IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-1624
LOWER TRIBUNAL NOS.:
First District Court of Appeal Case No. 1D02-2939
Second Judicial Circuit No. 02-CA-1490

JIM SMITH, SECRETARY OF STATE, ETC., ET AL.,

Petitioners,

v.

COALITION TO REDUCE CLASS SIZE, and
PRE-K COMMITTEE,

Respondents.

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondents, COALITION TO REDUCE CLASS SIZE, and PRE-K COMMITTEE (PARENTS FOR READINESS EDUCATION FOR OUR KIDS), do not object to the Petitioner's Statement of the Case and Facts, except to the extent that their statement omits certain information.[1] For example, the Petitioner's statement omits the fact that this Court previously reviewed both proposed amendments at issue and approved them for accuracy and compliance with Article XI, Section 3, Florida Constitution and Section 101.161, Florida Statutes. This Court performed such review of the proposed amendments at issue pursuant to the constitutional authority of Article V, Section 3(b)(10), Florida Constitution. *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size,* 816 So.2d 580 (Fla. 2002); *Advisory Opinion to the Attorney General Re: Voluntary Universal Pre-Kindergarten Education*, 27 Fla.L.Weekly S663 (Fla. July 11, 2002).

The challenged legislation in Chapter 2002-390 did not become effective until May 24, 2002, a date after the approval of the Class Size Amendment by the Supreme Court of Florida, and

[1] The Respondents also adopt that portion of the Petitioner's Appendix at Tabs 1 and 2, containing the trial court order and Chapter 2002-390 respectively. The additional materials in the Petitioner's Appendix, however, were not part of the trial record. Therefore, the Respondents object to the inclusion of such non-record materials in the Petitioner's Appendix.

after the Supreme Court requested briefing on the Pre-K Amendment.[2]

The Petitioner's statement of facts also omits that the Petitioner seeks to apply the challenged legislation's requirements for governmental analysis and a fiscal impact statement to the citizen initiatives proposed by Respondents to amend the constitution, while not applying the same requirements to legislative proposals to amend the State Constitution, which also appear on the ballot at the general election of 2002.[3] Through the operation of a provision that states that any initiative proposal already certified for ballot position in 2002 will not be subject to the fiscal impact analysis requirements of the act, one initiative petition has been exempted from having ballot language describing its increase or decrease in any revenues or costs to state or local governments.

The Complaint filed by the Respondents in the trial court alleged that the legislation embodied in Chapter 2002-390 violates certain provisions of the United States and Florida

[2] The Pre-K Amendment had not been approved by this Court as of the effective date of Chapter 2002-390, but was subsequently approved for accuracy and compliance with the necessary provisions of law.

[3] Section 8 of Chapter 2002-390, Laws of Florida, provides that '[t]his act does not apply ...to any joint resolution filed with the Secretary of State prior to the effective date of this act."

Constitutions. The Respondents' Complaint alleged that Chapter 2002-390 violated Article XI, Section 3, of the Florida Constitution; the First Amendment of the United States Constitution; the Equal Protection Clauses of the United States and Florida Constitutions; and the Due Process Clauses of the United States and Florida Constitutions. Shortly after filing the Complaint, the Respondents moved for a temporary injunction. A hearing was held on July 15, 2002, through which the trial court received evidence and argument pertaining to the claims at issue.

On July 17, 2002, the trial court entered an Order Granting Preliminary Injunction. The trial court concluded that Chapter 2002-390 violated Article XI, Section 3, Florida Constitution, because that section is "self-executing." The trial court concluded that legislation affecting the method provided by the Florida Constitution is permissible "only if necessary to ensure ballot integrity." Trial Court Order, p. 2. The trial court further concluded that the challenged legislation violated the Due Process Clauses of the federal and state constitutions. The trial court did not rule on the First Amendment and Equal Protection arguments presented by the Respondents.

The Petitioner filed a timely Notice of Appeal. The First District certified the appeal directly to this Court, citing Fla.R.App.P. 9.125. *Harris v. Coalition to Reduce Class Size,* 27 Fla. L. Weekly D1685 (Fla. 1st DCA 2002). This Court entered an Order entitled "Certified Judgment From Trial Court – Order Accepting Jurisdiction, Establishing Briefing Schedule and Setting Oral Argument."

SUMMARY OF ARGUMENTS

1. Article XI, Section 3, Florida Constitution, provides a self-executing method for the people to amend the Florida Constitution. No legislation is necessary for this self-executing constitutional provision. Any legislation concerning the people's right to amend their constitution is permissible "only" when such legislation is "necessary to ensure ballot integrity." The Petitioner's argument does not even suggest that challenged legislation is "necessary to ensure ballot integrity." Instead, the Petitioner and friends urge this Court to overrule prior precedents by adopting a standard that such measures need only be "reasonably designed to ensure ballot integrity." The Petitioner's argument falls short of this Court's strict standard that limits legislative entanglement in the citizen initiative process. Therefore, the trial court must be affirmed.

2. Chapter 2002-390 also violates the due process rights of the Respondents. Because this Court had approved the *Class Size* proposed amendment and had set the briefing for the *Pre-K* proposed amendment, prior to the effective date of Chapter 2002-390, its retroactive impact on these proposed amendments violates due process and the Florida Constitution's provisions for Supreme Court review of proposed amendments.

3. The Petitioner's argument that Chapter 2002-390 is valid for no reason other than it arguably serves a public interest ignores the strict constitutional prohibition on legislation affecting the initiative process. This Court has unambiguously held that such legislation is valid only when necessary to ensure ballot integrity. Therefore, the Petitioner's argument that the Legislature may act without constitutional restriction if it believes its legislation is in the public interest must be rejected.

STANDARD OF REVIEW

The standard of review on appeal from a grant of a temporary injunction is abuse of discretion, which is based on the principal of general reasonableness. *P.M. Realty & Investments, Inc. v. City of Tampa,* 779 So.2d 404 (Fla. 2nd DCA 2000), *rev. denied* 786 So.2d 580 (Fla. 2001); *Banyan Lakes Homeowners*

Association, Inc. v. School District of Palm Beach County, 2002 WL 1798921 (Fla. 1st DCA August 7, 2002). To the extent that the order is based on issues of law, this Court is not required to defer to the decision of the trial court. *Nastasi v. Thomas*, 766 So.2d 462 (Fla. 4th DCA 2000).

ARGUMENT

Introduction.

The trial court entered a temporary injunction in this action, precluding the enforcement of Chapter 2002-390. The trial court found that the injunction was proper based on the Respondents' showing of all of the requirements for a temporary injunction, including: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest. *Tom v. Russ*, 752 So.2d 1250, 1251 (Fla. 1st DCA 2000); *Spradley v. Old Harmony Baptist Church*, 721 So.2d 735, 737 (Fla. 1st DCA 1998). The trial court did not abuse its discretion in entering the temporary injunction in this case.

A. ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION, IS A SELF-EXECUTING PROVISION, AND LEGISLATION AFFECTING THE PEOPLE'S RIGHT TO AMEND THE CONSTITUTION IS OPEN TO JUDICIAL INQUIRY TO ENSURE THE INTEGRITY.

Article XI, Section 3, Florida Constitution, is a "self-executing" provision, which delineates the process for citizens to amend the Florida Constitution through the initiative process. Article XI, Section 3, Florida Constitution, provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

This Court has held: "This is a self-executing constitutional provision. It clearly establishes a right to propose by initiative petition a constitutional amendment which may be implemented **without the aid of any legislative enactment**." *State of Florida, ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So.2d 561, 566 (Fla. 1980)(emphasis added). As this Court outlined in that decision, the four methods of amending the Florida Constitution are "delicately balanced to reflect the power of the people to propose amendments through the initiative process . . ." *Id.* This Court set a strict standard for legislation concerning the initiative amendment process:

> In considering **any** legislative act or administrative rule which **concerns** the initiative amending process, we must be careful that the legislative statute or implementing rule is **necessary for ballot integrity** since any restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process. The delicate symmetric balance of this constitutional scheme must be maintained, and **any** legislative act regulating the process should be allowed ***only*** **when *necessary* to ensure ballot integrity.**

Id. (Emphasis added).

Despite the clear holding of this Court regarding the narrow role to be played by the Legislature in regulating the process for citizen initiatives to amend the Florida Constitution, the Petitioners as well as *amici* argue that the Legislature possesses the power to regulate the initiative process beyond that which is necessary to ensure ballot integrity. The Petitioner and *amici* suggest that the issue is whether the measure is "reasonably designed to ensure ballot integrity." *See* Petitioner's Brief, p. 5.[4] In essence, they seek to lower the standard without any authority. Under this Court's standards, none of the

[4] The Governor in his *amicus curiae* brief also suggests that the standard is whether the "fiscal impact law is reasonably designed to ensure ballot integrity." Governor's Brief at p. 7. That is not the standard. Instead, the Petitioner's burden in this action is to show that the fiscal impact statement and analysis to be supplied by the government is **"necessary to ensure ballot integrity."** *Citizens Proposition for Tax Relief*, 386 So.2d at 566.

Petitioner's asserted justifications support the regulation of the initiative process contained in Chapter 2002-390.

Petitioners and *amici* note the various statutes and administrative regulations affecting the initiative process. They argue that none of these regulations are provided for in the constitutional scheme setting forth the initiative process yet they have not been determined to constitute an impermissible interference on the initiative process. For example, Section 101,161, Florida Statutes, requiring a ballot summary and title is cited as such a regulation. Yet, as this Court has held, the ballot summary requirements codified in Section 101.161, Florida Statutes, are inherent in the initiative process itself: "Implicit in [Article XI, Section 5, Florida Constitution] is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So.2d 7, 12 (Fla. 2000) (footnote omitted) (emphasis in text).

This Court has specifically determined that "verification is an element of ballot integrity and a task which the legislature may require to be accomplished as a prerequisite to filing an initiative constitutional proposal with the Secretary of State." *State ex rel. Citizens Proposition for Tax Relief v. Firestone*,

386 So.2d 561, 567 (Fla. 1982). Nevertheless, it has been determined that the Legislature possesses no authority to modify the signature verification requirements of Article XI, Section 3, Florida Constitution. *Let's Help Florida v. Smathers,* 360 So.2d 494, 495 (Fla. 1st DCA 1978). In addition, this Court has determined that administrative rule provisions requiring that signature petitions be submitted to the appropriate supervisors of elections for verification no later than 5 p.m. of the 122nd day prior to the general election were contrary to the constitutionally prescribed initiative process. *Citizens Proposition for Tax Relief*, 386 So.2d at 567. Whether other statutory or administrative regulations affecting the initiative process unconstitutionally impinge upon the initiative process is not before the Court at this time.

The Governor argues, without citing any Florida case law, that the Legislature has "broad authority" to enact laws affecting the initiative process. *Amicus* Brief of the Governor at p. 2, 4. In taking this position, the Governor borrows principles from federal cases that do not construe the parameters of Article XI, Section 3, Florida Constitution, but instead construe the limits of federal constitutional law. The trial court in this case did not rely on those federal authorities or

constitutional provisions in reaching its decision. Instead, the trial court relied on Florida case law construing Article XI, Section 3, Florida Constitution. Order, p. 2 (*citing State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So.2d 561 (Fla. 1980) and *Miami Heat Limited Partnership v. Leahy*, 682 So.2d 198 (Fla. 3d DCA 1996). As noted by the trial court, these cases provide for a very limited role for the Legislature in regulating the initiative process. The Governor's argument that the Legislature has broad authority is based on standards applicable to federal constitutional provisions that are not the subject of this appeal.

This Court has concluded that Article XI of the Florida Constitution is "delicately balanced" so that the Legislature bears no greater power than the citizens to propose constitutional amendments. The Petitioners and *amici* express a point of view that governmental analysis is necessary to ensure that Floridians know what they are doing. This view ignores the fact that the citizen initiative process is designed to allow the people to amend the Florida Constitution by bypassing the Legislature. *See Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996)(purpose of Florida's initiative process is to allow the people to "enact change by bypassing their representatives

altogether"), *cert. denied*, 117 S.Ct. 1086 (1997). Petitioners and *amici* presume that the Legislature can "ensure" that the people will know what they are doing only if they are so informed by the government. By entangling itself in the substance of the proposal, however, the government upsets the delicate balance of the initiative process vis-à-vis the other methods of amending the constitution.

This Court has noted the special right of electors to determine the manner in which the Florida Constitution may be amended. Recently, in *Advisory Opinion to the Attorney General Re: Right to Treatment and Rehabilitation for Non-Violent Drug Offenses,* 27 Fla. L. Weekly S488, (Fla. 2002), the Court highlighted the right of the people to formulate their own organic law:

> There is no lawful reason why the electors of this State should not have the right to determine the manner in which the Constitution may be amended. This is the most sanctified area in which a court can exercise power. Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of [the law].

(Citing to *Pope v. Gray*, 104 So.2d 841, 842 (Fla. 1958).)

The Petitioners and *amici* argue that the Legislature's role in the initiative process may go beyond ensuring ballot

integrity. Their argument flies in the face of this Court's unambiguous language of the *Citizens Proposition for Tax Relief* decision: "**any** legislative act regulating the process should be allowed ***only*** **when** ***necessary*** **to ensure ballot integrity.**" (Emphasis added.) *Citizens Proposition for Tax Relief*, 386 So.2d at 566. The Petitioners suggestion that the issue is whether the measure is "reasonably designed to ensure ballot integrity" simply misses the mark. This Court's mandate that legislation affecting the initiative process is valid only when necessary to ensure ballot integrity is not limited to "restrictions" on the initiative process, as the government argues, but instead to any action that regulates or concerns the initiative process. The attempt of the Petitioners and *amici* to reconstruct the standard is based on the fundamental misunderstanding that there are other undefined sources of power that confer upon the Legislature the power to enact legislation affecting the initiative process. This argument simply fails to acknowledge that the initiative method of amending the state constitution is a fundamental right of Floridians that can be regulated only when necessary to ensure ballot integrity.

None of the cases cited by Petitioners or *amici* address the issue of allowing the government to provide an uninvited

commentary on the predicted effects of a citizen's proposed amendment. Instead, the cited cases deal with the issue of ensuring that such language is accurate. In sharp contrast, Chapter 2002-390 deals not with the accuracy of ballot language, but with the government's ability to include **supplemental** information and analysis on top of an otherwise accurately expressed proposal.

In this case, there can be no doubt that the proposals at issue are accurate, because this Court has already found them to be accurate. *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size,* 816 So.2d 580 (Fla. 2002); *Advisory Opinion to the Attorney General Re: Voluntary Universal Pre-Kindergarten Education*, 27 Fla.L.Weekly S663 (Fla. July 11, 2002). Therefore, the government's argument that their additional fiscal analysis is necessary to ensure accuracy or to keep the Respondents from "hiding the ball" is an effort to redefine and greatly expand the concept of "accuracy."

The Governor's argument that *Advisory Opinion to the Attorney General re Tax Limitation*, 644 So.2d 486 (Fla. 1994) supports his position is misguided. In that case, this Court struck a proposed amendment because it failed to accurately reflect the full impact of a proposed amendment. In the instant

case, the Court utilized the same standards used in *Tax Limitation* to conclude that the proposed amendments are accurate and do not "hide the ball." This Court's prior approval of the current proposals reflects that they were sufficiently accurate in all respects, including the fiscal ramifications of the proposals.

Moreover, in *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982), this Court concluded that in its form prior to the challenged legislation, Section 101.161, Florida Statutes, already was designed to "assure that the electorate is advised of the true meaning, and ramifications, of an amendment." This precedent confirms that fiscal analysis in the challenged legislation of Chapter 2002-390 is not "necessary" to ensure that ballot language is accurate. This Court already has the power without Chapter 2002-390 to adequately address the accuracy of a proposal, including hidden fiscal ramifications, just as it did in the *Tax Limitation* case.[5] Because Chapter 2002-390 is not "necessary" to ensure ballot integrity or accuracy, it must be

[5] Petitioner and *amici* cite numerous cases for the proposition that ballot language must be accurate. These cases, however, are of no assistance in resolving this case because this Court has already applied the principles of those cases in concluding that the Class Size and Pre-K Amendments are accurate without the government's fiscal analysis. Moreover, none of those cases deal with the issue of the constitutionality of legislative enactments affecting the initiative process. Instead, the cases cited by the Petitioner are limited to cases that simply apply section 101.161 to proposed amendments. Therefore, they are not relevant to the issue at hand.

stricken under the principles set forth in *Citizens Proposition for Tax Relief.*

The Third District has also examined what type of enactment is "necessary to ensure ballot integrity" and concluded that even a single-subject requirement is not "necessary to ensure ballot integrity." *Miami Heat Limited Partnership v. Leahy*, 682 So.2d 198, 202 (Fla. 3d DCA 1996). In that case, the home rule charter of Dade County provided the sole authority for initiative petitions. The charter did not contain a single-subject requirement for initiative petitions. Therefore, an ordinance adding a single subject requirement was determined to be invalid. Following the "perfect analogy" of Article XI, Section 3, Florida Constitution, as applied and interpreted in *Citizens Proposition for Tax Relief*, the Third District concluded that the ordinance's attempt to add requirements to the initiative process was "*not* 'necessary to ensure ballot integrity' and that such a restriction on the initiative process would strengthen the authority and power of the County Commission but weaken the power of the initiative process." *Id.* at 202.

A single subject requirement has much more to do with ballot integrity than a government-generated fiscal impact statement. If a single subject requirement is deemed not "necessary" to

ensure ballot integrity, then the provisions of Chapter 2002-390 are not necessary to ensure ballot integrity. While a single subject requirement at least addresses the issue of presenting multiple proposals in one amendment, and the consequent danger of voter confusion, the fiscal impact statement and analysis address only the content of the proposition and the government's opinion of whether the proposed amendment would be good policy.

Chapter 2002-390 is not necessary to ensure ballot integrity. At worst, it provides the government with the ability to manipulate numbers in order to control the outcome of a vote on a proposed amendment that it favors or disfavors. But even at best, it is a creation of the Legislature designed to communicate the government's prediction about how much an amendment could cost. Whether this is a good idea or not, it is not "necessary to ensure ballot integrity." Article XI, Section 3, Florida Constitution, neither states nor implies that a fiscal-impact statement or legislative analysis of a proposed amendment is part of the constitutional process for amending the Florida Constitution.

No clearer example of the *ultra vires* exercise of power by the Legislature in imposing the requirement that a fiscal impact statement be included as a part of the initiative process can be

found than in the present context. Included on the 2002 general election ballot for approval or rejection by the people is a legislatively proposed amendment to the Florida Constitution, Constitutional Revision No. 2, which "[r]equires the Legislature to provide by general law for the provision of an economic impact statement to the public prior to the public voting on an amendment to the Florida Constitution." This proposal refutes the argument of Petitioner's and *amici* that the Legislature has inherent authority to provide for a fiscal impact statement to accompany proposed initiative amendments under its authority to regulate elections or its authority to ensure a valid election process.

During the course of the legislative debate on HJR 571 (2001 Regular Session), the joint resolution proposing this amendment to Article XI, Section 5, Florida Constitution, the sponsor of the joint resolution, Representative Randy Johnson, was asked: "Why do you believe we need to do this in the form of a constitutional amendment rather than by law?" In response, Representative Johnson, stated: "Mr. Speaker, as I understand it, it takes a constitutional revision to amend our Constitution." House Debate of HJR 571, May 2, 2001. Thus, the Legislature knew that it could not impose the requirement of a fiscal impact

statement by legislative fiat. The Legislature knew that the people have the right to vote on propositions to change the method by which they can amend their organic law. At the November 2002 general election, if the people want to change their constitution to include the requirement for fiscal impact statements, they can approve Constitutional Revision No. 2. Until then, however, the Legislature has no power to add such requirements by legislative fiat.

As this Court held in *Thomas v. State ex rel Cobb*, 58 So.2d 173, 174 (Fla. 1952) and reiterated recently in *Cook v. City of Jacksonville*, 27 Fla.L.Weekly S495 (Fla. May 23, 2002): "The Constitution is the charter of our liberties. It cannot be changed, modified or amended by legislative or judicial fiat. It provides within itself the only method for its amendment." The legislation at issue upsets the delicate symmetric balance of Article XI of the State Constitution. It tips the scales of power in favor of a term-limited group of elected officials who seek more influence in controlling the initiative process. This is just the sort of legislative fiat that is impermissible under our constitution. Because the Florida Constitution does not authorize the provisions embodied in Chapter 2002-390, and such provisions are not "necessary" to ensure ballot integrity, the

trial court's determination that Respondents are likely to prevail on the merits should be affirmed.

B. THE RETROACTIVITY PROVISIONS OF CHAPTER 2002-390 IMPAIR THE DUE PROCESS RIGHTS OF THE RESPONDENTS AND VIOLATE THE PROVISIONS OF ARTICLE V, SECTION 3(b)(10), FLORIDA CONSTITUTION.

This Court has previously reviewed the language of each amendment at issue and determined that each complies with the requirements of Article XI, Section 3, and section 101.161, Florida Statutes. *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size,* 816 So.2d 580 (Fla. 2002); *Advisory Opinion to the Attorney General Re: Voluntary Universal Pre-Kindergarten Education*, 27 Fla.L.Weekly S663 (Fla. July 11, 2002). The Court summarized in the *Class Size* decision: "[W]e conclude that the ballot initiative complies with section 101.161(1). Accordingly, there is no bar to placing the proposed amendment on the ballot."[6]

On April 25, 2002, when the Supreme Court issued the opinion in *Class Size*, it established vested rights in the proponents of the Class Size Amendment. Moreover, the proponents of the Pre-K Amendment relied on the statutes then in effect to conduct their drive for an amendment to the Florida Constitution by drafting the ballot language to conform to the constitutional and

[6] The Court approved the Pre-K Amendment, utilizing similar language.

statutory requirements; by obtaining signatures in support of their proposed amendment; by obtaining the Attorney General's opinion that the Supreme Court of Florida should review their proposed amendment; and by briefing the issue for the Supreme Court. The governmental action in this regard created vested rights in the proponents of the Pre-K Amendment prior to the enactment of Chapter 2002-390.

Chapter 2002-390 became effective on May 24, 2002, within one month after the Court's opinion approving the first amendment at issue. The legislation erased the rights that existed with respect to both amendments as of May 24, 2002. As such, the legislation operates retroactively to take away rights that were previously vested in Respondents, in violation of the Due Process clauses of the United States and Florida Constitutions.

Legislation that abrogates existing rights is unconstitutional. *Dept of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981). As the Supreme Court of Florida held in *Knowles:* "Under due process considerations, a retroactive abrogation of value has generally been deemed impermissible." *Id.* at 1158 (citations omitted). If a party has a vested right as the result of a judicial decision, that right cannot be abrogated by retroactive legislation. *Id.*; *Rupp v. Bryant*, 417

So.2d 658 (Fla. 1982). Unless a statute is remedial, which this legislation clearly is not, Florida courts will not apply a statute retroactively "if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mutual Automobile Insurance Co v. Laforet*, 658 So.2d 55, 61 (Fla. 1995).

In *Kean v. Clark*, 56 F.Supp.2d 719 (S.D.Miss. 1999), the United States District Court for the Southern District of Mississippi struck a legislative enactment that would have modified Mississippi's initiative process, but which would have applied only to a citizen initiative then pending (the Term Limits Initiative). The action purporting to regulate the initiative process stated that it "shall be applicable to all initiative measures that have not been placed on the ballot at the time this proposed amendment is ratified by the electorate." *Id.* at 723. As the court noted: "The retroactivity provision sentence targets the Term Limits Initiative in particular because it is the only initiative which was pending placement on the statewide ballot when the amendment was adopted . . . . ." *Id.*

The proponents of the Term Limits Initiative argued that the application of the more restrictive provisions retroactively violated Due Process rights among other things. The court held:

> Although the State disputes the arguments of Plaintiffs regarding the political motivations of the provision, it is evident that the provision targets the Term Limits Initiative because it is the only initiative affected by the provision. This amounts to content-based discrimination against a particular political viewpoint, even though the . . . requirement itself is facially content-neutral. . . . Therefore, the retroactivity provision is invalid and the State is enjoined from applying the provision to the Term Limits Initiative.

Id. at 734.

In this case, the retroactivity language of Chapter 2002-390 is nearly identical to that stricken in *Kean*. Moreover, in both cases, the retroactivity language affected only a limited number of initiatives. Therefore, irrespective of both the political motive and the wisdom of the legislation, the retroactivity language of Chapter 2002-390 violates the United States and Florida Constitutions.

The Petitioners argue that the challenged legislation may be applied retroactively because it is arguably "procedural." Petitioners' Brief at p. 14. Yet, a "procedural" law is one that prescribes a method for enforcing rights. *Richardson v. Honda Motor Co.*, 686 F.Supp. 303, 304 (M.D.Fla. 1988). On the other hand, if a law creates a new obligation or duty, then it is substantive and may not be altered retroactively. *Id.* Here, the

law at issue means that proposed amendments that have been approved by this Court in the form originally presented by the Respondents are no longer acceptable for the ballot in the form submitted. Instead, the proposals submitted by the Respondents must be accompanied by the fiscal analysis of a third party government agency. This involves a change in the terms of the proposal from the way in which it was originally approved by this Court. This process changes the substantive right that the Respondents possessed under this Court's decisions to place the proposed amendments on the ballot in the form that the Respondents proposed. These legislative changes go far beyond procedure. In each particular instance, the governmental fiscal analysis will address the substance of each proposed amendment, carrying the potential in each case to make or break a proposed amendment.

An additional problem created by the retroactivity provision of Chapter 2002-390 is its conflict with Article IV, Section 10, and Article V, Section 3(b)(10), Florida Constitution. Those provisions require the Attorney General to petition the Supreme Court "as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." (Emphasis added). In passing a statute purporting to implement Article XI, Section 3,

while sidestepping the review requirement mandated by Article IV, Section 10, and Article V, Section 3(b)(10), the Legislature has made an end-run around the judiciary for election year 2002. If the statute is constitutional, then the Supreme Court will not perform its function under Article V of reviewing the initiative proposal in the form in which it is to be placed on the ballot, because the challenged legislation cuts the Court out of the process of review for the proposed amendments at issue. This process directly violates Article IV, Section 10, and Article V, Section 3(b)(10), Florida Constitution, and the Respondents' Due Process rights. Accordingly, the trial court's determination that the Respondents would prevail on the merits should be affirmed.

C. THE RESPONDENTS HAVE SHOWN THE LIKELIHOOD OF IRREPARABLE HARM AND THE UNAVAILABLIITY OF AN ADEQUATE REMEDY AT LAW.

The trial court correctly ruled that the Respondents would suffer irreparable harm and have no adequate remedy at law if not granted injunctive relief. As the First District noted in certifying the question, the ballots must be printed and mailed to absentee voters by September 21, 2002. The First District further noted that the "time constraints created by the state election laws require that the supreme court immediately resolve those issues, rather than permitting the normal appellate process

to run its course." *Harris v. Coalition to Reduce Class Size,* 27 Fla. L. Weekly D1685 (Fla. 1st DCA 2002). For the same essential reason, the trial court correctly determined that injunctive relief was appropriate because time constraints in the normal course of circuit court litigation would have precluded any adequate remedy to ensure that the 2002 ballots are valid.

D. CONSIDERATION OF THE PUBLIC INTEREST JUSTIFIES THE ISSUANCE OF THE TEMPORARY INJUNCTION.

The question in this case is not whether the inclusion of a fiscal impact statement is a good idea, but whether the Legislature possesses the constitutional power to entangle itself in the citizen initiative process for amending the constitution. The Petitioner's second argument is devoid of constitutional analysis and suggests that the Legislature has absolute power to act in what it deems to be the "public interest." In essence, these governmental officials imply that they may supersede the Florida Constitution if they believe they have a good idea. This portion of their argument should be summarily rejected, as it was in *Let's Help Florida v. Smathers, supra* (determination that application of the random sampling methodology of verifying signatures was inappropriate to initiative petitions) and *State ex rel. Citizens Proposition for Tax Relief, supra* (finding that an administrative rule promulgated by the Department of State is

unconstitutional to the extent that it prohibited the filing of a verified initiative petition through the 91st day preceding the election).

Irrespective of the wisdom of Chapter 2002-390, the provisions of Article XI, Section 3, Florida Constitution, reflect fundamental rights of Florida citizens. In the context of such initiative petitions to amend state constitutions, the United States Supreme Court has held that constitutional protection is at its "zenith." *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S.Ct. 636, 640 (1999). The government has only the limited function in ensuring that initiative petitions meet the single-subject and ballot summary requirements.

In sharp contrast to their intended ministerial role, the government's role under the provisions of Chapter 2002-390 is to provide commentary and analysis about a citizen initiative to amend the Florida Constitution, whether the person proposing such amendment agrees with such analysis or not. Such a process is subject to abuse, as the government could predict a high fiscal impact for those proposals disfavored by the principals of the Revenue Estimating Conference or a low fiscal impact for those proposals favored by those same principals.

This danger was recognized during the Legislature's debate of HJR 571 in 2001. Inquiring of the sponsor of the joint resolution, Representative Dockery stated:

> Representative Johnson, my concern with this is – whose numbers are we going to rely on as being the accurate economic impact? I think that this leaves open a lot of room for whoever controls the numbers controls what is said about a particular issue and I'm a little concerned that we're leaving it up to governmental bureaucracies to kind of dictate to the people of Florida what those numbers are.

House Debate of HJR 571, May 2, 2001. Based on the foregoing, it is evident that the Legislature recognized that the governmental control over the job of estimating economic impact could affect the outcome of any particular initiative. This simply presents too much legislative influence in a process designed to bypass the Legislature.

The Petitioners argue that the State's predictions and assumptions as to the costs of the substantive provisions of each citizen initiative amendment will aid the voter. This argument suffers from the presumption that only the government can provide the truth as to the projected fiscal impact of each proposal. The United States Supreme Court has noted in the context of state regulation of initiative proposals that: "The First Amendment is a value-free provision whose protection is not dependent on 'the

truth, popularity, or social utility of the ideas and beliefs which are offered. [citations omitted] 'The very purpose of the First Amendment is to **foreclose public authority from assuming a guardianship of the public mind** . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Meyer v. Grant*, 108 S.Ct. 1886, 1891 (1988)(emphasis added)(*quoting* various long-standing precedents).

In initiating proposals to amend the Florida Constitution under Article XI, Section 3, the people are their own watchmen. In presuming to ensure that the people's action reflects the people's will in this case, the Legislature presumes too much. Such legislative conduct upsets the "delicate symmetric balance" of Article XI by granting the Legislature too much power in a process designed to bypass them.

The Governor and the House of Representatives spend considerable effort in their *amici* briefs attacking the wisdom of the Class Size and Pre-K Amendments based on their estimates of the cost. Such argument would be better placed in public debate. The Governor and the House of Representatives reveal in their briefs that they do not like the proposals at issue. They advocate strongly against them. Their argument that their intent

is to inform voters of their version of the truth neglects to point out that the information that they intend to present to the voters is not neutral, but partisan and adversarial. The Revenue Estimating Conference is made up of representatives of the Governor's Office and the House and Senate. Fla.Stat. §216.136. To allow the challenged legislation to stand is to invite advocacy, such as that expressed in the *amicus curiae* briefs of the Governor and House of Representatives, into the people's process for proposing initiatives to amend the Florida Constitution.

The government's entanglement in the substance of such initiatives contravenes the policy behind the initiative process, which is designed to allow direct political change in spite of politicians. The legislation at issue presents a grave danger of advocacy seeping into the governmental analysis to be placed alongside the initiatives proposed by citizens.

In the final analysis, the only question in this appeal is whether the challenged legislation's provision for permitting governmental analysis and commentary to be added to a citizen proposal to amend the Florida Constitution is "necessary to ensure ballot integrity." It is not. The temporary injunction preserves the right of the people – the inherent source of all

political power under Article I, Section 1, Florida Constitution – to propose amendments to the Florida Constitution without government comment upon their initiative, unless and until the people adopt Constitutional Amendment 2 at the November 2002 general election. Therefore, the Petitioner's argument falls short and the determination of the court that issuance of the temporary injunction was in the public interest should be affirmed.

CONCLUSION

The legislation at issue is not "necessary to ensure ballot integrity" as this Court has required in the context of legislation affecting the citizen initiative process of Article XI, Section 3, Florida Constitution. In fact, no party has argued in briefing this case that the legislation at issue is necessary to ensure ballot integrity. Instead, the Petitioner and friends have argued that their authority should not be limited to the narrow standards prescribed by this Court. The legislation embodied in Chapter 2002-390 entangles the government in a process that is intended to bypass the government. This excessive governmental influence and entanglement in the citizen initiative process upsets the "delicate symmetric balance" of Article XI of our Florida Constitution. The challenged legislation violates Section XI, Article 3, Florida Constitution, the First and Fourteenth Amendments to the United States Constitution, and the Due Process protections of the Florida and United States Constitutions. Accordingly, this Court should affirm the trial court's well-reasoned opinion striking the provisions of Chapter 2002-390.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct coy of the foregoing was served by hand-delivery to Charles T. Canady, Carlos G. Muniz, Simone Marstiller, Executive Office of the Governor, Room 209, The Capitol, Tallahassee, Florida 32399-0001, Attorneys for Jeb Bush, Governor of the State of Florida; served via facsimile and U.S. Mail to Benjamin H. Hill, III, Lynn C. Hearn, Mark J. Criser, Hill, Ward & Henderson, P.A., Suite 3700, Bank of America Plaza, 101 East Kennedy Boulevard, Post Office Box 2231, Tampa, Florida 33601, Attorneys for The Florida House of Representatives; and by hand-delivery to L. Clayton Roberts and Heidi Hughes, PL-02, The Capitol, Tallahassee, Florida 32399-0250, Attorneys for Secretary of State, Jim Smith, this ____ day of August, 2002.

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Thomas M. Findley

CERTIFICATE OF COMPLIANCE

I hereby certify that the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure, have been complied with in this Brief and the size and style of type used in this brief is Courier New 12 point.

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Thomas M. Findley