed have been held to be defective.[1]

So too, in this case, the smoking ban sponsor has not been able to avoid the temptation to overreach, allowing its deeply-held commitment to its cause to cloud its judgment in preparing the initiative petition. The result is a proposed amendment and ballot title and summary that violate both of the relevant legal requirements applicable to initiative petitions.[2]

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[1] Notably, of the seven proposed constitutional amendments or revisions reviewed by the Court in the cases cited by the sponsor to support its "deferential" standard of review, only two were found to meet the requisite legal requirements. *See Sponsor's Initial Brief* at 12-13.

[2] In their initial briefs, the sponsor and proponents of the smoking ban initiative rely heavily upon the Attorney General's cursory review of the initiative in request for an advisory opinion. The smoking ban sponsor even claims that "[t]he Attorney General in his request for an advisory opinion has stated that the smoke-free workplace amendment satisfies both of these requirements [single-subject rule and title/summary requirements]." *Sponsor's Initial Brief* at 10. Of course, the Attorney General is not tasked with performing a substantive analysis of the initiative for compliance with the relevant legal requirements, nor does his request for advisory opinion purport to undertake such a review. In fact, no where in the Attorney General's request does he state that the initiative complies with the single-subject rule, and no where does he analyze the factors this Court uses to determine whether an initiative complies with this requirement. Moreover, while the Attorney General initially observes that the title and summary "appear to inform the voter of the chief purpose of the amendment," he goes on to note that "several provisions in the text of the proposed amendment may be subject to differing interpretations and, therefore, affect whether the summary adequately informs the voter of the substance of the proposed amendment." *Attorney General's Request* at 5. Thus, despite the sponsor's and proponents' attempts to

I. THE SMOKING BAN INITIATIVE VIOLATES THE SINGLE-SUBJECT RULE ESTABLISHED IN ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.

Contrary to the sponsor's claim that the initiative procedure "empowers the people at all stages of the process," "the people" do not have a representative at the table when an initiative is being prepared. *Sponsor's Initial Brief* at 12-13. The interest group sponsoring the initiative make the policy choices about what goes into the initiative and what stays out. Moreover, the sponsor exercises complete control over the language of the initiative, ballot title, and summary, dictating how the initiative is presented both to voters and to potential signers of the initiative petition.

Because the initiative process is unique in its lack of public representation in the preparation of the amendment, ballot title, and summary, and because this process is not subject to the public testimony, debate, and balancing of competing values that mark the four "legislative" amendment processes, an interest group advocating an initiative amendment is subject to one constitutional rule of restraint -- the amendment

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mischaracterize them, the Attorney General's brief observations on the initiative in his request to the Court do not even begin to reach any kind of definitive conclusion on the initiative's legality.

or revision "shall embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const.

Rather than deal with the specific factors that this Court considers in determining whether an initiative violates the single-subject rule, the sponsor and proponents simply argue that the smoking ban initiative satisfies the rule because it has a "logical and natural oneness of purpose" – prohibiting smoking in enclosed indoor workplaces. *Sponsor's Initial Brief* at 21. Respectfully, this single-subject "analysis" is neither meaningful nor helpful. Many initiative amendments that the Court has held violate the single-subject rule could fairly be described as having a "oneness of purpose." Even a proposed constitutional amendment that would "abolish all taxes" could be said to have a "oneness of purpose," but such an amendment would surely not comply with the single-subject rule.

In determining whether a sponsor has crafted an initiative that violates the single-subject rule, this Court considers four principal factors: (a) whether the amendment performs or substantially affects multiple, distinct functions of government, as opposed to only a single function; (b) whether the broad sweep of the amendment will result in unannounced collateral effects that might impact a voter's consideration of the amendment; (c) whether the initiative actually asks voters multiple questions, instead of just one; and (d) whether the proposed amendment

would substantially affect other sections of the constitution.

As demonstrated in FRA's Initial Brief, the smoking ban initiative fails all four of these tests, and therefore must be rejected for violating the single-subject rule. In its Answer Brief, FRA will focus exclusively on the first of these factors, relying on its Initial Brief with regard to all of the others.

A. THE SMOKING BAN INITIATIVE IMPROPERLY PERFORMS FUNCTIONS OF BOTH THE LEGISLATIVE AND JUDICIAL BRANCHES OF STATE GOVERNMENT.

An initiative amendment may not attempt to perform multiple, distinct functions of government. *Advisory Opinion to the Attorney General -- Save Our Everglades*, 636 So. 2d 1336, 1139-41 (Fla. 1994). "Where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation." *Evans*, 457 So. 2d at 1354 (initiative violated single-subject rule by performing legislative and judicial functions).

For example, in *Save Our Everglades*, the Court was confronted with a proposed amendment that established a trust for restoration of the Everglades, provided for its operation, and funded the trust by levying a penny per pound tax on raw sugar. The Court held that the initiative implemented "a public policy decision of statewide significance and thus performs an essentially legislative function." *Save*

Our Everglades, 636 So. 2d at 1340. Further, the Court held that the initiative performed a judicial branch function, because the initiative contained a factual finding that "[t]he sugar cane industry in the Everglades Ecosystem has profited while damaging the Everglades with pollution and by altering the water supply." *Id.* at 1338, 1340.

The initiative amendment then went on to impose a fee on the industry as the remedy flowing from this "judgment of wrongdoing and de facto liability," performing "a quintessential judicial function." *Id.* at 1340. The Court held that "[i]t is as though the drafters drew up their plan to restore the Everglades, then stepped outside their role as planners, donned judicial robes, and made factual findings" to support their plan and predetermined remedy. *Id.* The Court concluded that the initiative "falls far short of meeting the single-subject requirement." *Id.* at 1340-41.

Just as in *Save Our Everglades*, the sponsor of the smoking ban initiative has crafted a proposal that performs the functions of multiple branches of state government. First, the smoking ban initiative plainly performs an essentially legislative function, replacing the policy judgments of its sponsor for those of the Legislature, which has been very proactive in regulating smoking in the workplace. *See* §§ 386.201-.209, Fla. Stat. (the "Florida Clean Indoor Air Act"); *FRA' s Initial Brief* at 15-17. Notably, both the smoking ban initiative itself and the sponsor's initial

brief conspicuously fail to make any mention of these laws.

The smoking ban initiative would wipe away these legislative efforts to carefully balance the rights of all parties concerned with the regulation of smoking in the workplace. In their place, the sponsor of the smoking ban initiative seeks to seize the legislative role for itself, eliminating the existing rights of businesses to designate smoking areas outside of the common areas of their premises shared by the public. Clearly, the smoking ban sponsors have prepared an initiative that makes "a public policy decision of statewide significance and thus performs an essentially legislative function." *Save Our Everglades*, 636 So. 2d at 1340.

Further, like the initiative sponsors in *Save Our Everglades*, the sponsor of the smoking ban initiative has improperly performed the role of yet another branch of state government – the judiciary. In the "Whereas" clauses preceding the proposed Section 20 that the sponsor seeks to add to Article X, the sponsor has chosen to make the following findings of **fact** an integral part of its proposed amendment:

> **FULL TEXT OF PROPOSED 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 . . . .

See Appendix A.

Obviously, the initiative sponsor designed these statements of "fact"to prey upon voters' fears and portray a vote against the proposed amendment as a vote to affirmatively risk one's health. The sponsor no doubt hopes that this tactic will make it easier to convince voters to sign the initiative petition placing the matter on the ballot, as well as to help secure ultimate voter approval of the initiative. But, just as in *Save Our Everglades*, the sponsor of the smoking ban initiative is not free to fashion its remedy – a ban on smoking in the workplace – and then rationalize that remedy with its own findings of "fact." *Save Our Everglades*, 636 So. 2d at 1340-41.

B. CONTRARY TO THE SPONSOR'S CLAIMS, THIS COURT HAS JURISDICTION TO CONSIDER THE FINDINGS OF FACT CONTAINED IN THE PROPOSED SMOKING BAN AMENDMENT.

This Court's holding in *Save Our Everglades* should have made it clear to all potential initiative sponsors that statements of fact in an initiative are to be avoided as they perform a judicial function and violate the single-subject rule. Nonetheless, the smoking ban sponsor apparently made a conscious decision to try to skirt this prohibition by including its findings of fact in the preamble to the amendment, rather

than in the text of the proposed section it wants to add to Article X. By doing so, the smoking ban sponsor argues that it has deprived this Court of any jurisdiction to consider the sponsor's findings of fact. *Sponsor's Initial Brief* at 22. In this instance, however, the initiative sponsor has been too clever for its own good.

First and foremost, the smoking ban sponsor has **not** placed these findings of fact outside its initiative amendment and beyond this Court's review. To the contrary, the sponsor of the smoking ban initiative specifically asks voters to adopt the "Whereas" clauses as an integral part of the proposed constitutional amendment. The sponsor has presented these "Whereas" as an express part of the "FULL TEXT OF PROPOSED AMENDMENT" and as an express part of the proposed constitutional amendment to be "ENACTED BY THE PEOPLE OF FLORIDA." *See* Appendix A.

The sponsor's contention that these "Whereas" clauses are simply "additional materials" supporting the proposed amendment, as authorized by Division of Elections rules, is, therefore, patently false, as well as irrelevant to this Court's analysis. The smoking ban sponsor made the conscious decision to include these findings of fact in its proposed amendment in an effort to scare voters into signing the petition and supporting the measure, and the sponsor now must accept the consequences of its choice. This Court clearly has jurisdiction to consider these statements of fact in holding that the smoking ban initiative violates the single-subject rule.

Second, the sponsor argues that its findings of fact are outside the Court's single-subject review because the statements will not be codified as part of the Florida Constitution. The sponsor, however, cites no legal authority whatsoever for this proposition. Presumably, the sponsor's suggestion is premised upon the fact that "Whereas" clauses in legislation are not generally codified as part of the Florida Statutes. However, this is true because, in legislation, the "Whereas" clauses appear **before** the phrase "Be It Enacted by the Legislature of the State of Florida." *See, e.g., Senate Bill 99* (2002 Regular Session) (attached as Appendix B). Thus, the "Whereas" clauses are not actually part of the legislative enactment that is intended to become part of state law. If the "Whereas" clauses appear **after** the phrase "Be It Enacted by the Legislature of the State of Florida," however, the "Whereas" clauses **are** codified as part of the Florida Statutes. *See* Appendix C (Composite of Excerpts from §440.49, Fla. Stat., and Ch. 93-415, Laws of Fla. (see pp. 68, 171)).

In the smoking ban initiative, the sponsor has similarly presented the "Whereas" clauses **after** the phrase "BE IT ENACTED BY THE PEOPLE OF FLORIDA." *See* Appendix A. Thus, the sponsor has expressly included the "Whereas" clauses as part of the proposal they are asking voters to enact into law as part of the Florida Constitution, and these "Whereas" clauses would, if the initiative is adopted, properly be considered part of the constitutional change enacted by the voters.

Further, assuming *arguendo* that the "Whereas" clauses would not be codified as part of the text of the Florida Constitution, the smoking ban sponsor's argument that they should be ignored as part of this Court's single-subject review seems to rest on the notion that these statements of fact would have no legal effect if adopted by the voters. Of course, this is not the case. If the smoking ban amendment were adopted by the voters, the sponsor and proponents would no doubt argue that both the Legislature and this Court should rely upon these "Whereas" clauses in interpreting and applying the amendment -- that the amendment should be applied in a manner that best achieves a zero tolerance level for second-hand tobacco smoke because any exposure is unsafe and "causes death and disease." Thus, it is disingenuous to argue that the sponsor's statements of "fact" should be beyond this Court's review.

Finally, again assuming *arguendo* that the "Whereas" clauses would not be codified as part of the Florida Constitution, this would not remove these statements of fact from this Court's review. Article XI, Section 3 applies the single-subject rule to the "amendment." The smoking ban sponsor argues that this reference must be strictly construed to apply only to the proposed physical change in the text of the Florida Constitution. Article XI's use of the word "amendment," however, cannot be given so restrictive a reading. For example, Article XI, Section 5 states that "[a] proposed amendment . . . shall be submitted to the electors at the next general

election." If a reference to "amendment" in Article XI could only mean the physical, textual change in the Florida Constitution, then the entirety of the "amendment" would have to submitted to voters on the ballot, not just a summary and title.

Thus, Article XI's use of the word "amendment" must extend beyond the confines of the proposed textual change in the Florida Constitution to all of the matters the initiative sponsor has included as part of its proposed amendment. This Court must consider the entirety of what the initiative sponsor is calling upon voters to enact, not just the textual constitutional change, in determining whether the amendment violates the single-subject rule. To hold otherwise would risk gutting the single-subject rule, allowing sponsors to place whatever findings of fact they choose, no matter how preposterous, in the preamble of their amendment and avoid the important limitations the single-subject rule was intended to place on initiative sponsors.

C. THE "FINDINGS" STATED BY THE SPONSOR IN THE SMOKING BAN INITIATIVE ARE NOT FACTS AND ARE PRIME EXAMPLES OF WHY SUCH STATEMENTS IMPROPERLY USURP A JUDICIAL FUNCTION AND HAVE NO PLACE IN AN INITIATIVE AMENDMENT.

The smoking ban sponsor presents its "Whereas" clauses as settled and irrefutable statements of fact:

> 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;

Indeed, in its Initial Brief, the sponsor characterizes the "Whereas" clauses as "scientifically-substantiated facts" and as "completely supported by the pertinent evidence." *Sponsor's Initial Brief* at 5, 12.

Subsequently, however, the sponsor seeks to soften these categorical statements, describing them as merely the sponsor's "claims" and "harmless statements of the sponsor's intent and motivations." *Sponsor's Initial Brief* at 5 n.3, 24. But the "Whereas" clauses are stated as findings of fact, not "claims" or

"statements of intent." The "Whereas" clauses contain no conditional language that incidental exposure to second-hand tobacco smoke "may be unsafe," "may cause death or disease," or "may increase one's risk of death or disease." Rather, the sponsor has chosen to affirmatively state as fact that **any** exposure to second-hand tobacco is unsafe "and causes death and disease."

The sponsor's desire to retreat from these statements of "fact" is understandable. Contrary to the proponents' claims, second-hand tobacco smoke has not been legally classified as a Group A (known human) carcinogen by the United States Environmental Protection Agency ("EPA"). *See ACS Initial Brief* at 7. A substance is categorized as a Group A human carcinogen "'only when there is sufficient evidence from epidemiologic studies to support a causal association between exposure to the agents and cancer.'" *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 451 n.22 (M.D. N.C. 1998).

In late 1992, EPA did issue a report on the respiratory health effects of breathing second-hand tobacco smoke (also known as environmental tobacco smoke or "ETS"). In this report, EPA purported to classify second-hand tobacco smoke as a Group A carcinogen. *See id.* at 438. But, in 1998, the findings of this report and its classification of second-hand tobacco smoke as a Group A carcinogen were expressly rejected and vacated by a federal district court. *Id.* at 466.

In remarking upon the "glaring deficiencies" in the EPA record used to support its attempted classification, the district court made the following findings regarding the process used by EPA to conclude that second-hand tobacco smoke is a carcinogen:

> EPA determined it was biologically plausible that ETS causes lung cancer. In doing so, EPA recognized problems with its theory, namely the dissimilarities between MS ["mainstream smoke" inhaled by a smoker] and ETS. . . . EPA did not explain much of the criteria and assertions upon which EPA's theory relies. EPA claimed selected epidemiologic studies would affirm its plausibility theory. The studies EPA selected did not include a significant number of studies and data which demonstrated no association between ETS and cancer. EPA did not explain its criteria for study selection, thus leaving itself open to allegations of "cherry picking."
>
> . . .
>
> Using its normal methodology and its selected studies, EPA did not demonstrate a statistically significant association between ETS and lung cancer. This should have caused EPA to reevaluate the inference options used in establishing its plausibility theory. . . . Instead, EPA changed its methodology to find a statistically significant association. EPA claimed, but did not explain how, its theory justified changing the Agency's methodology. With the changed methodology and selected studies, EPA established evidence of a weak statistically significant association between ETS and lung cancer.
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> . . .

> In this case, EPA publicly committed to a conclusion before research had begun; . . . adjusted established procedure and scientific norms to validate the Agency's public conclusion, and aggressively utilized the Act's authority to disseminate findings to establish a de facto regulatory scheme intended to restrict Plaintiffs' products and to influence public opinion. In conducting the ETS Risk Assessment, EPA disregarded information and made findings on selective information; did not disseminate significant epidemiologic information; deviated from its Risk Assessment Guidelines; failed to disclose important findings and reasoning; and left significant questions without answers. EPA's conduct left substantial holes in the administrative record.

Id. at 463-66 (citations and footnotes omitted). The district court's decision is presently on appeal to the Fourth Circuit.

Notably, in the wake of these events, the Occupational Safety and Health Administration recently withdrew all of its proposed rules that would have regulated second-hand tobacco smoke in the workplace. Indoor Air Quality, 66 Fed. Reg. 64,946 (Dec. 17, 2001) (Notice of Withdrawal of Proposed Rules).

At this point, no one knows whether second-hand tobacco smoke will ever be shown to be a human carcinogen. But even this showing would not validate the sponsor's finding of fact in its initiative that <u>any</u> level of exposure is unsafe "and causes death and disease." Numerous chemical compounds have been classified as Group A human carcinogens. The fact is that we are all exposed to dozens of hazardous substances in the indoor air we breathe every single day. They are emitted

from building materials and furniture, from carpeting, from carpet glue, from plastics, from paint, from cleaning solutions, from dry cleaned garments, etc. *See* Appendix D, pp. 1A, 2A, 3A-B, 4A, 5A-B (Composite of EPA, OSHA, and other Internet Sources). Why isn't our exposure to these carcinogens a national public health crisis? Because we are exposed to these substances at levels so low that they cannot be shown to have any harmful effect. Indeed, the only practical way to achieve a zero tolerance level for all known carcinogens in an indoor workplace would be to outlaw indoor workplaces themselves!

The question of whether any particular substance encountered in the environment is "unsafe" hinges on the level of exposure that can be shown to cause harm. For example, assume Substance A can be shown to statistically increase the likelihood of developing cancer at an exposure level of 100. While it can be stated that Substance A is a carcinogen, it cannot be stated that any level of exposure (whether .01, 1 or 10) is unsafe and "causes death and disease." Moreover, if the environment only produces an exposure level of 20, there certainly is no cause to declare a public health emergency.[3] As the EPA itself concedes, "[t]he relative importance of any single source [of indoor air pollution] depends on how much of a

[3] For example, OSHA has set a permissible exposure limit of 1 part per million parts of air for benzene in the workplace during an 8-hour workday, 40-hour workweek. *See* Appendix D, p. 3C.

given pollutant it emits and how hazardous those emissions are." *See* Appendix D, p. 1A.

As an example of this principle -- exposure matters -- consider the thousands of therapeutic drugs people take to cure or control illnesses, preserve health, and extend life. While these drugs are safe if taken as prescribed, many are lethal if taken at higher doses. Take one pill, you live; take 20 pills, you die. The fact that there is some level of exposure that is lethal does not convert your medicine into a poison, nor does it support the premise that your drug should be banned.

Radiation is yet another example. Obviously, there is some level of exposure to radiation that is lethal, whether that be a high rate of exposure over short periods or a moderate rate of exposure accumulating over a much longer period of time. But at low rates of exposure, no harm can be shown to exist. Thus, rather than ban the many products that emit low levels of radiation (televisions, computer monitors, cell phones, etc.), we control the levels of radiation that we are exposed to from these devices.

Finally, consider the water you drink every day. You probably receive an annual report from your water utility documenting the levels of various carcinogens contained in that water, some of which occur naturally. There is no effort to remove 100% of all of these carcinogens from your water. Rather, the water is treated and

monitored to insure that none of these compounds reach a concentration that could be deemed harmful.[4]

As a consequence, **none** of the studies the sponsor refers to in Appendix 1 of its initial brief even begin to support the sweeping factual conclusion in the initiative amendment that any exposure to second-hand tobacco is unsafe "and causes death and disease." This finding of "fact" stated by the sponsor in its initiative amendment has **not** been scientifically demonstrated, despite the claims of the sponsor and proponents in their initial briefs.[5]

Moving briefly to the other statements of fact placed by the sponsor in the smoking ban initiative, is it really true that "exposure to second-hand tobacco smoke frequently occurs in the workplace"? When was the last time you were exposed to unwanted second-hand tobacco smoke in your workplace? The fact is that many employers already ban smoking in their workplaces, whether spurred by the Florida Clean Indoor Air Act or other considerations. Isn't exposure to second-hand tobacco

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[4] For example, EPA has set the maximum permissible level of benzene in drinking water at 0.005 milligrams per liter. *See* Appendix D, p. 3C.

[5] *See* (*Environmental Tobacco Smoke Revisited: The Reliability of the Data Used for Risk Assessment*, Nilsson, R., 21 Risk Analysis 737 (2001)); Appendix F (*Environmental Tobacco Smoke - Is It Really A Carcinogen?*, Armitage, A.K., et al., 25 Med. Sci. Res. 3 (1997)); Appendix G (*Environmental Tobacco Smoke and Lung Cancer Risk*, Congressional Research Service (Nov. 14, 1995)); Appendix H (Composite of Topical Newspaper and Magazine Articles).

smoke much more frequent and more serious at home, where individuals are exposed to second-hand tobacco smoke by smoking family members? Indeed, this type of long-term and concentrated exposure in the home, which is generally poorly ventilated, is predictably the focus of most scientific studies that seek to show some increased health risks associated with second-hand tobacco smoke. In fact, it was precisely these types of studies that formed the basis of the EPA's flawed attempt to classify second-hand tobacco smoke as a Group A carcinogen. *See* Appendix G, p.1.

And what of the sponsor's statement of fact that "ventilation and filtration systems do not remove the cancer-causing substances from second-hand smoke." Of course, this statement is premised upon the faulty notion discussed above that zero is the only acceptable level of second-hand tobacco smoke. Numerous studies have shown how effective ventilation and filtration systems can be in removing second-hand tobacco smoke from indoor air. *See* Appendix I (*In-situ Performance Assessment of Air Cleaning Equipment at a Morale, Welfare, and Recreation Facility at the Naval Training Center, Great Lakes, Illinois,* Invironment (Jan. 27, 2000)). Such systems are frequently marketed to and incorporated into restaurants. *See* Appendix J (Honeywell Brochure). Indeed, if such systems can be shown to satisfactorily remove simulated chemical weapons from indoor air, then why can't they satisfactorily remove second-hand tobacco smoke? See Appendix K ("*Test*

Report for the System Effectiveness Test of Home/Commercial Portable Room Air Cleaners," to U.S. Army, Biological Chemical Command) (appendices omitted)).

Of course, none of the above is submitted to suggest that this Court should rule on the truth or falsity of the initiative sponsor's statements of fact, because this case does not come to the Court clothed with the factual record required to make such determinations. And that is precisely the point. In drafting its proposed amendment, the initiative sponsor has sought to replace fact-finding by judge and jury with fact-finding by majority vote.[6]

The initiative sponsor designed these statements of "fact"to prey upon voters' fears both when deciding whether to sign the initiative petition and when deciding whether to vote for or against the measure. But, just as in *Save Our Everglades*, the sponsor of the smoking ban initiative is not free to fashion its remedy – a ban on smoking in the workplace – and then rationalize that remedy with its own findings of

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[6] The sponsor characterizes its statement that any exposure to second-hand tobacco is unsafe "and causes death and disease" as "scientifically-substantiated facts" and "completely supported by the pertinent evidence." *Sponsor's Initial Brief* at 5, 12. When subjected to judicial scrutiny, however, the irrefutable truth of this statement was certainly not adequately demonstrated based upon the factual record presented to Florida's Eleventh Circuit Court in Miami-Dade County. *Broin v. Philip Morris Companies, Inc.*, No. 91-49738 (11th Cir. Ct. Feb. 5, 1998), *affirmed*, 743 So. 2d 24 (3d DCA 1999), *review dismissed*, 743 So. 2d 14 (Fla. 1999) (Trial Court's "Memorandum Opinion and Order" attached as Appendix C to FRA's Initial Brief); *see FRA's Initial Brief* at 19-20.

"fact." *Save Our Everglades*, 636 So. 2d at 1340-41.

D. OTHER INITIATIVES POINTED TO BY THE SPONSOR AS PRECEDENT FOR ITS "FINDINGS OF FACT" ARE UNAVAILING AS THEY ARE PLAINLY PRESENTED AS STATEMENTS OF INTENT, NOT AS STATEMENTS OF FACT.

Finally, the sponsor points to other initiative amendments that it claims contained findings of fact similar to those placed in the smoking ban initiative, none of which were found to violate the single-subject rule. Ignoring the *Save Our Everglades* case discussed above, the smoking ban sponsor argues that these other initiatives demonstrate that the Court has freely permitted initiative sponsors to place such findings of fact in their proposed amendments.

The sponsor's attempted analogy to each of these other initiatives is faulty and unavailing. None of these cases involve statements even remotely resembling the type of categorical statements of fact that the smoking ban sponsor has chosen to place in its amendment. All of these cited initiatives are constructed as broad statements of policy, not statements of fact. Moreover, in none of the Court's

opinions in these cases is there any discussion of the impact of the highlighted

language on the single-subject analysis.[7]

The following are the statements pulled from other initiatives that the smoking ban sponsor is asking this Court to find indistinguishable from the "Whereas" clauses contained in the smoking ban initiative:

> High-Speed Rail - "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 . . ."
>
> Fish & Wildlife Conservation Commission - "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."
>
> Marine Net Fishing - "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."

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[7] *Advisory Opinion to the Attorney General re Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 368, 369, 371 (Fla. 2000); *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351 (Fla. 1998); *Advisory Opinion to the Attorney General–Limited Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993); *Advisory Opinion to the Attorney General–Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991).

> Limited Political Terms - "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."

Contrast, the above statements of policy and intent with just one of the categorical statements of fact in the smoking ban amendment:

> "[S]econd-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."

There is simply no rational way to equate this statement of fact, with which the smoking ban sponsor has chosen to open its proposed amendment, with the language of the other initiatives cited by the sponsor. The smoking ban sponsor has not stated that there "may be no safe level of exposure" to second hand tobacco smoke, or that they "believe that there is no safe level of exposure," or that second-hand tobacco smoke "may cause death or disease."

Thus, it is clear that the "Whereas" clauses inserted by the sponsor into its proposed amendment, are not, and are not intended to be, "harmless statements of the sponsor's intent and motivations" as it claims. *Sponsor's Initial Brief* at 24. Rather, they are, and are intended to be, statements of "scientifically-substantiated facts," as

the sponsor otherwise admits in its brief. *Sponsor's Initial Brief* at 5.

II. THE BALLOT TITLE AND SUMMARY OF THE SMOKING BAN INITIATIVE VIOLATE SECTION 101.161, FLORIDA STATUTES, BY FAILING TO GIVE FAIR NOTICE TO VOTERS OF THE AMENDMENT'S ACTUAL TERMS AND EFFECT.

Pursuant to Section 101.161, Florida Statutes, only the title and summary of a proposed constitutional amendment actually appear on the election ballot presented to voters. Thus, Section 101.161 requires the sponsor of a proposed amendment to set forth in clear and unambiguous language the chief purpose of the proposal in the amendment's ballot title and summary. *Save Our Everglades*, 636 So. 2d at 1341; *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982). Section 101.161 insures that the ballot title and summary will not mislead the voter as to the amendment's purpose and will give the voter sufficient notice of the contents of the amendment to allow the voter to cast an intelligent and informed vote. *Advisory Opinion to the Attorney General Re People's Property Rights Amendments Providing Compensation For Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1307 (Fla. 1997); *Save Our Everglades*, 636 So. 2d at 1341; *Askew*, 421 So. 2d at 155.

The burden is squarely upon the initiative sponsor to accurately inform the public of the substance and effect of the proposed amendment through the ballot

summary and title. *Wadhams v. Board of County Comm'rs*, 567 So. 2d 414, 417 (Fla. 1990); *Askew*, 421 So. 2d at 156.

As in other states with a similar constitutional initiative process, it must be presumed that voters will derive, and should be able to derive, all of the information they need about the proposed amendment from their inspection of the ballot summary and title immediately before casting their vote. *Christian Civic Action Comm. v. McCuen*, 884 S.W.2d 605, 607 (Ark. 1994). "The law requires that before voting a citizen must be able to learn from the proposed question and explanation what the anticipated results will be." *Askew,* 421 So. 2d at 156 (Boyd, J., concurring).

To avoid misleading the voting public, the drafter must ensure that the summary and title provide the electorate with fair notice of the "true meaning, and ramifications, of an amendment." *Askew*, 421 So. 2d at 156; *Advisory Opinion to the Attorney General–Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020-21 (Fla. 1994). The proponents of the smoking ban initiative argue that the ballot title and summary are not required to disclose <u>every</u> possible effect of a proposed amendment. *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982); *ACP's Initial Brief* at 7; *ACS's Initial Brief* at 10. While this statement is true as far as it goes, it does not go nearly far enough. The voter "'must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than

it appears to be.'" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)). Voters cannot be asked to vote on a proposal that appears to do one thing, but that will actually result "in other consequences that may not be readily apparent or desirable to the voters." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1023 (Kogan, J., concurring). Thus, an initiative sponsor, while not required to disclose every possible effect of a proposed amendment, is required to disclose all material effects of a proposed amendment – those effects that could reasonably be expected to influence a voter's decision on the proposed amendment.

The sponsor of the smoking ban initiative has devised the following ballot title and summary for its initiative petition:

> TITLE: PROTECT PEOPLE FROM THE HEALTH HAZARDS OF SECOND-HAND TOBACCO SMOKE BY PROHIBITING WORKPLACE SMOKING
>
> SUMMARY: 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.

For all of the reasons discussed in FRA's Initial Brief, this ballot title and

summary are misleading, fail to adequately and accurately reflect the contents of the proposed amendment and its ramifications, and are purposefully imbued with political rhetoric designed to scare voters into supporting the initiative. In its Answer Brief, FRA will only discuss those aspects of the title and summary and governing law addressed by the sponsor and proponents in their Initial Briefs.

First, the summary and title are misleading in that they indicate that the proposed amendment is necessary because there currently are no legal mechanisms for protecting the public from second-hand tobacco smoke. The summary and title do not reveal the change that the proposed amendment would make to the current state of the law – smoking is already prohibited in the common areas of all workplaces to which the public has access. §§ 386.203-.205, Fla. Stat. The summary and title do not reveal that the proposed amendment would dramatically expand the prohibitions in current law, banning smoking in restaurants and most bars, and in indoor workplaces where there are no non-smokers and no public access.

In this regard, the smoking ban initiative is much like the series of proposed amendments reviewed by the Court in *Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2000). In this case, the Court held that the title of the initiative was misleading because it implied that there were no existing legal constraints on the government regarding

discrimination and differential treatment. *Id.* at 898; *see Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) (summary misleading in that it gave voters the false impression that the amendment was necessary to prohibit casino gambling in Florida, when most types of casino gambling have long been prohibited by statute); *Advisory Opinion to Attorney General Re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994) (summary misleading because it implied that there were no limitations on taxes in the constitution when several such limitations did exist).

In communicating the true meaning and effect of a proposed amendment, the initiative sponsor must prepare a summary and title that make clear how the proposed amendment will change the existing state of the law. *Wadhams*, 567 So. 2d at 416; *Evans*, 457 So. 2d at 1355; *Askew*, 421 So. 2d at 155-56. In voting upon a constitutional amendment, a voter is "'simply making a choice between retention of the existing law and the substitution of something new.'" *McCuen*, 884 S.W.2d at 608 (quoting *Bradley v. Hall*, 251 S.W.2d 470, 471 (Ark. 1952)). If the ballot title

and summary do not indicate the present state of the law, then they do not adequately inform voters of the choice they are called upon to make. *Id.* at 607-08.

Anticipating this problem with the ballot summary, the smoking ban proponents

argue that the ballot summary need not give the voter fair notice of any change the proposed amendment might make in existing statutory law, but presumably only changes in constitutional law. *ACP Initial Brief* at 7-8; *ACS Initial Brief* at 10. As the cases cited by FRA make clear, however, disclosure in the ballot summary regarding such changes is required in order to give the voter fair notice of the change in law they are being asked to make.

Moreover, the cases cited by the proponents do not support their stated proposition. In the primary cited case, *Advisory Opinion to the Attorney General Re: Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d 972 (Fla. 1997), the Court considered an initiative amendment that would prohibit public funding of political campaigns. Opponents of the measure argued that the ballot title and summary were defective because they failed to reveal that the proposed amendment would eliminate existing statutes authorizing and administering public funding of political campaigns. Without any discussion on this point, the Court disagreed and held that the title and summary met the necessary legal requirements. *Id.* at 976-77.

At least two grounds for this holding, however, are available. The first is that the Court presumed the public was generally aware that there was already provision in law for the public funding of political campaigns. *See Advisory Opinion to the*

Attorney General re Limited Casinos, 641 So. 2d 71, 75 (Fla. 1994) (title regarding "limited casinos" was not defective because "[w]e are confident that the public knows that casino gambling is now prohibited and will understand that the effect of the amendment would be to permit casino gambling"); *accord Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986) (summary stating that amendment "authorizes the state to operate lotteries" was not defective, apparently because public could be presumed to know that the state was not currently authorized to operate a lottery).

Second, even if the average voter was not aware that the statutes then provided for public campaign funding, the ballot summary affirmatively pointed out the present existence of such laws to the voters:

> Title: PROHIBITING PUBLIC FUNDING OF POLITICAL CANDIDATES' CAMPAIGNS
>
> Summary: Prohibits the payment of State funds to political candidates' campaigns for Governor, Lieutenant Governor, Cabinet offices, Florida Senate or Florida House of Representatives. The amendment will be effective upon passage. Upon passage, any funds remaining in public campaign financing accounts will be used to satisfy existing obligations, then treated as general revenue for the State.

Obviously, there would be no funds in "public campaign financing accounts" if a law providing for public campaign financing was not already on the books and functioning. Thus, the voters was informed of their choice – they could continue to

have public campaign financing as it existed in present law or do away with it entirely.

The ballot title and summary in this case do not present voters with notice that a vote for the smoking ban initiative is a vote to repeal the existing laws dealing with second-hand tobacco smoke in the workplace. On the contrary, the ballot title and summary are calculated to leave voters with the impression that no legal protections on this front currently exist. Otherwise, why would the proposed amendment be needed "[t]o protect people from the from the health hazards of second-hand tobacco smoke?"

If there were no legal protections currently in force, and the voters choice was between no legal protection and the smoking ban, then the title and summary might be sufficient. But that is not the choice that voters are being asked to make in this situation. The smoking ban initiative does not "write on a clean slate." As such, voters deserve to be informed in the ballot summary that an affirmative vote on the smoking ban initiative will eliminate existing statutory controls on smoking in the workplace.

In addition, the smoking ban sponsor makes clear in its brief that the initiative will ban smoking in all "food-service establishments." *Sponsor's Initial Brief* at 9. But by simply referring to a ban on smoking in the "workplace," the ballot title and summary do not provide voters with fair notice of this intended effect. In reading the

"workplace" language, the average voter will naturally tend to picture their own office or workplace, and interpret this language to mean that both they and their co-workers will not be able to smoke inside. Even for smokers, the initiative may not seem like much of a change in the status quo, since so many employers now limit employee smoking exclusively to outdoor areas.

In envisioning this typical office setting, however, many voters would not necessarily extend the "workplace" concept to include places of traditional public accommodation, like restaurants and bars, and interpret the ban as extending beyond workers to all other persons entering that "workplace," e.g., customers. Moreover, while the average voter would reasonably interpret a ban on "workplace" smoking as prohibiting smoking while work is being performed in an enclosed space, they would not necessarily understand that the amendment would ban smoking in that place at all other times as well, even after all "work" has ceased.

Because there are very few indoor areas that do not constitute a "workplace" for some person at some point in time, even if this work amounts to nothing more than periodic upkeep and maintenance, the initiative would ban smoking far beyond the office setting that many voters would reasonably imagine. The references to "workplace" smoking in the summary and title are misleading and do not advise voters that the smoking ban initiative would convert virtually all enclosed spaces they

may visit, including all restaurants and most bars, into exclusively non-smoking establishments.

Further, the initiative sponsor suggests that "[n]onsmokers will be protected" by the initiative's ban on smoking in enclosed indoor workplaces. *Sponsor's Initial Brief* at 6. But this points up yet another reason why the ballot summary and title are misleading – the smoking ban amendment would prohibit smoking even when no nonsmoker could possibly be exposed to second-hand tobacco smoke. The amendment itself makes clear that it would ban smoking even when there are no nonsmokers in the workplace and there is no public access to the workplace.

Finally, the summary and title are clearly designed to provoke a sense of voter alarm that their health is in imminent peril, that there are no legal protections in place to control their exposure to second-hand smoke, and that a vote against the amendment would be a vote to put their health at grave risk. The opening phrase of both the ballot summary and title ("PROTECT PEOPLE FROM THE HEALTH HAZARDS OF SECOND-HAND TOBACCO SMOKE") assume the incontrovertible truth of the statements of "fact" contained in the amendment's "Whereas" clauses, announcing that a total ban on workplace smoking is necessary because:

> (a) Any exposure to second-hand tobacco smoke is dangerous and causes death and disease; and

(b) No technology currently exists or could be created that would alleviate this risk.

The Court has expressly warned initiative sponsors to avoid inserting into a ballot summary and title political rhetoric and emotional language, confining the summary and title to an impartial, accurate, and informative synopsis of the amendment. *Save Our Everglades*, 636 So. 2d at 1341-21. For example, in examining the initiative title "SAVE OUR EVERGLADES," the Court found that the title improperly implied "that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be 'saved' via the proposed amendment." *Id.* at 1341. The Court held that the summary more closely resembled "political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *Id.* at 1342.

> 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.

Evans, 457 So. 2d at 1355. The ballot summary and title devised by the sponsor of the smoking ban initiative patently violate the Court's admonitions.

Recognizing the dangers inherent in allowing such electioneering to take place

in the ballot title and summary, many states with initiative processes similar to Florida's also prohibit title or summary language geared toward influencing voters rather than informing them of the amendment's content and effects. *See, e.g., Mazzonne v. Attorney General*, 736 N.E.2d 358, 372 (Mass. 2000) (ballot summary "must not be partisan, colored, argumentative, or in any way one sided); *State v. Celebrezze*, 426 N.E. 2d 493, 495 (Ohio 1981) ("use of language which is 'in the nature of persuasive argument in favor of or against the issue' is prohibited"); *Kenney v. Paulus*, 604 P.2d 405, 406 (Or. 1979) (ballot title must be "impartial"); *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281, 1298 (Cal. 1978) (ballot title and summary must be "impartial, and not argumentative or likely to create prejudice for or against the measure"); *Johnson v. Hall*, 316 S.W.2d 194, 196 (Ark. 1958) (ballot title and summary " must contain no partisan coloring).

CONCLUSION

The sponsor of the smoking ban initiative, while no doubt convinced of the merits of its cause, must comply with same constitutional and statutory rules of restraint as any other interest group proposing an amendment by initiative to the Florida Constitution. Despite the Court's clear dictates in this regard, the smoking ban sponsor has failed to do so, unable to avoid the temptation to overreach in

preparing its proposed amendment, ballot title, and summary. As a consequence of the sponsor's decisions to step beyond these legal bounds, the smoking ban amendment may not be placed on the ballot.

Respectfully submitted on this 18th day of December, 2001.

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I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced and complies with this Court's requirements.

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INDEX TO APPENDIX