IN THE
SUPREME COURT OF FLORIDA

Case No. SC01-351
L.T. Case No. 1D00-1335

MARC D. SARNOFF, TOM HYDE, STEVEN REGISTER, CHARLES STAHMAN, HARRY BRADY & MELISSA RICHIE, individually and on behalf of all others similarly situated,

Petitioners,

v.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et. al.,

Respondents.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF CASE AND FACTS

This case involves constitutional challenges to fees assessed and paid under a mandatory motor vehicle emissions inspection program that the Department of Highway Safety and Motor Vehicles ("Department") administered in six Florida counties from 1991 to 2000. At issue is the decision of the First District, which affirmed class certification of the Petitioners' facial constitutional claims, but reversed class certification of their as applied constitutional claims. Department of Highway Safety and Motor Vehicles v. Sarnoff, 776 So. 2d 996 (Fla. 1st DCA 2000) (the "Decision") [A9] The trial court certified both constitutional claims based on this Court's decision in Department of Revenue v. Nemeth, 733 So. 2d 970 (Fla. 1999). The sole issue on appeal is whether the Decision's holding – that as applied constitutional claims may not be asserted unless each class plaintiff has first sought an administrative refund from the Comptroller – conflicts with this Court's "direct file" exception in Nemeth, which recognizes the right to file constitutional claims directly in circuit court without first seeking refunds from the Comptroller.

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[1] Neither the Department nor the First District contest that Petitioners met all class action prerequisites (numerosity, commonality, typicality, adequacy of representation) as to each of the constitutional claims asserted below or that the requirements of Rule 1.220(b), Florida Rules of Civil Procedure, were met.

Petitioners' Class Action

In 1997, Petitioners, Marc D. Sarnoff, Tom Hyde, Steven Register, Charles Stahman, Harry Brady and Melissa Richie, brought a class action against the Department claiming that the motor vehicle inspection fees were unconstitutional. [A1] Each of the six Petitioners resides in one of the six counties where the inspection program was implemented (Broward, Dade, Duval, Hillsborough, Palm Beach and Pinellas) and paid the challenged fees. [A1 6-8]

The United States Environmental Protection Agency had previously designated these six counties as ozone non-attainment areas because they had exceeded national ambient air quality standards. [A1 2] In response, the Florida Legislature enacted the Clean Outdoor Air Law, which created the Motor Vehicle Inspection Program (the "Program"). [A1 3] The Program, codified in section 325.214, Florida Statutes, required that motor vehicles registered in the six affected counties pass an annual emissions inspection to renew their registrations. [A1 3]

The Motor Vehicle Inspection Program

From the Program's inception, the Department set (by administrative rule, Rule 15C-6.003, Florida Administrative Code) the annual motor vehicle inspection fee at

the statutory maximum of $10.00.

[2] [A1 3] The total actual cost of administering and enforcing the Program (including the per inspection cost owed to inspection contractors) was substantially less than the $10.00 fee. [A1 4] Petitioners contend that the amount of each overcharge ranged between $1.10 and $3.70 per inspection, depending upon the county where the motorist resided, and totaled approximately $16,000,000.00 *per year* in the aggregate. [A1 4-5] As a result, the Department collected sums far in excess of the actual cost of administering and enforcing the Program each year the Program was in place. [A1 5]

Initially, the Department placed the excess funds into the Motor Vehicle Inspection Trust Fund. [A1 5] In 1995, however, the Legislature eliminated the Motor Vehicle Inspection Trust Fund and all of the overcharges the Department collected went into the statewide Highway Safety Operating Trust Fund (along with fees from other unrelated programs). [A1 6]. This change (i.e., placing the Program fees into a statewide Department operating fund) resulted in disparate

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[2] Prior to 1998, the Legislature directed the Department to set the fee at an amount *no greater than* that necessary to: (a) pay the per-inspection cost (i.e., sums owed to contractors who did the inspections); and, (b) defray the Department's actual costs of administering and enforcing the Program. § 325.214(2), Fla. Stat. (1995).

treatment between taxpayers in the six counties where the Program is administered and citizens in all other counties; the former are required to pay the tax into a trust fund that benefits persons statewide, who are not required to pay the tax. [A1 6]

The Petitioners' Constitutional Challenges

The Petitioners' original complaint in July 1997 alleged that the imposition of fees in excess of the cost to administer and enforce the Program was unconstitutional for the following reasons:

> Excess fees beyond the actual costs of administration constituted unlawful taxes in violation of article II, section 3 (separation of powers) and article VII, section 1 of the Florida Constitution ("No tax shall be levied except in pursuance of law.");
> The implementation of the statute resulted in an unconstitutional general law taxing only a targeted locale;
> The fees violated equal protection by treating taxpayers arbitrarily by assessing taxes of different amounts based solely on where they lived in Florida without a rational basis; and,
> The fees violated substantive due process because they lacked a rational basis and failed to promote the health, safety or welfare of the persons or locales subjected to the fee.

[A1 13-14] The original complaint – which asserted only constitutional challenges – contained two counts, the first based on the unconstitutionality of the fees imposed and the second based on the creation of a common fund for the refund of unconstitutional taxes paid pursuant to section 325.214(2) and its implementing rule,

Rule 15C-6.003, Fla. Admin. Code.

After Petitioners filed their lawsuit, the Legislature responded in 1998 by amending section 325.214(2) to *mandate* that the Department charge each motorist a uniform rate of $10 in each county without regard to actual administration costs. In response, Petitioners filed an amended complaint that added a facial constitutional challenge (Count II) to the newly-amended statute. [A2] Count I, which challenged the statute and rule as implemented on various constitutional grounds, remained unchanged. Count II, which was added, set forth the grounds for challenging the amended statute on its face including violations of article II, section 3 and article VII, section 1 of the Florida Constitution, and equal protection and substantive due process violations. Count III, which was Count II in the original complaint, remained unchanged. As in their original complaint, Petitioners again raised only constitutional challenges.

The Trial Court Proceedings and Order

Petitioners moved for class certification and provided supporting materials including affidavits, admissions and a memorandum of law. [A3; A3B; A3D; A7] The parties entered a stipulation regarding the procedures for class certification, including

an agreement that the class certification hearing would await this Court's resolution of the then-pending cases in Nemeth and Hamerhoff. [A4C] The Department answered the amended complaint twice [A4; A5] and provided a memorandum of law in opposition to class certification. [A6]

After a class certification hearing, the trial court on March 6, 2000 certified each of Petitioners' constitutional challenges as class claims, finding all class action prerequisites were met. The court rejected the Department's argument that each of the millions of class members were required to have first sought an administrative refund from the Comptroller pursuant to section 215.26, Florida Statutes before filing a constitutional challenge. [A8] The trial court based its ruling on the "direct file exception" that this Court recognized in a line of cases holding that plaintiffs who challenge a tax as unconstitutional may file directly in circuit court without first pursuing administrative remedies.

[3] [A8 3]

In rejecting the Department's position, the trial court relied upon and quoted

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[3] Department of Rev. v. Nemeth, 733 So. 2d 970 (Fla. 1999); Department of Rev. v. Kuhnlein, 646 So. 2d 717 (Fla. 1994).

Nemeth's central holding that "a Florida taxpayer may file directly in the appropriate court without first filing an administrative claims pursuant to section 215.26 if the sole basis claimed for the refund is that the tax is unconstitutional." [A8 2-3] The trial court held that "[b]ecause the amended complaint challenges the inspection fee as an unconstitutional tax, the Nemeth exception … applies." [A8 3] Further, the trial court found "no support for the [Department's] argument that the [direct file] exception applies only when the sole issue raised is the facial validity of a tax statute." [A8 3] Thus, the trial court certified the as applied and facial constitutional claims based on Nemeth. [A8]

The First District's Decision

The Department appealed the trial court's ruling as to only Count I. The Department did not contest that each of the class certification requirements had been met as to Counts I, II or III. Instead, the Department limited its appeal solely to the applicability of the direct file exception to Count I, which raised an as applied constitutional claim.

On December 29, 2000, the First District – in a 2-1 decision – ruled in favor of the Department's position. [A9] The Decision acknowledged this Court's decision in

Nemeth, which recognized a "direct file exception" whereby taxpayers "may file directly in the appropriate court without filing an administrative claim pursuant to section 215.26 if the sole basis claimed for the refund is that the tax is unconstitutional." [A9 11 n.1] (citing Nemeth) The First District, however, narrowly interpreted Nemeth to only apply to facial constitutional challenges to a statute, not to as applied constitutional challenges. [A9 11-12] The First District, therefore, reversed the trial court's order as to Petitioner's as applied constitutional claim in Count I. [A9 12] The other constitutional claims, which were certified below, were affirmed and are not at issue in this appeal.

The majority concluded that the Petitioners, and each of the millions of members of the putative class, "were required to seek a refund under section 215.26, before filing suit in circuit court." [A9 12] The majority acknowledged that this Court in Nemeth "did not use the term 'facial' in its discussion of the direct-file exception for claims based on the unconstitutionality of a tax[.]" [A9 6] Nonetheless, the majority narrowly restricted Nemeth to only facial challenges such that any as applied constitutional challenges to a tax must first be presented to the Comptroller under section 215.26. One judge dissented primarily on procedural and

jurisdictional grounds, and stated that he would affirm the trial court's class certification order on the merits. [A9 12-18] Petitioners moved for rehearing, rehearing en banc, certification and clarification [A10], all of which were denied. [A11]

Petitioners filed a timely notice to invoke jurisdiction based on conflicts with former decisions of this Court. This Court accepted jurisdiction on June 14, 2001.

SUMMARY OF THE ARGUMENT

The First District's Decision is contrary to this Court's decisions in Department of Revenue v. Nemeth, 733 So. 2d 970 (Fla. 1999) and Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). In Nemeth, this Court repeatedly and emphatically held that plaintiffs who challenge a tax as unconstitutional may file directly in circuit court without first pursuing administrative refunds from the Comptroller under section 215.26, Florida Statutes (the "direct file" exception). To do so "would be a futile act" because the Comptroller is without authority to remedy constitutional claims or render relief under the repayment statute, section 215.26. Despite the clear language of Nemeth, the Decision erroneously concludes that this Court intended that the direct file exception only apply to facial constitutional challenges, not to as applied challenges. By severely limiting Nemeth, the First District reversed the trial court's class certification order as to the as applied constitutional claim in Count I and required each Petitioner to pursue a futile refund claim from the Comptroller. The anomalous result is that – despite all class certification requirements being met as to each of Petitioners' constitutional claims – Petitioners may pursue their facial claims but must pursue futile administrative

relief as to their as applied claims. As this Court stated in Nemeth, it is futile to pursue administrative relief because the Comptroller is not empowered by law to make refunds "of taxes that might violate the constitution." For this reason, the Decision directly conflicts with the central holding of Nemeth and should be reversed.

Moreover, the Decision exacerbates this conflict by relying on this Court's decision in Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So. 2d 153 (Fla. 1982), whose administrative exhaustion principles have nothing to do with constitutional tax challenges. In doing so, the Decision creates direct conflict with Department of Revenue v. Amrep Corp., 358 So. 2d 1343 (Fla. 1978), which expressly held that the administrative procedures act does not apply to tax assessment challenges and that plaintiffs need not first pursue administrative remedies before invoking the exclusive jurisdiction of the circuit court.

As this Court recognized in Amrep, the circuit courts have exclusive jurisdiction over tax matters thereby requiring that Petitioners pursue relief in the judicial system, not via administrative remedies. Both article V, section 20(c)(3), Florida Constitution, and section 26.012(2), Florida Statutes, provide that circuit courts

have "exclusive original jurisdiction" in "all cases involving legality of any tax assessment or toll" including the denial of refunds. These jurisdictional provisions make abundantly clear that circuit courts – not administrative agencies or other governmental bodies – have the sole authority to address and adjudicate the legality of tax matters. The First District's Decision does not even mention or discuss these jurisdictional limitations or the Amrep decision, thereby overlooking a fundamental basis for upholding the trial court's order.

Finally, public policy and principles of judicial administration support application of the direct file exception of Nemeth to as applied constitutional challenges. The Decision undermines the ability of plaintiffs to assert, as well as trial courts to administer, class claims based on constitutional violations. Claimants subject to small overcharges may not know of or even seek administrative remedies because the cost of doing so outweighs the potential refund resulting in a substantial windfall to the agency imposing the unconstitutional tax.

In addition, requiring claimants to exhaust administrative remedies to assert as applied constitutional claims – where facial constitutional claims are already pending and certified – is nonsensical. The Decision creates two different sets of

rules and remedies by permitting facial constitutional claims to be adjudicated in circuit court directly, yet mandating a futile course of administrative relief for as applied constitutional claims. The Decision also effectively immunizes executive agencies from constitutional tax challenges: claimants who challenge unconstitutional *legislative* enactments must do so directly in circuit courts, while those who challenge similar *executive* enactments must comply with futile and burdensome administrative refund procedures before seeking judicial relief. Neither public policy nor this Court's decision in Nemeth support such an illogical result.

For each of these reasons, the First District's Decision is contrary to this Court's precedents and should be reversed with instructions that Petitioners' as applied constitutional claims in Count I be reinstated as a proper class claim below.

ARGUMENT[4]

THE DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *KUHNLEIN* AND *NEMETH*, WHICH PERMIT THE DIRECT FILING OF CONSTITUTIONAL TAX CHALLENGES IN CIRCUIT COURT WITHOUT FIRST SEEKING REFUNDS FROM THE COMPTROLLER.

The Decision directly conflicts with this Court's decisions in Kuhnlein and Nemeth, which held that claims based on the constitutionality of a tax may be filed directly in the circuit court without first pursuing a refund from the Comptroller. The primary reason for this "direct-file exception" is the futility of seeking redress from the Comptroller, who is without authority to remedy constitutional claims in tax matters. The Comptroller has only limited authority under the refund statute, section 215.26, Florida Statute, which does not include the authority to provide refunds for constitutional claims or unconstitutional taxes. For this reason, this Court in Nemeth specifically held that seeking refunds from the Comptroller for an unconstitutional tax is "futile." 733 So. 2d at 974.

In Nemeth, the certified question was whether plaintiffs challenging the constitutionality of a motor vehicle impact fee were required to seek relief from the Comptroller before filing suit. This Court squarely rejected the Department's position that a plaintiff must first seek administrative relief from the Comptroller. It expressly repeated its clear holding numerous times by stating:

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[4] The standard of appellate review is de novo on the legal issue of whether this Court's decision in Nemeth applies to both facial and as applied constitutional tax challenges.

> "we expressly hold ***that a taxpayer's claim based solely upon the tax being unconstitutional may be filed in the appropriate court rather than with the Comptroller.***" Id. at 971 (emphasis added)
>
> > "Our decision [in Kuhnlein] established that in cases where the plaintiff is challenging the constitutionality of an involuntarily paid tax and seeking a refund for the same ***the taxpayer need not comply with the 'administrative' requirements of section 215.26***." Id. (emphasis added)
> >
> > "***In order to avoid the recurrence of this issue in similar situations in the future***, ***we expressly hold that a Florida taxpayer may file directly in the appropriate court without filing an administrative claim pursuant to section 215.26 if the sole basis claimed for the refund is that the tax is unconstitutional***." Id. at 973-74 (emphasis added)
> >
> > "Therefore, ***we now explicitly hold*** that ***a plaintiff challenging the constitutionality of a tax statute*** and seeking a refund, while ***not required to file with the Comptroller***, must still file suit" within the applicable three year statute of limitations." Id. at 974 (emphasis added)

As the highlighted language makes evident, this Court clearly, emphatically, and repeatedly held that challenges to the constitutionality of a tax may be filed directly in court without pursuing administrative relief under section 215.26, which would be futile because the Comptroller lacks authority to resolve or remedy constitutional claims.

The central point in Nemeth is the futility of pursuing administrative relief that simply does not exist. This Court noted "that the Comptroller cannot declare a tax unconstitutional, and thus, when the claim is solely that the refund is required because the tax is unconstitutional, ***to file the claim with the Comptroller would be a futile act***." Id. at 974 (emphasis added). This Court noted that the Comptroller's legislative authority, section 215.26,

[5] does not include the ability to refund unconstitutional taxes or provide a remedy under the circumstances.

> We recognize that our holding appears to conflict with section 215.26(4), which provides that the statute is "the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury." However, we find no inconsistency because ***the statute is only the exclusive remedy for tax refunds which the Comptroller is actually empowered to make***, such as refunds for overpayment, section 215.26(1)(a); when no tax is due, section 215.26(1)(b); or for payments made in error, section 215.26(1)(c); ***but not for taxes that might violate the constitution***.

Id. at 974 (emphasis added). As the highlighted language indicates, aggrieved persons may not seek refunds from the Comptroller for taxes that may be in violation of constitutional protections. Instead, these persons – such as the Petitioners – may go directly to the circuit courts where exclusive jurisdiction lies and need not first pursue relief from the Comptroller.

In light of these principles, the Decision's holding that this Court intended that

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[5] Section 215.26(1), entitled "Repayment of funds paid into State Treasury in error," provides in relevant part that the "Comptroller of the state may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute: (a) An overpayment of any tax, license, or account due; (b) A payment where no tax, license, or account is due; and (c) Any payment made into the State Treasury in error[.]" § 215.26(1), Fla. Stat. (1999).

Nemeth only apply to facial constitutional challenges is deeply flawed. The Nemeth decision does not use the term “facial" and made no distinction between facial versus as applied claims. Instead, the key holding of Nemeth – that filing a refund claim is “futile” because the Comptroller lacks authority and remedial powers for unconstitutional taxes – applies equally in both situations. This Court explicitly held that section 215.26 only empowers the Comptroller to make refunds for overpayments, for when no tax is due, and for payments made in error, "***but not for taxes that might violate the constitution***." *Id.* (emphasis added). The First District disregarded this point and, instead, reasoned that Kuhnlein and Nemeth were both facial challenges to the same statute thereby inferring that the direct file exception only applies to such challenges. This reasoning is not only faulty but also overlooks the central reason for the direct file exception: the futility of seeking relief from the Comptroller.

In addition, the First District seriously erred in its conclusion that other lower courts have interpreted Kuhnlein and Nemeth as limiting the direct file exception to only facial challenges. The Decision cites to Reinish v. Clark, 765 So. 2d 197 (Fla. 1st DCA 2000); Public Medical Assistance Trust Fund v. Hameroff, 689 So.

2d 358 (Fla. 1st DCA 1997), *approved in part*, 736 So. 2d 1150 (Fla. 1999), and P.R. Marketing Group, Inc. v. GTE Florida, Inc., 747 So. 2d 962 (Fla. 2nd DCA 1999) for the proposition that these decisions "assumed" such an interpretation of Kuhnlein and Nemeth. As discussed below, none of these cases address whether the direct file exception applies to as applied constitutional tax challenges and each is easily distinguishable, if not supportive of the Petitioners' position.

In Reinish, the First District upheld the trial court's reliance on Nemeth to permit a facial challenge to the constitutionality of a state homestead exemption statute. The appellate court rejected the arguments of the property appraiser, tax collector and Department of Revenue that the homeowners were required to seek administrative remedies before pursuing relief in court. The court stated that "fulfilling the state's refund procedures is not a condition precedent to bringing a constitutionally based refund action." 765 So. 2d at 202 (*quoting* Hamerhoff). Because the homeowners were asserting constitutional claims for refunds, the First District recognized the applicability of the "exception to the general rule that requires a party first to seek, and then be denied, a refund before suing for a tax refund." Id. (*citing* Kuhnlein). Because the decision in Reinish did not address as applied constitutional claims, it

is of little assistance except to re-emphasize the underlying basis for the direct file exception, which is that "constitutionally based refund actions" go straight to court. Moreover, as a matter of logic, the fact that a facial constitutional challenge was permitted in Reinish does not preclude as applied constitutional claims. Likewise, in Hameroff, the First District held that physicians and group practices challenging the constitutionality of an assessment under a public medical assistance trust fund were not required to first comply with section 215.26 by seeking a refund from the Comptroller. Instead, the appellate court squarely rejected the argument that class representatives must seek and be denied refunds because "compliance with the refund procedure is not required as a condition" of bringing a legal challenge in court. Id. at 359. In rejecting the government's attempts to limit the holding in Kuhnlein, the court stated:

> We read *Kuhnlein* as creating an exception to the general rule established in *Devlin v. Dickinson*, 305 So. 2d 848 (Fla. 1st DCA 1975), and similar cases, which requires a party to first seek and be denied a refund before filing suit for a tax refund. Appellant urge us to read that portion of *Kuhnlein*, quoted above, which refers to "other procedural requirements," as necessitating an application for and denial of a refund. ***Such a reading, however, would fly in the face of the clear holding in Kuhnlein that fulfilling the state's refund procedures is not a condition precedent to bringing a constitutionally-based refund action.*** It is obvious to us that, read in context, this quoted language refers to the rules of procedure and statutory requirements relating to the maintenance of class actions.

Id. at 359 (emphasis added). As the emphasized language indicates, the decision in Hamerhoff – rather than foreclosing the application of the direct file exception to as applied constitutional claims – is a powerful affirmation of the application of Kuhnlein in the class action context where constitutional claims are asserted, as in the instant case.

[6]

Finally, the Decision relies on P.R. Marketing, which it claims is "analogous" to the instant case. *The First District overlooks, however, that P.R. Marketing did not even involve a constitutional challenge.* Instead, the plaintiffs had filed a class action alleging that a private company, GTE Florida, had charged and collected more sales tax on long distance calls then was allowable by law. The trial court denied certification of the class and dismissed the action because the plaintiffs "had not exhausted their administrative remedies [under section 215.26]

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[6] This Court approved the First District's decision in light of Nemeth, and remanded it for the trial court to ensure that the representative class members filed suit solely upon allegations that the tax was unconstitutional and within the three year of having paid the "assessment" at issue in that case. Public Medical Assistance Trust Fund v. Hamerhoff, 736 So. 2d 1150, 1150 (Fla. 1999).

regarding the refund of erroneously collected taxes." Id. at 962-63. The Second District affirmed, but noted that – unlike the instant case – the plaintiffs were not even asserting any constitutional claims. The court stated that "***[s]ince the appellants did not allege that the tax in this case was unconstitutional***, but instead that GTE was taxing in an improper manner and for an unlawful amount, we must follow the supreme court's recent holdings and affirm the trial court's order." Id. (emphasis added). *In other words, the direct file exception for constitutional tax challenges was inapplicable because the plaintiffs had not even asserted a claim that the tax was unconstitutional*. For this reason, the decision in P.R. Marketing is entirely irrelevant to the instant case, and the First District's heavy reliance on its holding is obvious error.

II. THE DECISION CREATES CONFUSION BY RELYING ON THE *KEY HAVEN* DOCTRINE AND CONFLICTS WITH THIS COURT'S DECISION IN *AMREP*.

Beyond conflicting with Nemeth, the Decision also creates confusion by relying on principles of exhaustion of administrative remedies under Chapter 120, Florida Statutes, as established in Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153, 157-58 (Fla.

1982). Reliance on the Key Haven doctrine for the notion that the Petitioners have presented a "rule" challenge and that administrative remedies should have been exhausted before filing with the circuit court, is misplaced for a number of reasons.

The most basic is that the Decision's reliance on the Key Haven line of cases improperly equates constitutional tax challenges with administrative challenges under Chapter 120. The former fall within the exclusive jurisdiction of the circuit courts; the latter do not. Under both the Florida Constitution and Florida Statutes, the circuit courts have the sole and exclusive jurisdiction for tax challenges. Article V, section 20(c)(3), Florida Constitution, provides that "[c]ircuit courts … shall have exclusive original jurisdiction … in all cases involving legality of any tax assessment or toll[.]" Art. V, § 20(c)(3), Fla. Const. (2000). Similarly, section 26.012(2)(e), Florida Statutes, provides that circuit courts "shall have exclusive original jurisdiction: … (e) In all cases involving legality of any tax assessment or toll or denial of refund, except as provided in s. 72.011." § 26.012(2)(e), Fla. Stat (2000). As these provisions make clear, circuit courts have the exclusive, constitutionally-based jurisdiction over all cases involving the legality of taxes, assessments and tolls including denials of refunds.

This point is evident in this Court's decision in Department of Revenue v. Amrep Corp., 358 So. 2d 1343 (Fla. 1978).[7] Amrep expressly held that Chapter 120's requirement of exhausting administrative remedies prior to filing suit in circuit court does not apply to tax assessment challenges except as provided in section 72.011, Florida Statutes, because ***circuit courts*** – not state agencies – have ***original and exclusive jurisdiction*** in all cases involving the legality of any tax assessment. 358 So. 2d at 1348-49. The motor vehicle inspection fee statute at issue, section 325.214, is ***not*** one of the enumerated statutes in section 72.011. The Petitioners' tax challenge is thereby within the ***exclusive jurisdiction of the circuit court*** – exclusive even as to state agencies and their administrative remedies. Remarkably, the First District's Decision fails to even mention Amrep or the exclusive jurisdictional provisions in the state constitution and statute.

In Amrep, the plaintiffs challenged the constitutionality of a tax statute, which the trial judge declared unconstitutional on equal protection grounds. Id. at 1346. As

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[7] This Court cited Amrep in Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (Fla. 1978), a case upon which the Department relied below.

in the instant case, the state agency appealed and argued that the taxpayers could not challenge a tax assessment on constitutional grounds in circuit court until they complied with the administrative guidelines of Chapter 120, Florida Statutes. Id. at 1347. This Court rejected the Department's position for two related jurisdictional reasons.

First, this Court cited section 26.012(2)(e), which provides that the circuit courts have "exclusive original jurisdiction" in " all cases involving legality of any tax assessment or toll or denial of refund" with certain inapplicable exceptions under section 72.011. Id. at 1348 (*quoting* § 26.012(2), which has not changed since Amrep). Second, this Court cited article V, section 20(c)(3), Florida Constitution, which provides, in relevant part, that "circuit courts shall have exclusive original jurisdiction `in all cases involving legality of any tax assessment or toll.'" Id. (*quoting* constitution).

Given these two clear jurisdictional provisions in tax matters, the Court held that "no provisions in Chapter 120" including the then recently-enacted Administrative Procedures Act existed that "directly or by implication divest[ed] the circuit courts of their historical jurisdiction to determine the issues in contested tax

assessment actions such as the dispute in the instant case." Id. at 1348-49. As such, the Court specifically rejected the argument that the enactment of Chapter 120 was intended to displace the circuit court's exclusive and original jurisdiction in tax matters, particularly those involving constitutional claims.

[8] Because circuit courts have original and exclusive jurisdiction in tax matters, neither the aggrieved taxpayers in Amrep – nor the Petitioners here – must exhaust administrative remedies; instead, they are required to seek redress in the circuit courts. Accordingly, Key Haven and its progeny, which require the exhaustion of administrative remedies under Chapter 120 before filing suit, are inapplicable when challenges are made to the constitutionality of certain taxes, such as those at issue in Amrep and in the instant case.

Notably, other district courts have applied the jurisdictional principles in Amrep, consistent with the Petitioners' position, after the Key Haven decision in 1982.

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[8] The Court cited a First District decision (involving a constitutional attack on a Department of Revenue *rule* concerning a documentary stamp tax), which held that the "***Administrative Procedure Act could not and does not*** relegate Fourteenth Amendment questions to administrative determination, nor restrict the occasions for judicial consideration of them … nor ***otherwise impair the judicial function to determine constitutional disputes***." Id. at 1349 (*citing* Department of Rev. v. Young Am. Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976)) (emphasis added).

For example, in a tax refund action the First District in Florida Export Tobacco Co., Inc. v. Department of Revenue determined that the "Comptroller did not have the power to adjudicate the merits of the legality of the assessment." 510 So. 2d 936, 955 (Fla. 1st DCA 1987). The court stated that "[u]nder the circumstances, the circuit court had exclusive original jurisdiction to adjudicate the legality of the tax assessment against appellants in their refund action." Id.

Likewise, in WJA Realty Ltd. Partnership v. Department of Business Regulation, 620 So. 2d 217 (Fla. 1st DCA 1993), the First District again relied on the principles set forth in Amrep fifteen years earlier. In WJA Realty, the First District relied on Florida Export to hold that an administrative agency lacked jurisdiction to determine the legality of a tax assessment. Id. at 218. The district court held that the authority to determine the legality of a tax assessment "remains within the exclusive original jurisdiction of the circuit courts in accordance with section 26.012(2)(e), Florida Statutes, and Article V, section 20(c)(3), Florida Constitution." Id.

In summary, this Court's holding in Amrep establishes that the circuit court has exclusive original jurisdiction to adjudicate the Petitioners' constitutional tax claims thereby nullifying the First District's reliance on Key Haven and its progeny. Given

that the Comptroller is without authority to order refunds in constitutional challenges under Nemeth, requiring Petitioners to first file a refund application under the Key Haven doctrine would be nonsensical and equally futile. Because circuit courts – not state agencies – have original and exclusive jurisdiction in cases involving the legality of tax assessments, the First District's Decision creates confusion with Key Haven and conflict with Amrep thereby requiring reversal.

III. PUBLIC POLICY AND PRINCIPLES OF JUDICIAL ADMINISTRATION SUPPORT APPLICATION OF THE DIRECT FILE EXCEPTION TO AS APPLIED CONSTITUTIONAL CLAIMS.

Public policy and principles of judicial administration support application of the direct file exception of Nemeth to as applied constitutional challenges. Beyond the futility of seeking relief from the Comptroller, the Decision undermines the ability of plaintiffs to assert, as well as trial courts to administer, class claims based on constitutional violations. It also creates two categories of procedures and remedies for legislative versus executive enactments that violate the constitution.

Where a large number of claimants are subject to small, perhaps nominal overcharges, they may not know of or even seek administrative remedies (because the cost of doing so outweighs the potential refund) thereby resulting in a substantial

windfall to the agency imposing an unconstitutional tax. The Decision enables state agencies to make up for revenue shortfalls by levying *de facto* taxes with the knowledge that, so long as the overcharges are individually *de minimis* (but substantial in the aggregate), they will avoid any meaningful judicial scrutiny or liability.

In this regard, the legal issue presented has great practical consequences because few persons individually, or as a class, would pursue a lawsuit over a $10.00 fee if they must first run the gauntlet of administrative hurdles that the Decision requires to perfect their right to seek judicial relief for constitutional violations.[9] Here, the fee is *de minimis* as to any one claimant, but is significant in the aggregate (over 16 million dollars *annually* in unlawfully collected taxes). From a public policy standpoint, the Decision effectively prevents a common fund class action as a remedy or tool of judicial administration where an agency exceeds its authority by imposing an unconstitutional tax.

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[9] As the trial court found, "each member of the class could not independently and efficiently prosecute the constitutional claims involved due to the small amount of each individual annual payment" of $10.00. [A8 5]

Moreover, requiring each claimant to exhaust administrative remedies to assert an as applied constitutional claim – where facial constitutional claims are pending – is nonsensical. The Decision creates two different sets of rules and remedies by permitting facial constitutional claims to be adjudicated in circuit court directly, yet mandating a futile course of administrative relief for as applied constitutional claims. This Court in Nemeth surely did not envision this result, which places trial courts in the untenable position of bifurcating or delaying resolution of interrelated constitutional claims based on common facts even where all class prerequisites exist.

The Decision also effectively immunizes executive agencies from constitutional tax challenges. Claimants who challenge unconstitutional *legislative* enactments must do so directly in circuit courts because of the direct file exception in Nemeth and the exclusive jurisdiction of circuit courts in tax matters. Amrep, supra. Under the First District's Decision, however, claimants who challenge similar *executive* enactments must comply with futile and burdensome administrative refund procedures before seeking judicial relief.

For instance, if the legislature passes a statute that establishes a facially unconstitutional tax, judicial relief is immediately available, if not compelled. If an

executive agency adopts a rule that imposes an unconstitutional tax (e.g., a vehicle inspection fee that is higher for members of a particular racial group), however, all potential class members affected by the agency action must pursue futile relief from the Comptroller. Neither public policy nor the Court's decision in Nemeth support such an illogical and unreasonable result.

Here, the Department and First District acknowledge that Count II – which facially challenges the constitutionality of the *legislatively* imposed $10.00 inspection fee in 1998 – was properly certified as a class action without class members having sought refunds from the Comptroller. Yet, the Decision results in claimants having fewer rights and remedies for their challenge of *executive agency* action under similar, if not identical, constitutional theories. The right to challenge unconstitutional taxes should not depend upon which branch of government has committed the violation or result in different degrees of protection for constitutional rights depending upon which branch of government is the malefactor.

In conclusion, each of these public policy and judicial administration principles buttresses the importance of rejecting the First District's narrow interpretation of this Court's decision in Nemeth. The Nemeth decision – standing alone – is sufficient to

reverse the Decision below and reinstate the Petitioners' as applied constitutional challenge. These additional public policy and judicial management principles, however, emphasize the Decision's detrimental impact on the Petitioners as well as others who are subject to unconstitutional levies of taxes by state agencies and the need to vacate the Decision below.

CONCLUSION

Based upon the foregoing, Petitioners request that this Court reverse the First District's Decision with instructions to reinstate the trial court's certification of Count I.

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CERTIFICATE OF SERVICE
AND TYPEFACE COMPLIANCE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to: Eric J. Taylor, Esq., Asst. Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this 9th day of July, 2001; and, that this Initial Brief uses the Times New Roman 14-point font.

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Attorney

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