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

INITIAL BRIEF OF OPPONENT THE FLORIDA RESTAURANT ASSOCIATION, INC.

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STATEMENT OF THE CASE AND FACTS

Pursuant to Article XI, Section 3 of the Florida Constitution, Smoke-Free for Health, Inc. ("Smoke-Free"), a political committee registered with the State of Florida under Section 106.03, Florida Statutes,[1] has proposed an initiative amendment to the Florida Constitution for placement on the November 2002 general election ballot. Throughout this brief, Smoke-Free will be referred to as the "sponsor" of the initiative petition.

In sum, the proposed constitutional amendment purports to ban smoking in all "enclosed indoor workplaces," with very limited exceptions. For ease of reference, the full text of the proposed constitutional amendment, ballot summary, and title are attached hereto as Appendix A. A copy of the initiative petition itself is attached hereto as Appendix B. Throughout the brief, this initiative will be referred to as "the smoking ban initiative" or "the smoking ban."

Having received certification from the Secretary of State that the sponsor has collected the requisite number of petition signatures, the Attorney General has petitioned this Court for an advisory opinion as to whether the initiative petition complies with Article XI, Section 3 of the Florida Constitution and Section 101.161,

[1] All references herein to the Florida Statutes are to the Official Florida Statutes (2001), unless otherwise indicated.

Florida Statutes. *See* Art. IV, § 10, Fla. Const.; §§ 15.21, 16.061, Fla. Stat. This Court entered an order on November 8, 2001, inviting interested parties to file briefs in the case.

The Florida Restaurant Association, Inc. ("FRA"), is a non-profit, state-wide trade association representing the interests of over 9,500 restauranteurs, and more generally representing the interests of the approximately 35,000 restauranteurs operating public food service establishments throughout the State of Florida. Currently, restauranteurs are free to prohibit smoking in their establishments, or, if they choose, they may designate a smoking area to accommodate their smoking customers. By law, however, no more than 35% of the restaurant's seating capacity may be located in a designated smoking area. § 386.205(4)(b), Fla. Stat. Because the smoking ban initiative would eliminate restauranteurs' existing right to provide reasonable accommodation for their patrons who smoke, FRA is participating in this proceeding as an interested party.

SUMMARY OF ARGUMENT

Article XI, Section 3 of the Florida Constitution directs that an amendment proposed by initiative petition "shall embrace but one subject and matter directly connected therewith." This limitation applies only to amendments by initiative petition, because, unlike the other procedures for amending the constitution, there is no opportunity for public input into the development of an initiative petition. The interest group sponsoring the initiative controls this process.

This Court has applied the single-subject requirement to prohibit initiative petitions that: (a) perform more than one governmental function; (b) create unanticipated collateral impacts that would affect a voter's decision on the amendment; (c) pose multiple questions to a voter instead of single question, some of which the voter could be expected to support and others the voter could be expected to oppose; or (d) affect multiple sections of the constitution. The smoking ban initiative fails all of these tests.

First, the smoking ban initiative improperly performs the functions of both the state legislature and the judiciary. The smoking ban initiative seeks to nullify comprehensive state legislation that already protects the public from second-hand tobacco smoke. §§ 386.203-.205, Fla. Stat. In addition, the initiative sponsor has included in its amendment several highly controversial "findings of fact," warning

voters that a total ban on workplace smoking is necessary 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 risk. By making these findings, the sponsor has used its initiative to impermissibly perform a function properly reserved to the judiciary.

Second, the smoking ban initiative engages in "logrolling" by posing several discrete questions to voters and creating numerous collateral effects that voters would not readily anticipate, each of which could be expected to materially affect a voter's decision to support or oppose the initiative. Such an initiative unfairly requires voters to vote for part of an amendment they oppose in order to secure passage of another part they support. Many voters would probably support the notion of prohibiting workers in a typical office setting from smoking in that enclosed space. However, they would <u>not</u> necessarily choose to extend the "workplace" concept to include places of traditional public accommodation, like restaurants and bars, <u>and</u> to extend the ban beyond <u>workers</u> to all other persons entering that "workplace," e.g., customers. Yet, the smoking ban initiative forces the voter into an "all-or-nothing" vote on all of these propositions and effects.

Further, the smoking ban would apply: (a) regardless of whether the public has access to the "workplace"; (b) regardless of whether the workplace is occupied by

only smokers; (c) not only when work is being performed in the workplace, but at all other times as well; and (d) to motor vehicles and private residences in which any "work" is performed. Again, the smoking ban initiative impermissibly presents a voter with many discrete questions and collateral effects on which the voter could reasonably be expected to respond differently.

Finally, the smoking ban initiative substantially affects multiple sections of the Florida Constitution, including the right to privacy, the right to peaceably assemble, and, in attempting to establish its "findings of fact" by majority vote, the right of access to courts. As such, the proposed amendment violates the single-subject rule.

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 that smoking areas in restaurants are currently restricted to 35% of the seating capacity. Instead, the title and summary suggest that there are presently 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 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. Nor do the title and summary advise voters that their vehicles and homes may be converted into smoke-free zones if any work is performed in those "workplaces," as defined in the actual text of the amendment.

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 the proposed amendment.

No matter how convinced they are of the merits of their cause, interest groups sponsoring initiatives must comply with the single-subject rule and the statutory title and summary requirements. Because the sponsor of the smoking ban initiative has chosen to ignore these requirements in pursuing its initiative, this Court has no choice but to prevent the placement of the smoking ban initiative on the ballot.

ARGUMENT

As the organic law of the State of Florida, establishing the individual rights of Floridians and the structure and powers of their government, the "proposal of amendments to the [Florida] Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation." *Crawford v. Gilchrist*, 64 Fla. 41, 54, 59 So. 963, 968 (1912).

The Florida Constitution provides five methods by which proposed constitutional amendments or revisions may be put before Florida voters for their consideration. In four of these five methods, proposed amendments or revisions are drafted, debated, and refined through a legislative or quasi-legislative process in which the interests of Florida's citizens are represented by elected officials or their designees.[2] Through public hearing and comment procedures, these four processes also provide an opportunity for citizens to directly participate in the shaping of a constitutional amendment or revision.

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

In the fifth method of constitutional amendment, however, the public has no representation or input into the preparation of the proposed amendment. In this ballot initiative process, an interest group dedicated to a particular cause develops its own idea for a constitutional amendment, organizes and raises funds, drafts the amendment and initiative petition, and seeks to collect a sufficient number of voter signatures to place the amendment on the ballot.

Because the initiative process is unique in its lack of public representation in the drafting of the amendment, and because the formulation of the amendment 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 or revision "shall embrace but one subject and matter directly connected therewith."[3] Art. XI, § 3, Fla. Const. (hereinafter "the single-subject rule").

The only other rule of restraint an initiative sponsor must comply with is statutory. While Article XI, Section 5 of the Florida Constitution states that "[a] proposed amendment . . . shall be submitted to the electors at the next general election," the actual text of the amendment is not presented to voters on the ballot.

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[3] All emphasis appearing in quoted material in this brief is supplied unless otherwise noted.

Rather, section 101.161(1), Florida Statutes, requires the interest group sponsoring the amendment to prepare a summary and title that will be placed on the ballot instead of the actual text of the amendment.

To insure that voters are able to cast an intelligent and informed vote on a proposed amendment, section 101.161(1) requires the group sponsoring the initiative to prepare a ballot summary that contains the "substance [of the amendment] . . . in clear and unambiguous language" and that serves as an "explanatory statement . . . of the chief purpose of the measure." The title consists of a caption "by which the measure is commonly referred to or spoken of." *Id.*

The framers of Florida's 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). Nonetheless, this Court will not prevent a proposed amendment from reaching the ballot unless the interest group sponsoring an initiative has crafted a proposal that is "clearly and conclusively defective." *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982).

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 these long-established constitutional and statutory

requirements. Of the 39 initiative petitions that this Court has reviewed, the Court has been forced to conclude that just over half (20) were "clearly and conclusively defective."[4]

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

Recognizing that the initiative procedure is the only method of amending the Florida Constitution in which the people of Florida are not represented in the process of drafting a proposed amendment, the authors of Article XI imposed the single-subject rule only on this particular amendment procedure. *Fine*, 448 So. 2d at 988. The initiative process was placed in the Florida Constitution "to allow the citizens . . . to propose and vote on singular changes in the functions of our governmental structure." *Id.* at 988.

This constitutional safeguard is primarily designed to eliminate the danger that the drafter of an initiative amendment may seek passage of an unpopular measure by

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[4] One initiative petition regarding tax limitations was reviewed twice by the Court – both before and after the adoption of a separate initiative removing revenue limitations from the single-subject rule. The cited figures count this initiative petition only once, reflecting that the Court ultimately held that the initiative complied with the remaining ballot summary and title requirements. *See Advisory Opinion to Attorney General Re Tax Limitation*, 673 So. 2d 864 (Fla. 1996); *Advisory Opinion to Attorney General Re Tax Limitation*, 644 So. 2d 486 (Fla. 1994).

including it with a more popular one in the same proposed amendment. *Id.*; *In re Advisory Opinion to the Attorney General–Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1019-20 (Fla. 1994); *Evans*, 457 So. 2d at 1354. Since the voter is faced with an "all-or-nothing" decision in the voting booth, this tactic, commonly referred to as "logrolling," forces the voter into a situation where the voter must vote for part of an amendment that the voter finds repugnant in order to secure passage of another part of the amendment that the voter supports. *Fine*, 448 So. 2d at 988; *In re: Advisory Opinion to the Attorney General -- Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994); *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20. To protect voters against such ploys in amending the Florida Constitution, this Court requires strict compliance with the single-subject rule. *Fine*, 448 So. 2d at 989.

In addition to the dangers of logrolling, an initiative proposal is not subject to the mechanisms of debate and refinement that are all integral parts of the other constitutional amendment procedures. *Evans*, 457 So. 2d at 1357 (Overton, J., concurring); *Fine*, 448 So. 2d at 988-89. Further, the participants in these other "filtering" mechanisms who are responsible for the drafting of proposed amendments are typically individuals with considerable experience in legal and governmental affairs. *See* Art. XI, §§ 1, 2, 4, 6, Fla. Const. The refining processes inherent in these other constitutional amendment procedures help insure that a proposed amendment

is precisely crafted, so as to avoid unintended collateral effects on other aspects of Florida government and law, and to harmonize any proposed amendment both within the context of the rest of the Florida Constitution and within the broader context of our federal system. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022 (Kogan, J., concurring).

Because such public "filtering" mechanisms do not exist in the initiative process, the single-subject rule seeks to fill this void by requiring an initiative sponsor to direct and focus the electorate's attention on "a change regarding one specific subject of government." *Fine*, 448 So. 2d at 988. Absent such a requirement, this Court, rather than the drafters of a proposed amendment, would be left to deal with the unanticipated collateral effects of an adopted amendment without the traditional aids to judicial construction (legislative history, etc.) necessary for this purpose. *Fine*, 448 So. 2d at 989. For this reason as well, the Court requires strict compliance with the single-subject rule. *Id.*

On the drafters of an initiative rest "[t]he decisions which determine compliance with the requirements" of the single-subject rule. *Evans*, 457 So. 2d at 1360 (Ehrlich, J., concurring). "If drafters of an initiative petition . . . choose to violate the one-subject requirement, this Court has no alternative but to strike it from the ballot." *Id.* at 1359 (Ehrlich, J., concurring).

In determining whether the sponsor of an initiative has violated 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 below, the smoking ban initiative violates all four of these tests, and must be rejected for its failure to satisfy the single-subject rule.

A. THE SMOKING BAN INITIATIVE IMPROPERLY PERFORMS MULTIPLE FUNCTIONS OF STATE GOVERNMENT.

First, the Court must determine whether the amendment performs or substantially affects multiple, distinct functions of government, as opposed to only a single function. *Save Our Everglades*, 636 So. 2d at 1339-41. "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. In 1985, the Legislature enacted the "Florida Clean Indoor Air Act." §§ 386.201-.209, Fla. Stat. (Supp. 1986). This Act prohibited smoking in any "public place" except in designated smoking areas, punishable by a fine of up to $100 for a first violation and $500 for each subsequent violation. *Id.* § 386.204, .208. The Act included a long list of such "public places" consisting of "enclosed, indoor areas used by the general public," including: government buildings, public transportation, hospitals, nursing homes, educational facilities, museums, theaters, auditoriums, arenas, recreational facilities, restaurants that seat more than 50 people, retail stores (unless their primary business was the sale of tobacco products), grocery stores, and all other "<u>places of employment</u>." *Id.* § 386.203(1).

The Act also gave an employer or other person in charge of a public place the option to designate some part of the workplace as a smoking area, within certain statutory limitations. § 386.205, Fla. Stat. (1986). For example, a smoking area could not contain "common facilities" that were expected to be used by the public. *Id.* § 386.205(5); § 386.203(6) (defining "common facilities" as "restrooms and water fountain areas"). No more than one-half of the total square footage "in any public

place within a single enclosed indoor area used for a common purpose" could be designated as a smoking area. *Id.* § 386.205(4). Subsection (3) stated in part:

> In a workplace where there are smokers and nonsmokers, employers shall develop, implement, and post a policy regarding designation of smoking and nonsmoking areas. Such a policy shall take into consideration the proportion of smokers and nonsmokers. Employers who make reasonable efforts to develop, implement, and post such a policy shall be deemed in compliance. An entire area may be designated as a smoking area if all workers routinely assigned to work in that area at the same time agree.

The original 1985 law allowed restauranteurs to designate smoking areas "in accordance with customer demand as determined by the management." § 386.205(4), Fla. Stat. (1986).

In 1992, the Legislature amended the law to add health care facilities, day care centers, and common areas of retirement homes and condominiums to the list of "public places" in which smoking is generally prohibited. § 386.203(1)(t)-(v), Fla. Stat. (1993). The law was also amended to reflect that a smoking area may not be designated in a "day care center, school or other education facility, or <u>any common area</u>." *Id.* § 386.205(2)(a); § 386.203(6) (abandoning "common facilities" for much broader category of "common areas" – "any hallway, corridor, lobby, aisle, water fountain area, restroom, stairwell, entryway, or conference room in any public place"). Starting on October 1, 1992, restaurants with seating for more than 50 persons were

no longer free to establish smoking areas in accordance with customer demand. Rather, restaurants were expressly required to set aside at least 35% of their dining room seating for non-smokers. *Id.* § 386.205(4) (no more than 65% of seating may be in a designated smoking area).

In 2000, the Legislature further tightened the regulation of smoking in restaurants. Chapter 2000-185, Laws of Fla. (2000). Effective October 1, 2000, the percentage of seating reserved for non-smokers was increased from 35 percent to 50 percent. § 386.205(4)(b)1, Fla. Stat. (no more than 50% of seating may be in a designated smoking area). In addition, all restaurants were required to comply with the Act, including those smaller restaurants seating less than 50 persons that were previously exempt from the law. Finally, effective less than two months ago (October 1, 2001), the percentage of seating for non-smokers was increased yet again to 65 percent. § 386.205(4)(b)2, Fla. Stat. (no more than 35% of seating may be in a designated smoking area).

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 body of the amendment, the sponsor of the smoking ban initiative has made the following findings of **fact** as the pretext for a total ban on "workplace" smoking:

> 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 . . . .

Of course, while stated as irrefutable facts, these are not matters upon which all reasonable people agree. Many studies and expert witnesses could be produced to counter the sponsor's bald assertions that "there is no safe level of exposure" to second-hand tobacco smoke, and that any exposure "causes death and disease." Indeed, if it were true that even a brief, incidental exposure to second-hand smoke is

unsafe and "causes death and disease," second-hand tobacco smoke would be as toxic as many chemical and biological weapons.

Notably, the health effects of second-hand tobacco smoke were recently the subject of class-action litigation in 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). The first stage of this class action lawsuit focused on the trial of common issues, including "generic causation"– whether second-hand tobacco smoke generally can cause one or more of the medical conditions alleged by the plaintiffs. *Id.* at 6. Plaintiffs called 52 witnesses in this first stage of the trial and rested their case, with the defendants calling 14 witnesses before a settlement was announced to the trial court. *Id.* at 7.

In determining whether to approve the settlement, the trial court considered the class plaintiffs' likelihood of success at trial. In doing so, the trial court observed that "[t]here were substantial risks and weaknesses in the Plaintiffs' case." *Id.* at 16. Among these risks, the trial court held that "[t]he high likelihood was that the jury would not find causation" as to all of the medical conditions alleged by the plaintiffs.

Id. at 17. "Taken as a whole, the outcome of this case, in this Court's opinion was far less than 50/50." *Id.* at 20.

The settlement preserved the right of persons claiming injury from exposure to second-hand tobacco smoke to file individual suits seeking recovery for their alleged injuries. *Id.* at 14. In the aftermath of the class action settlement, there are over 3,000 individual lawsuits pending in the trial courts of the State of Florida alleging injuries from second-hand tobacco smoke, primarily in Miami-Dade County. In the only case to proceed to trial to date, the jury found for the defendants. *Fontana v. Philip Morris, Inc.*, No. 00-01731 (Fla. 11th Circ. Ct.) (Verdict Apr. 5, 2001) (Verdict attached as Appendix D). In fact, counsel has been unable to find any reported case anywhere in the country in which a plaintiff has successfully established a claim of injury caused by second-hand tobacco smoke.

With regard to technological means of eliminating alleged health risks associated with second-hand tobacco smoke, numerous ventilation and filtration systems are on the market specifically targeted to removing second-hand tobacco smoke from the air. *See* Appendix E (composite of several trade publications).

Of course, this Court is not in a position to 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.

Obviously, the initiative sponsor designed these statements of "fact"to prey upon voters' fears and to portray a vote against the proposed amendment as a vote to affirmatively risk one's health. 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.

If the single-subject rule did not prohibit initiative sponsors from including such findings of fact in their proposed amendments, the implications would be alarming. Imagine the impact of proposals prefaced by the following "findings of fact:"

> Title: Ban on Coal-Fired Power Plants in the State of Florida
> WHEREAS, global warming will result in the melting of the polar ice caps, flooding all coastal areas of the State of Florida within 50 years; WHEREAS, coal-fired power plants are the primary source of pollution causing global warming; NOW, THEREFORE . . .
>
> Title: Suspension of Due Process for Foreign Citizens
> WHEREAS, citizens of foreign countries have infiltrated our society at every level and are plotting acts of terrorism that will kill or injure Florida citizens; WHEREAS, the prosecution of foreign citizens for acts of terrorism is impossible if they are afforded the same due process rights as American citizens; NOW, THEREFORE . . .
> Title: Selection and Retention of Circuit and County Judges

> WHEREAS, the current necessity for circuit and county judges to stand for popular election results in them soliciting and accepting campaign contributions that amount to bribes; WHEREAS, such contributions lead judges to issue rulings for their campaign contributors and against those who do not contribute to their campaigns; NOW, THEREFORE . . .

No matter how convinced they are of the merits of their cause, interest groups sponsoring initiatives are not free to perform the functions of multiple branches of government in placing a proposed constitutional amendment before the voters of this state. The sponsor of the smoking ban initiative has clearly done so in this case, performing the functions of both the legislative and judicial branches of state government.[5] Because the sponsor has chosen to ignore the dictates of the single-

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[5] In his November 7 request to the Court, the Attorney General suggests that these "factual conclusions . . . designed to appeal to the emotions of the voter" are somehow less offensive that those made in the *Save Our Everglades* initiative, because the factual conclusions regarding second-hand tobacco smoke are contained in several "Whereas" clauses that would not be codified as part of the actual constitutional amendment. *See Attorney General's Letter*, p. 7. This unsupported suggestion is incorrect as a matter of law. The sponsor of the smoking ban initiative specifically asks voters to adopt the "Whereas" clauses as an integral part of the proposed constitutional amendment. *See* Appendix B ("FULL TEXT OF PROPOSED AMENDMENT: BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT: WHEREAS, second-hand tobacco smoke is a known human carcinogen . . . ."). Presumably, the Attorney General's suggestion is premised upon the fact that "Whereas" clauses in legislation are not 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 F). By contrast, in the smoking ban initiative, the sponsor has presented

subject rule in pursuing its initiative, this Court has no choice but to prevent the placement of the smoking ban initiative on the ballot.

B. THE SMOKING BAN INITIATIVE WILL HAVE MANY UNANTICIPATED COLLATERAL EFFECTS.

Second, the Court must examine whether the breadth of a proposed amendment will result in unanticipated collateral effects that would materially impact a voter's decision on whether to vote for or against the amendment. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022-23 (Kogan, J., concurring); *Fine*, 448 So. 2d at 995 (McDonald, J., concurring). The existence of such hidden effects amounts to de facto logrolling, "because the electorate cannot know what it is voting on." *Fine*, 448 So. 2d at 995 (McDonald, J., concurring). The drafters of a proposed amendment cannot ask the voters to vote on a proposal that appears to do only one thing, but which also results "in other consequences that may not be readily apparent or desirable to the voters." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1023 (Kogan, J., concurring).

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the "Whereas" clauses **after** the phrase "BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT." 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.

The smoking ban initiative violates the single-subject rule because it creates a variety of collateral effects that are not readily apparent to voters and would materially impact a voter's decision on whether to support or oppose the proposed amendment. As a general proposition, many voters would probably support the idea of prohibiting a worker from smoking in the workplace in situations where it would expose co-workers to unwanted second-hand tobacco smoke. Thus, their initial reaction to the proposed amendment probably would be positive. In considering their own office or workplace, even smokers might not consider the smoking ban initiative to be much of a change to the status quo, since so many buildings now have limited employee smoking exclusively to outdoor areas.

But the initial reaction of many of these same voters would change if they understood the actual scope and reach of the smoking ban initiative. For example, subsection (c) of the proposed amendment defines "enclosed indoor workplace" as

> 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.

Numerous material collateral effects that voters would not readily anticipate flow from this definition, any one of which could be expected to materially affect their vote on the initiative.

First, while the initiative refers to a ban on "workplace" smoking, the far less obvious impact to voters of the "workplace" definition is that smoking will be prohibited in virtually every indoor area they may visit, including all restaurants and most bars, because: (a) the ban applies not just to workers in the "workplace" but to every person entering that space, including members of the public; and (b) the ban on smoking in the "workplace" applies not just while work is being performed, but at all other times as well. 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 smoking ban initiative will eliminate smoking in virtually all enclosed spaces a voter may visit.

Second, the smoking ban initiative does not even confine itself to situations in which co-workers or members of the public might be exposed to unwanted second-hand tobacco smoke. Instead, the above definition reflects that the smoking ban would apply even where there is only one person working in an enclosed place, and regardless of whether or not the public has any access to that enclosed place. Thus, a sole proprietor working **alone** in his place of business would be prohibited from

smoking, even though this activity would not offend any other person. Further, the amendment would prohibit workplace smoking even when the workplace is staffed exclusively by smokers.

Third, the smoking ban would apply to "any place where one . . . engages in work . . . which . . . is predominantly or totally bounded on all sides and above by physical barriers" – not just to fixed places like an office building or retail store. As such, the smoking ban would apply to automobiles and trucks in commercial use or in which any work is performed, even if there is only one person in the vehicle. Any one of these collateral effects would be sufficient grounds for many voters to pause and reconsider their initially favorable reaction to the amendment.

Moreover, "work" is defined in the initiative as "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." As such, the smoking ban would be triggered if you perform any work-related or volunteer activity, such as responding to telephone calls, in an enclosed place (including your personal automobile). Once triggered, this ban would apply not only during the time you are engaged in that "work," but at all other times as well.

Next, consider the impact of the smoking ban initiative on private residences. While subsection (b) of the initiative provides that "tobacco smoking may be permitted in private residences whenever they are not being used commercially to provide child care, adult care, or health care" the initiative contains no definition of the term "private residence." By contrast, the amendment is quite clear that smoking is prohibited in "any place where one or more persons" engage in "employment or employment-type service for or at the request of another." So what about the persons you employ to perform work inside your home, e.g., a painter, carpet cleaner, housekeeper, babysitter, nanny, appliance repair person, etc.? To those persons, your house is a place in which they engage in "employment or employment-type service for or at the request of another." As such, their work could convert your home into an "enclosed indoor workplace" in which smoking is prohibited.

The smoking ban initiative creates numerous collateral effects that are not readily apparent to voters, any one of which could reasonably cause many voters who might otherwise support the amendment to vote against it. As such, the smoking ban initiative violates the single-subject rule and must be rejected.

C. THE SMOKING BAN INITIATIVE IMPROPERLY ASKS VOTERS MULTIPLE QUESTIONS.

Third, the Court must determine whether the proposed initiative actually asks a voter multiple questions, instead of just one. If so, the initiative sponsor improperly engages in "logrolling," forcing the voter to cast an all-or-nothing vote with regard to the amendment even though it asks the voter distinct questions. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20 (amendment violated single-subject rule as it asked voters to vote "yes" or "no" on ten different classifications); *Fine*, 448 So. 2d at 990-92 (amendment violated single-subject rule as it asked voters to impose limitations on three different revenue sources -- taxes, user fees, and revenue bonds). The single-subject rule prevents voters from being trapped in such a predicament. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020.

The inquiry for single-subject purposes is not simply whether the initiative may be divided and phrased as multiple questions, but whether those multiple questions are sufficiently distinct from each other, in light of the aim of the amendment, that a voter could reasonably be expected to reach different conclusions from one question to another. *Advisory Opinion to the Attorney General Re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998); *Save Our Everglades*, 636 So. 2d at 1341.

For example, in *Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998), the operative language of the proposed amendment stated:

> The right of every natural person to the free, full and absolute choice in the selection of health care providers, licensed in accordance with state law, shall not be denied or limited by law or contract.

The Court held that this proposed amendment violated the single-subject rule because it forced voters to take a position on two distinct questions which they could reasonably be expected to answer differently: (a) whether laws imposing limitations on provider choice should be prohibited; and (b) whether private parties should be prohibited from entering into contracts that would limit provider choice. *Id.* at 566 ("The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the health care provider issue in an 'all or nothing' manner.").

Similarly, in *Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994), the Court held that the proposed amendment, which would have established a trust fund for Everglades clean-up and funded the trust through a penny per pound tax on raw sugar, impermissibly asked voters multiple questions on which they could reasonably be expected to reach different conclusions:

> There is no "oneness of purpose," but rather a duality of purposes. One objective--to restore the Everglades--is politically fashionable, while the other--to compel the sugar industry to fund the restoration--is more problematic.

> Many voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing. The danger is that our organic law might be amended to compel the sugar industry to pay for the cleanup singlehandedly even though a majority of voters do not think this wise or fair.

Id. at 1341. No "interest group [should] be given the power to 'sweeten the pot' by obscuring a divisive issue behind separate matters about which there is widespread agreement." *Advisory Opinion to the Attorney General–Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 232 (Fla. 1991) (Kogan, J., concurring in part and dissenting in part).

Instead of one question, the sponsor of the smoking ban initiative has prepared an amendment that presents voters with a myriad of distinct questions, each of which the voter could be expected to answer differently, for example:

(1) Should smoking be prohibited both for workers in an office setting and for members of the public in places of traditional public accommodation like restaurants and bars?

(2) Should smoking be prohibited in virtually all enclosed spaces, even when such smoking would not offend any other person, e.g., when only one person or only smokers are present?

(3) Should smoking be prohibited both in fixed workplaces, like office buildings and retail stores, and in other "enclosed indoor workplaces," like an automobile or truck?

(4) Should smoking be prohibited in a "workplace" at all times, even when no work is being performed there?

(5) Should smoking be prohibited in an "enclosed indoor workplace" even when everyone in that space is a volunteer "working" for free?

(6) Should smoking be prohibited in all enclosed indoor workplaces even when the business accommodates non-smokers by installing ventilation equipment to remove second-hand tobacco smoke from the air?

(7) Should smoking be permitted in retail tobacco shops, designated smoking guest rooms in hotels, and stand-alone bars, because the public and workers in those places have accepted the risk that they will be exposed to second-hand tobacco smoke?

(8) Should smoking be prohibited in all other enclosed workplaces, because there are no other workplaces, e.g., restaurants, in which workers or the public can be said to have accepted the risk that they will be exposed to some second-hand tobacco smoke?

(9) Should any work performed in your home by others convert it into a "workplace" in which smoking is prohibited?

(10) If volunteer "work" otherwise converts an indoor space into an area in which smoking is banned, should smoking be prohibited in private residences used to furnish child care, adult care, or health care only when its for compensation?

The sponsor of the smoking ban initiative improperly seeks to camouflage these more complex and divisive questions behind the more politically "saleable" concept of reducing unwanted exposure to second-hand tobacco smoke. All of these questions are sufficiently distinct that a voter could reasonably be expected to reach different conclusions from one question to another. As such, the smoking ban

initiative presents voters with not a single question, but many questions, in violation of the single-subject rule.

D. THE SMOKING BAN INITIATIVE SUBSTANTIALLY AFFECTS MULTIPLE SECTIONS OF THE CONSTITUTION.

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

The smoking ban initiative, which proposes to add a Section 20 to Article X, would affect at least five other sections of the Florida Constitution. First, unlike the U.S. Constitution, the Florida Constitution contains an express right of privacy:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . .

Art. I, § 23, Fla. Const. The smoking ban initiative clearly does violence to this section of the Florida Constitution in that it would ban smoking even in workplaces not accessible to the public that contain only one person, whose smoking obviously could not offend any one else. In addition, the initiative would ban smoking in workplaces comprised exclusively of smokers, impacting not only the privacy rights of those person but their right to peaceably assemble, as set forth in Article I, Section 5. The initiative amendment would also diminish the property rights of business owners preserved in Article I, Section 2, who are presently able to set the smoking policy for their place of business, and the right of employees to collectively bargain guaranteed in Article I, Section 6.

Finally, the initiative substantially impacts the right of access to courts preserved in Article I, Section 21. The sponsor seeks to establish the following highly controversial "facts" by majority vote as part of its initiative: (a) any exposure to second-hand tobacco is unsafe and causes death and disease; and (b) no technology exists that would eliminate this risk. Voters will be presented with these factual conclusions: (a) in pre-election media coverage and the required newspaper publications of the amendment;[6] (b) as the pretext for the ballot title and summary ("To protect people from the health hazards of second-hand tobacco smoke") that they

[6] *See* Article XI, § 5, Fla. Const.

will see in the voting booth; (c) in post-election media coverage; and (d) if adopted, as part of the Florida Constitution itself and as the pretext for the opening phrase of the textual amendment ("As a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke . . ."). Faced with these representations, voters cannot help but interpret the initiative as conclusively establishing these facts with the imprimatur of the government of the State of Florida. These "findings of fact" impermissibly create a *de jure* or *de facto* irrebuttable presumption, influencing the possible jury pool for pending and future judicial proceedings involving these issues.

II. THE BALLOT TITLE AND SUMMARY OF THE SMOKING BAN INITIATIVE VIOLATE SECTION 101.161, FLORIDA STATUTES.

A. THE LEGAL REQUIREMENTS THAT AN INITIATIVE SPONSOR MUST SATISFY.

Pursuant to Section 101.161, Florida Statutes, only the ballot 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*, 421 So. 2d at 154-55. 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; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020-21. The voter "'must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.'" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)). Voters cannot be asked to vote on a proposal that appears to do one thing, but that will actually result "in other consequences that may not be readily apparent or desirable to the voters." *Restricts Laws Related to Discrimination*, 632 So. 2d at 1023 (Kogan, J., concurring).

Naturally, the initiative sponsor must ensure that the ballot title and summary accurately reflect the contents of the amendment itself. *Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 726 (Fla. 1994) (summary stated that amendment would "ensure" that state prisoners serve at least 85% of their sentence, while text made clear that this would not be true in cases of pardon and clemency); *Save Our Everglades*, 636 So.2d at 1341 (amendment text indicated that sugar industry would bear full cost of Everglades clean up, while summary stated that sugar industry would only "help" pay for the clean up). In doing so, the summary and title must not use ambiguous and undefined terms, the perceived meaning of which will vary from voter to voter. *Advisory Opinion to the Attorney General Re Amendment to Bar Government from Treating People Differently Based*

on Race in Public Education, 778 So. 2d 888, 898-99 (Fla. 2000); *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 620-21 (Fla. 1992).

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.

For example, in *Advisory Opinion to the Attorney General Re Fish and Wildlife Conservation Commission,* 705 So. 2d 1351 (Fla. 1998), the Court considered an initiative amendment summarized by the sponsor as unifying the "Marine Fisheries Commission and the Game and Fresh Water Fish Commission to form the Florida Fish and Wildlife Conservation Commission," which would exercise regulatory power over "freshwater and marine aquatic life and wild animal life." The Court held that the summary was faulty because it did not adequately inform voters that the amendment would also change the law by removing the existing statutory authority

of other state agencies in this area, e.g., the Department of Environmental Protection's authority to protect endangered marine species. *Id.* at 1355.

Similarly, in *Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994), the Court reviewed an initiative that would have limited the government's power to adopt laws against discrimination except for discrimination based upon "race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status." The Court held that the ballot summary was defective because it failed to give voters any sense of the "myriad of laws, rules, and regulations" that would be repealed by the proposed amendment. *Id.* at 1021; *see Wadhams*, 567 So. 2d 414 (Fla. 1990) (summary did not reveal that initiative would supersede the charter review board's unlimited right to meet, replacing it with direction that the board would meet only every four years); *Evans v. Bell*, 651 So. 2d 152 (Fla. 1st DCA 1995) (summary did not inform voters that an elected career service board existed and that the amendment would abolish the elected board and substitute in its place an appointed board).

Finally, the summary and title should be both "fair" and an "accurate and informative synopsis of the meaning and effect of the proposed amendment," not an opportunity for the drafter to engage in political rhetoric which advocates the adoption of the amendment. *Save Our Everglades*, 636 So. 2d at 1341-42; *Evans*, 457 So. 2d

at 1355; *Askew*, 421 So. 2d at 155. The drafter of the summary and title must also avoid emotional language designed to sway voters, or language which seeks to convey a false sense of urgency, as such tactics may mislead a voter as to the contents and purpose of a proposed amendment. *Save Our Everglades*, 636 So. 2d at 1341-42.

B. THE SPONSOR OF THE SMOKING BAN INITIATIVE HAS FAILED TO SATISFY ITS LEGAL OBLIGATIONS REGARDING THE CONSTRUCTION OF THE BALLOT TITLE AND SUMMARY.

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.

This ballot title and summary are misleading, fail to adequately and accurately reflect the contents of the proposed amendment and its ramifications, and are imbued with political rhetoric designed to alarm voters.

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 even where there are no non-smokers in, and no public access to, the workplace in question.

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); *Tax Limitation*, 644 So. 2d at 494 (summary misleading because it implied that there were no limitations on taxes in the constitution when several such limitations did exist).

By referring to a ban on smoking in the "workplace," the summary and title are also misleading and fail to accurately reveal to voters the actual terms and effects of the proposed amendment. In reading this 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 buildings now have limited employee smoking exclusively to outdoor areas.

The references in the summary and title to "workplace" smoking, however, do not communicate to voters the true reach of the amendment – that smoking will be banned in virtually every enclosed space they may visit, including all restaurants and most bars. In reviewing the ballot summary and title, many voters would reasonably interpret a ban on "workplace" smoking as prohibiting workers in a typical office environment from smoking in that enclosed space. However, they 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.

As noted above, many voters would probably support the idea of prohibiting workers from smoking in the workplace in situations where it would expose co-workers to unwanted second-hand tobacco smoke. Based upon the ballot summary and title, those voters would probably react positively to the smoking ban initiative. But would they continue to react positively if they understood that the text of the

amendment would ban smoking even where there is only one person working in an enclosed place, and regardless of whether or not the public has any access to that enclosed place? Would those voters continue to support the initiative if they knew that a sole proprietor working **alone** in his place of business would be prohibited from smoking, even though this activity would not offend any other person? Would those voters continue to be supportive if they knew the initiative would prohibit workplace smoking even when the workplace is staffed exclusively by smokers?

After reading the summary and title, the average voter would no doubt also be surprised to learn that: (a) "workplace" includes not only your place of employment, but also any enclosed place in which you perform volunteer work, with no expectation of compensation; and (b) because the amendment defines a "workplace" as "any place" where work is performed -- not just fixed places -- automobiles and trucks in which any work is performed are "workplaces" in which smoking would be banned.

The initiative sponsor has also used other ambiguous and undefined terms in the summary. Aside from abolishing smoking areas in restaurants, which already are confined to no more than 35% of the seating capacity, the summary indicates that the smoking ban would not apply in a "stand-alone bar." This term is not defined in the summary, and, of course, most voters will interpret the term based upon their typical experience. As such, many voters will interpret "stand-alone bar" to mean a bar that

is physically distinct from the dining area, even if only separated by steps or railings, e.g., Bennigan's, Outback, Olive Garden, etc. Other voters will interpret the term to mean a bar that is separated by full or partial walls from the dining area, e.g., Chili's. After all, why would anyone want to ban smoking in a bar area, where smoking is generally anticipated by anyone entering the place?

Yet, in both instances, those reasonable voter interpretations of the term "stand-alone bar" would be wrong. Under the smoking ban initiative, smoking will be prohibited in **all** such bars, even if they are equipped with ventilation equipment designed to remove second-hand tobacco smoke from the air. The only kind of bar in which smoking will be permitted under the initiative is the rapidly disappearing local lounge or tavern that serves only the most limited food items.

Next, the summary affirmatively states that the proposed amendment would allow "exceptions for private residences." The amendment itself, however, provides no such guarantees. First, the actual amendment only indicates that "tobacco smoking may be permitted in private residences," not that it shall be permitted in private residences. Second, as discussed above, the amendment does not define "private residences," but it does expressly define "enclosed indoor workplace" and "work" in such a manner that any home in which work is performed by another could become an "enclosed indoor workplace" in which smoking is prohibited.

In using these ambiguous terms that do not accurately convey the material terms of the amendment, the ballot summary in this case suffers from the same defects as the summary reviewed by the Court in *Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995). In that case, the ballot summary indicated that the proposed amendment would allow local voter approval of casino gambling in "hotels." The Court held that the summary was defective because the public would ascribe a meaning to "hotel" that was far narrower than the actual text of amendment, which would have allowed local voter approval of casino gambling in "transient lodging establishments," including motels, condominium resorts, bed and breakfast inns, etc. *Id.* at 468-69. The Court also held that the summary was faulty because it indicated an ability to approve casino gambling on "riverboats [and] commercial vessels," implying to voters the ability to approve gambling only on operational, floating vessels. The text of the amendment, however, allowed local voter approval of gambling on board "stationary and non-stationary" riverboats and vessels. *Id.* at 469; *see also Witt v. Kulongoski*, 872 P.2d 14, 18-19 (Or. 1994) (ballot title's description that proposed initiative "bans clear cutting" did not adequately describe the initiative's terms – the initiative sought not only to prohibit the cutting and removal of all trees on a site but to impose additional requirements on a variety of other timber harvesting practices) .

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 inflammatory factual statements 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 can 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.

The fatal defects of such a ballot title and summary were also well considered by the Supreme Court of Arkansas, which has a constitutional initiative process similar to Florida's with similar requirements that the ballot title and summary:

> should be complete enough to convey an intelligible idea of and scope and import of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must contain no partisan coloring.

Johnson v. Hall, 316 S.W.2d 194, 196 (Ark. 1958) (quoting from and adopting a test set forth in a case from Massachusetts). In *Johnson*, the Arkansas Supreme Court was dealing with a proposed constitutional amendment with a ballot title stating "An Amendment Prohibiting Operation of Trains with Unsafe and Inadequate Crews." The Court found this ballot title faulty, and their reasoning in this regard is compelling:

> We think it can safely be said that all citizens are against the operation of trains that do not carry sufficient crews to reasonably assure safety. We cannot conceive that anyone would vote the contrary of this proposition, viz., to *permit* the operation of trains with unsafe and inadequate crews. The amendment itself seeks to declare that to operate trains with inadequate crews, (meaning, of course, a crew less than that provided in the act), 'is detrimental to the safety and welfare of the people. * * *' But there has been no prior determination that this assertion is always true. Actually, this is a fact question, depending upon the circumstances in each case. Such reasoning is in the nature of 'begging the question,' which is defined as 'founding a conclusion on a basis that needs to be proved as much as the conclusion itself.' Here, the voter is urged to support a measure which provides for a particular crew in the operation of trains, because to operate with a smaller crew is, according to the ballot title, 'unsafe and inadequate'--but the 'unsafe and inadequate' remains to be proved. As was stated in Bradley v. Hall, 220 Ark. 925, 251 S.W.2d 470, 472, 'In studying his ballot the voter is not bound by the rule of *caveat emptor*. He is entitled to form his own conclusions, not to have them presented to him ready-made.'

Johnson, 316 S.W.2d at 196 (emphasis in original); *see also Johnson v. Hall*, 316 S.W2d 197, 198 (Ark. 1958) (invalidating initiative because ballot title "An Amendment to Require Safety Devices at All Public Railroad Crossings" would improperly "convey to the voter, or carry the presumption to him, that at present the railroads were not using adequate safety devices at all public crossings and that our

present statutes do not provide adequate protection for the highway traveler. Certainly, all good citizens would vote for adequate protection at public crossings.").

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, this Court has no choice but to prevent the initiative from proceeding to the ballot.

Respectfully submitted on this 28th day of November, 2001.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing with its appendices was furnished by United States Mail on this 28th day of November, 2001, to the following:

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CERTIFICATE OF FONT

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

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