IN THE SUPREME COURT OF FLORIDA

Case No. SC 04 - 943

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: FLORIDA MINIMUM WAGE AMENDMENT

INITIAL BRIEF OF OPPONENTS
THE FLORIDA RESTAURANT ASSOCIATION, INC.,
AND THE FLORIDA RETAIL FEDERATION, INC.

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STATEMENT OF THE CASE AND FACTS

Pursuant to Article XI, Section 3 of the Florida Constitution, Floridians for All PAC, 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 possible placement on the November 2004 general election ballot. Throughout this brief, Floridians for All PAC will be referred to as the "sponsor" of the initiative.

In sum, the constitutional amendment proposed by Floridians for All PAC would establish a state-wide minimum wage of $6.15 per hour (increasing the $5.15 federal minimum wage by $1). The amendment would then mandate the increase of that minimum wage in each subsequent years based upon a designated national measure of inflation. 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, the initiative will be referred to as the "minimum wage initiative" or the "minimum wage amendment."

Having received certification from the Secretary of State that the sponsor has collected the requisite number of petition signatures, the Attorney General has

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[1] All references herein to the Florida Statutes are to the Official Florida Statutes (2003), unless otherwise indicated.

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, Florida Statutes. *See* Art. IV, § 10, Fla. Const.; §§ 15.21, 16.061, Fla. Stat. This Court entered an order on June 10, 2004, inviting interested parties to file briefs in the case by June 18, 2004.

The Florida Restaurant Association, Inc. ("FRA"), is a non-profit, state-wide trade association representing the interests of over 10,000 restaurant members, and more generally representing the interests of over 38,000 restaurants throughout the State of Florida. After the government sector, the restaurant industry is the largest employer in the State of Florida. A recent survey by the National Restaurant Association revealed that one in four adults has worked in a restaurant at some point in their lives. Restaurants remain one of the few businesses where a person can actually start a career at entry-level pay and end up as a restaurant owner or in the board room of a national restaurant chain. Because of the particular impact that the minimum wage amendment would have on the restaurant industry, FRA is participating in this proceeding as an interested party.

The Florida Retail Federation, Inc. ("FRF"), is a non-profit, state-wide trade association representing the interests of over 9,000 retailer members in Florida. FRF is the principal advocate for the state's second largest industry – retailing – and has

served as "The Voice of Florida Retailing" since its establishment in 1937. Many in the retail industry use a training wage system based on the federal minimum wage standard, and it is this "opportunity wage" that allows many unskilled, untrained individuals to begin a career that quickly leads to greater economic benefits. Because of the particular impact that the minimum wage amendment would have on the retailing industry, FRF is participating in this proceeding as an interested party.

SUMMARY OF ARGUMENT

On election day, Florida voters are frequently asked to adopt amendments to their Florida Constitution. In making this important decision, the actual text of the amendment is not presented to voters on the ballot. Instead, the voter is presented only with a ballot title and summary written by the private sponsor of the amendment.

Florida law requires the amendment sponsor to prepare a ballot summary that sets forth the "substance [of the amendment] . . . in clear and unambiguous language" and serves as an "explanatory statement . . . of the chief purpose of the measure." §101.161(1), Fla. Stat. (2003). Section 101.161 insures that the ballot title and summary will not mislead the voter and will give the voter sufficient notice of the content and effect of the amendment to allow the voter to cast an intelligent and informed vote.

The sponsor of the minimum wage initiative has devised a ballot summary that fails to give fair and accurate notice to voters of the amendment's content and effect, in violation of section 101.161. First, the ballot summary is misleading and inaccurate because it plainly indicates to the voter that, by adopting the amendment, the voter is effectively doing nothing more than raising the minimum wage in Florida for those employees already covered by the federal minimum wage. In fact, however,

the proposed Florida minimum wage would actually be broader and apply to many individuals who are not presently "covered by the federal minimum wage."

Second, the ballot summary is also misleading and inaccurate because it deceptively states that the new Florida minimum wage will be "indexed to inflation each year." This language indicates to voters that when inflation is positive, i.e., when the price of consumer goods and services is increasing, the minimum wage will go up. But this language also indicates to voters that when inflation is negative, i.e., when the price of consumer goods and services is decreasing, the minimum wage will be adjusted downward to reflect this decrease in the cost of living. Such conditions have frequently occurred in both the United States and around the world. Pursuant to the amendment text, however, the proposed Florida minimum wage could never decrease, even if the price of consumer goods and services actually went down.

The ballot summary also omits important information about the content and effect of the amendment that voters should reasonably expect to receive notice of in the summary. First, the ballot summary is silent on the special treatment afforded in the amendment for tipped employees, who constitute a large segment of Florida's labor market in light of the state's substantial tourism and hospitality industries. In particular, the summary does not reveal the fact that the amendment would depart from the federal minimum wage law by freezing at 2003 levels the "tip credit" otherwise

applicable to the federal minimum wage. As a result, many tipped employees under the amendment would end up with a disproportionate benefit and actually receive a higher wage than other Florida workers. Despite the fact that the ballot summary uses only 67 of the 75 words available to the sponsor, the summary makes no mention at all of this special treatment of tipped employees.

In addition, while voters reading the summary might reasonably believe that Florida's Legislature and executive agencies would have a primary role in the enforcement and interpretation of Florida's new minimum wage, they would be wrong. Instead, although the ballot summary does not reveal this fact, voters are actually being asked to adopt a statewide minimum wage for Florida, the terms and application of which will be dictated by a voluminous body of federal regulations and interpretive law that the amendment adopts by reference.

The sponsor of an initiative amendment must also comply with Article XI, Section 3 of the Florida Constitution, which directs that such an amendment "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.

A primary purpose of the single-subject requirement is to eliminate the danger that an initiative sponsor may seek passage of an unpopular measure by including it with a more popular one in the same proposed amendment. Because 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 does not support in order to secure passage of another part of the amendment that the voter does support. To protect voters against such ploys in amending the Florida Constitution, this Court requires strict compliance with the single-subject requirement.

The sponsor of the minimum wage amendment has violated the single-subject requirement because the amendment poses to the voter at least two fundamentally distinct questions on which the voter could reasonably be expected to reach different conclusions. First, the amendment asks the voter to adopt a $1 increase in the $5.15 federal minimum wage by establishing a state-wide minimum wage of $6.15 per hour. But the amendment does not stop there. It also asks the voter to agree to an increase in that minimum wage every year thereafter based upon a designated national measure of inflation.

A commitment to annual increases in the minimum wage in perpetuity has much more far-reaching implications for the state and its economy than a one-time increase

in the minimum wage. While a voter might desire an increase in the federal minimum wage, which was last raised in 1997, the amendment only allows the voter to achieve this goal by also accepting future minimum wage increases of unknown proportion every year thereafter.

The sponsor of the minimum wage initiative thus improperly seeks to camouflage the much more complex and divisive question of increasing the minimum wage annually with inflation behind the more politically "saleable" concept of a one-time $1 increase in the minimum wage. These questions are sufficiently distinct that a voter could reasonably be expected to reach different conclusions from one to the other. As such, the minimum wage initiative presents voters with not a single question, but at least two fundamentally distinct questions, in violation of the single-subject requirement.

No matter how convinced they are of the merits of their cause, interest groups sponsoring initiatives must comply with the single-subject requirement. Sponsors must also devise a ballot title and summary that are not misleading and that will give the voter sufficient notice of the content and effect of the amendment to allow the voter to cast an intelligent and informed vote. Because the sponsor of the minimum wage initiative has failed to do so, this Court has little choice but to prevent the placement of the initiative on the ballot.

ARGUMENT

The Florida Constitution is the organic law of the State of Florida, establishing the individual rights of Floridians and the structure and powers of their state government. As such, 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

[2] First, a constitutional amendment or revision 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 may be proposed by a periodic 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 concerning taxation or the state budgetary process may be proposed by a periodic taxation and budget reform commission. *Id.* § 6.

constitutional amendment or revision.

In the fifth method of constitutional amendment, however, the public has no representation or input into the preparation of the proposed amendment. In this "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. Art. XI, § 3, Fla. Const.

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. ("the single-subject requirement").

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

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

election," the actual text of the amendment is not presented to voters on the election ballot. 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 amendment text.

To insure 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 sets forth the "substance [of the amendment] . . . in clear and unambiguous language" and serves as an "explanatory statement . . . of the chief purpose of the measure." §101.161(1), Fla. Stat. (2003). 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 has indicated that it will not prevent a proposed amendment from reaching the ballot unless the initiative sponsor has crafted a proposal that is "clearly and conclusively defective." *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982). Despite this deferential standard, of the 49 initiative petitions that this Court has reviewed, the Court has concluded that nearly half (22) were "clearly and

conclusively defective."

I. THE BALLOT SUMMARY OF THE MINIMUM WAGE INITIATIVE VIOLATES SECTION 101.161, FLORIDA STATUTES.

A. THE SPONSOR OF AN INITIATIVE PETITION SEEKING TO AMEND THE FLORIDA CONSTITUTION CARRIES THE BURDEN OF CONSTRUCTING A BALLOT SUMMARY THAT FAIRLY AND ACCURATELY INFORMS VOTERS OF THE CONTENT AND EFFECT OF THE PROPOSED AMENDMENT.

As noted above, 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 prepare a ballot summary that sets forth the "substance [of the amendment] . . . in clear and unambiguous language" and serves as an "explanatory statement . . . of the chief purpose of the measure." §101.161(1), Fla. Stat. (2003).

Section 101.161 insures that the ballot title and summary will not mislead the voter and will give the voter sufficient notice of the content and effect 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); *Advisory Opinion to the Attorney General -- Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994); *Askew*, 421 So. 2d at 154-155.

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 initiative sponsor must ensure that the summary and title provide the electorate with fair notice of the "true meaning, and ramifications, of an amendment." *Askew*, 421 So. 2d at 156; *Advisory Opinion to the Attorney General–Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020-21 (Fla. 1994). The 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) (ballot summary defective because it did not give voters any sense of the many laws, rules, and regulations that would be repealed by a proposed amendment limiting the government's power to adopt laws against discrimination).

As a result, the foremost rule guiding a sponsor's construction of the ballot summary is self-evident – the ballot summary must accurately reflect the actual content and effect of the amendment that voters are being asked to adopt. While this should be a relatively straightforward endeavor, initiative sponsors have time and again fallen short in this all-important task. *See Advisory Opinion to the Attorney General Re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351 (Fla. 1998) (summary defective because it did not adequately inform voters that the amendment forming the new Florida Fish and Wildlife Conservation Commission would remove existing statutory authority of other state agencies, e.g., the Department of Environmental

Protection); *Evans v. Bell*, 651 So. 2d 152 (Fla. 1st DCA 1995) (summary defective because it 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); *Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 726 (Fla. 1994) (summary defective because it stated that the 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 defective summary stated that sugar industry would only "help" pay for the clean up); *Wadhams*, 567 So. 2d 414 (Fla. 1990) (summary defective because it 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); *see also Advisory Opinion to the Attorney General Re Right to Treatment & Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 499-500 (Fla. 2002) (Anstead, J., concurring in part and dissenting in part, in an opinion joined in by Harding and Lewis, JJ.).

B. THE SPONSOR OF THE MINIMUM WAGE INITIATIVE HAS PREPARED AN INACCURATE AND INADEQUATE BALLOT SUMMARY AND HAS FAILED TO SATISFY ITS LEGAL OBLIGATIONS TO FLORIDA VOTERS.

The sponsor of the minimum wage initiative has devised the following ballot title and summary for its proposed amendment:

> BALLOT TITLE: Florida Minimum Wage Amendment
>
> BALLOT SUMMARY: This amendment creates a Florida minimum wage covering all employees in the state covered by the federal minimum wage. The state minimum wage will start at $6.15 per hour six months after enactment, and thereafter be indexed to inflation each year. It provides for enforcement, including double damages for unpaid wages, attorney's fees, and fines by the state. It forbids retaliation against employees for exercising this right.

This ballot summary is misleading in several respects and does not fairly and accurately inform voters of the content and effect of the amendment to the Florida Constitution that the voters are being asked to adopt. Any one of these deficiencies would be material to a Florida voter in determining whether to vote for or against the amendment.

1. THE BALLOT SUMMARY DOES NOT INFORM VOTERS THAT THE NEW FLORIDA MINIMUM WAGE THEY ARE BEING ASKED TO ADOPT WILL EXTEND TO EMPLOYEES WHO ARE NOT COVERED BY THE FEDERAL MINIMUM WAGE.

First, the ballot summary plainly indicates to the voter that, by adopting the amendment, the voter is doing nothing more than raising the minimum wage in Florida for those employees already covered by the federal minimum wage. In fact, however, due to the definitions the amendment borrows from federal law, the proposed Florida minimum wage would actually be broader and apply to many individuals who are not presently "covered by the federal minimum wage." Thus, the summary does not reflect the content and effect of the amendment and affirmatively misleads voters as to the amendment's scope.

The text of the amendment contains the following definition section:

> **(b) Definitions.** As used in this amendment, the terms "Employer," "Employee" and "Wage" shall have the meanings established under the federal Fair Labor Standards Act (FLSA) and its implementing regulations.

As such, the amendment requires each "Employer" to pay a minimum wage to each of its "Employees," based upon the definitions of these terms borrowed from the federal Fair Labor Standards Act ("the federal act"). Notably, the federal act regulates not just minimum wages but three components of labor relations: (1) minimum wages;

(2) maximum hours; and (3) child labor.

The federal act contains a fairly straightforward definition of “Employer,” which applies across the span of the act’s minimum wage, maximum hour, and child labor requirements, as follows:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C.A. §203(d).

The federal act’s definition of “Employee” for purposes of the act’s minimum wage, maximum hour, and child labor requirements, is more involved and is set forth in full below:

> (e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means--
>
> (A) any individual employed by the Government of the United States–
>
> (i) as a civilian in the military departments (as defined in section 102 of Title 5),
>
> (ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual–

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who– (I) holds a public elective office of that State, political subdivision, or agency, (II) is selected by the holder of such an office to be a member of his personal staff, (III) is appointed by such an officeholder to serve on a policymaking level, (IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or (V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid

> expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
>
> (ii) such services are not the same type of services which the individual is employed to perform for such public agency.
>
> (B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.
>
> (5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

29 U.S.C.A. 203(d).

The text of the minimum wage initiative incorporates these federal definitions. Thus, any individual defined as an "Employee" under the above definition from the federal act would be entitled to an increased minimum wage if the minimum wage initiative were adopted by Florida voters.

What the ballot summary fails to inform voters, however, is that the amendment would also adopt a minimum wage in Florida for many individuals to whom no federal minimum wage currently applies. This is true because, while the minimum wage amendment incorporates the specific definition of "Employee" from section 203 of the federal act – a definition which applies across all of the act's minimum wage,

maximum hour, and child labor requirements – the minimum wage amendment does not incorporate the various categories of "Employees" listed in section 213 of the act who are exempt from the federal minimum wage. While these minimum-wage-exempt individuals are still "Employees" under the definition in section 203 of the federal act, and may be covered by the act's requirements pertaining to maximum hours and child labor, they are not entitled to receive the federal minimum wage.

But because these minimum-wage-exempt individuals are all "Employees" under the federal act's definition of "Employee" – the definition incorporated into the minimum wage amendment – all of these individuals would receive the newly created Florida minimum wage if the initiative were adopted. Thus, Florida voters would unknowingly be voting to extend a new Florida minimum wage to the many categories of workers who are exempt from the federal minimum wage under section 213 of the federal act, which states in relevant part:

> § 213. Exemptions
> (a) Minimum wage and maximum hour requirements
> The provisions of section 206 [the law requiring payment of the federal minimum wage] . . . and section 207 [the law imposing federal maximum hour requirements] of this title shall not apply with respect to–
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or

secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

. . . .

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

. . . .[4]

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid

[4] Numbered paragraphs of this subsection that have been repealed are omitted.

at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

. . . .

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

. . . .

(12) any employee employed as a seaman on a vessel other than an American vessel; or

. . . .

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of Title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

. . . .

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

. . . .

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not

> apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

29 U.S.C.A. §213.

If the sponsor of the minimum wage initiative had intended to apply the new Florida minimum wage only to those employees covered by the federal minimum wage, the sponsor could have done so by simply using language similar to the language used in the ballot summary, e.g., "'Employee' means any natural person who is covered by the federal minimum wage," or "'Employee' means any natural person who is entitled to receive the federal minimum wage." This language would have incorporated not only the definition of "Employee" from section 203 of the federal act, but also the specific exemptions from the federal minimum wage law contained in section 213 of the act. Instead, however, the sponsor of the minimum wage amendment chose to adopt the definition of "Employee" contained in section 203 of the broader federal act, which governs minimum wages, maximum hours, and child labor, without

incorporating the specific exemptions in section 213 of the act relative to the federal minimum wage.

As such, the ballot summary is patently misleading. The ballot summary states that the new Florida minimum wage would cover "all employees in the state covered by the federal minimum wage." This statement is true as far as it goes, but it clearly conveys to the voter that the proposed Florida minimum wage would not apply to individuals who are not otherwise covered by the federal minimum wage. By the plain terms of the amendment, however, the reach of the proposed Florida minimum wage would be more expansive than that of its federal counterpart and cover employees who are not otherwise entitled to receive the federal minimum wage.

The ballot summary, which indicates a narrower scope of operation for the amendment than the amendment text supports, suffers from the same defects as the ballot 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.

Like the ballot summary in *Casino Authorization, Taxation and Regulation*, the ballot summary for the minimum wage initiative indicates to voters that the proposed minimum wage increase will apply only to those workers already covered by the federal minimum wage. By adopting the definitions from the federal act, however, the text of the amendment reveals that the new Florida minimum wage will be more expansive and apply to many categories of workers that are not subject to the federal minimum wage.

For this reason alone, the ballot summary is fatally defective because 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).

2. THE BALLOT SUMMARY DOES NOT INFORM VOTERS THAT THE NEW FLORIDA MINIMUM WAGE MAY NOT BE DECREASED IN THE EVENT THAT CONSUMER PRICES FALL AND THE RATE OF INFLATION IS NEGATIVE.

Second, the ballot summary also deceptively states that the new Florida minimum wage will be "indexed to inflation each year." This language indicates to voters that when inflation is positive, i.e., when the price of consumer goods and services is increasing, the minimum wage will go up. But this language also indicates to voters that when inflation is negative, i.e., when the price of consumer goods and services is decreasing, the minimum wage will be adjusted downward to reflect this decrease in the cost of living. While many Americans have never experienced such negative inflation (also called "deflation"), this phenomenon has existed in Japan for the last few years and was frequently experienced in the United States from the 1920's through the 1950's. See Appendices C & D.

The ballot summary is thus patently misleading because, pursuant to the amendment text, the new Florida minimum wage can never decrease, even if the amendment's selected measure of inflation for the price of consumer goods and services goes down.

Subsection (c) of the amendment text states in relevant part:

> On September 30th of that year and on each following September 30th, the state Agency for Workforce Innovation shall calculate an adjusted Minimum Wage rate by increasing the current Minimum Wage rate by the rate of inflation during the twelve months prior to each September 1st using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index as calculated by the United States Department of Labor. Each adjusted Minimum Wage rate calculated shall be published and take effect on the following January 1st.

Thus, the new Florida minimum wage could be increased in response to positive inflation, but it could never be decreased if the rate of inflation was negative and the price of consumer goods and services had actually fallen.

Ironically, such periods of negative inflation typically occur in times of great economic turmoil, e.g., during the Great Depression of the 1930's in the United States, at a time when unemployment is high and businesses are struggling to keep their doors open. Under the new Florida minimum wage, Florida businesses confronted with such an economic crisis would be forced the keep their wages artificially high. At the same time, many of these businesses could not raise their prices due to soft consumer demand resulting from the high rate of unemployment and general lack of consumer confidence, leaving these businesses with little choice but to eliminate even more employees or close their doors.

3. THE BALLOT SUMMARY DOES NOT INFORM VOTERS THAT THE NEW FLORIDA MINIMUM WAGE WOULD RESULT IN TIPPED EMPLOYEES RECEIVING A MUCH HIGHER MINIMUM WAGE THAN OTHER FLORIDA WORKERS.

Third, the ballot summary fails to reflect the specific contents of the amendment with regard to its special treatment of tipped employees, who constitute a large segment of Florida's labor market in light of the state's substantial tourism and hospitality industries. In particular, the summary does not reveal the fact that the amendment would depart from the federal minimum wage law by freezing at 2003 levels the "tip credit" applicable to the federal minimum wage. In fact, the ballot summary makes absolutely no mention at all of the amendment's special treatment of tipped employees or the tip credit, despite the fact that the ballot summary uses only 67 of the 75 words available to the sponsor. §101.161(1), Fla. Stat. (2003).

Under the federal act, a "tipped employee" is one who is engaged in an occupation in which the employee "customarily and regularly receives more than $30 a month in tips." 29 U.S.C.A. §203(t). The employer of a tipped employee receives a credit of $3.02 per hour toward the federal minimum wage of $5.15 per hour, requiring that employer to pay a direct wage to the tipped employee of $2.13 per hour. *See* Appendix E; 29 U.S.C.A. §203(m).

Under the minimum wage amendment, however, the tip credit applied to the new Florida minimum wage would be forever frozen at the present level of $2.13 per hour. Minimum Wage Amendment, §(c) ("For tipped Employees meeting eligibility requirements for the tip credit under the FLSA, Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003").

Thus, no matter how high the new Florida minimum wage may rise, and no matter how high the actual amount of tips might increase over the ensuing years, and no matter how high the tip credit might be raised under the federal act, the tip credit under the new Florida minimum wage would never increase beyond $2.13 per hour.[5] As such, tipped employees would end up receiving much higher actual wages than other entry-level workers under the new Florida minimum wage.

The ballot summary, however, is completely silent on this issue, giving no indication that such a disparate effect on tipped employees and their employers is contained within the amendment. In fact, the ballot summary makes no mention of the amendment's special treatment of tipped employees or the tip credit, despite the fact

[5] Notably, the minimum wage amendment specifically prohibits the Florida Legislature from doing anything other than reducing the tip credit. Minimum Wage Amendment, §(f).

that the ballot summary uses only 67 of the 75 words available to the sponsor. §101.161(1), Fla. Stat. (2003). While it may not be possible for a sponsor to disclose every element of its amendment in the ballot summary, a sponsor must certainly disclose the material elements of the amendment. In a state like Florida with so many tipped employees in its large tourism and hospitality industries, some mention of the amendment's freeze on the tip credit is necessary to put voters on notice of this significant issue contained in the amendment.

4. THE BALLOT SUMMARY DOES NOT INFORM VOTERS THAT THE NEW FLORIDA MINIMUM WAGE THEY ARE BEING ASKED TO ADOPT WOULD INCORPORATE A VOLUMINOUS BODY OF FEDERAL LAW.

Finally, the ballot summary fails to inform voters that they are being asked to adopt and incorporate into the Florida Constitution not only the complex statutory definitions of the various terms contained in the federal act, but also the large body of implementing regulations under the federal act. Minimum Wage Amendment, §(b) (incorporating "implementing regulations" under the federal act); *see* 29 C.F.R. §500 *et seq.* The ballot summary also fails to inform Florida voters that they are being asked to adopt the existing body of "case law, administrative interpretations, and other guiding standards developed" under the federal act to "guide the construction of this amendment and any implementing statutes or regulations." Minimum Wage

Amendment, §(f).[6] Moreover, the amendment text makes clear that the Florida Legislature's power to adopt statutes implementing and interpreting the new Florida minimum wage would be extremely limited. Minimum Wage Amendment, §(f).

The ballot summary gives no hint of these contents of the amendment, despite the fact that the ballot summary uses only 67 of the 75 words available to the sponsor. §101.161(1), Fla. Stat. (2003). Thus, while voters reading the summary might reasonably believe that Florida's Legislature and executive agencies would have a primary role in the enforcement and interpretation of Florida's new minimum wage, they would be wrong. Instead, although the ballot summary does not reveal this fact, voters are actually being asked to adopt a voluminous body of federal regulations and interpretive law that the voter cannot possibly be expected to comprehend or appreciate. While it may not be possible for a sponsor to disclose every element of its amendment in the ballot summary, a sponsor must certainly disclose the material elements of the amendment. The adoption by reference of a large body of federal regulations and interpretive law is a material element that must be mentioned in order

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[6] Presumably, the sponsors of the minimum wage initiative are not asking voters to adopt a constitutional provision that would incorporate <u>future</u> changes in the definitions contains in the federal act or its implementing regulations, or future "case law, administrative interpretations, and other guiding standards," as this would constitute a wholesale ceding of authority to the federal government that is not disclosed in the ballot summary.

to put voters on notice of this significant issue contained in the amendment.

5. CONCLUSION

Under this Court's established case law, the initiative sponsor must ensure that the ballot title and summary fairly and accurately reflect the content and effect of the amendment voters are being asked to adopt. *Fish and Wildlife Conservation Commission*, 705 So. 2d 1351 (Fla. 1998) (summary defective because it did not adequately inform voters that the amendment forming the new Florida Fish and Wildlife Conservation Commission would remove existing statutory authority of other state agencies, e.g., the Department of Environmental Protection); *Evans*, 651 So. 2d 152 (Fla. 1st DCA 1995) (summary defective because it 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); *Stop Early Release of Prisoners*, 642 So. 2d 724, 726 (Fla. 1994) (summary defective because it 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 defective summary stated that sugar industry would only "help" pay for the clean up); *Wadhams*, 567 So. 2d 414 (Fla. 1990) (summary defective because it 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); *see Right to Treatment & Rehabilitation*, 818 So. 2d at 499-500 (Anstead, J., concurring in part and dissenting in part, in an opinion joined in by Harding and Lewis, JJ.).

The sponsor of the minimum wage initiative has not lived up to this critical obligation. For all of the reasons cited above, the minimum wage initiative sponsor has prepared a ballot summary that does not fairly and accurately reflect the contents of the amendment that voters are being asked to adopt. As a result, the amendment proposed by the sponsor cannot be allowed to proceed to the ballot. If the sponsor wishes to continue to pursue this amendment, it can readily do so by curing the defects identified herein so that voters will be adequately informed of the content and effect of the amendment before being asked to vote on the measure.

II. THE MINIMUM WAGE AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT ESTABLISHED IN ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION BECAUSE IT IMPROPERLY ASKS VOTERS MULTIPLE QUESTIONS.

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 requirement only on this particular amendment process. *Fine*, 448 So. 2d at 988. On the sponsor of an initiative rests "[t]he decisions which determine compliance with the requirements" of the single-subject provision. *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).

A primary purpose of the single-subject requirement is to eliminate the danger that the sponsor of an initiative amendment may seek passage of an unpopular measure by including it with a more popular one in the same proposed amendment. *Id.*; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20; *Evans*, 457 So. 2d at 1354. Because 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; *Save Our Everglades*, 636 So. 2d at 1339; *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 requirement. *Fine*, 448 So. 2d at 989.

In determining whether the sponsor of an initiative has violated the single-subject requirement, this Court has considered several factors, but the overarching test is whether the initiative engages in "logrolling" by actually asking a voter multiple questions instead of just one. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019-20 (amendment violated single-subject requirement because it asked voters to vote "yes" or "no" on ten different classifications); *Fine*, 448 So. 2d at 990-92 (amendment violated single-subject requirement because it asked voters to impose limitations on three different revenue sources -- taxes, user fees, and revenue bonds).

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; *see also Advisory Opinion to the Attorney General Re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, No. SC03-857, 2004 WL 1064930, at *6-8 (Fla. May 13, 2004) (Bell, J., specially concurring, in an opinion joined in by Anstead, C.J., and Lewis, J.; Wells, J., specially concurring).

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 requirement 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 minimum wage initiative has prepared an amendment that presents voters with at least two fundamentally distinct questions:

(1) In light of the fact that the federal minimum wage has been set at $5.15 per hour for several years now,[7] should Florida unilaterally adopt a higher state-wide minimum wage of $6.15 per hour?

and

(2) Should Florida adopt a minimum wage that will be increased annually in perpetuity based upon a stated national inflation measure?

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[7] The federal minimum wage was increased from $4.75 per hour to $5.15 per hour, effective September 1, 1997.

While a voter might well favor a $1 increase in the minimum wage in Florida, that same voter might feel very differently about committing to automatic annual increases in that minimum wage based upon national inflation figures, particularly any voter old enough to remember the days when the United States suffered through years of double-digit inflation. *See* Appendix D.

One need not be an economist to understand why such a voter would perceive adoption of an automatic inflation escalator in a state minimum wage as a fundamentally different proposition from adoption of a one-time increase in the minimum wage. The initial impact of a minimum wage hike is borne by businesses that provide a significant number of entry-level jobs where employees begin earning the minimum wage until they acquire more valuable skills and experience. Such businesses include restaurants, retailers, and the many small businesses that are the engines of our local economies. A one-time increase in the minimum wage is difficult enough for these businesses to cope with. Faced with higher labor costs from a minimum wage increase, many of these businesses are forced to: (a) increase the price of the goods and/or services they provide (the same goods and services consumed by the employees that the minimum wage increase is supposed to help); and/or (b) decrease their labor costs by laying off employees or reducing employee benefits, like health insurance and retirement. *See generally*, Appendix F.

If the minimum wage is then annually increased to account for inflation, however, then all of the businesses that raised their prices to fund the initial minimum wage increase will fuel even further inflation, leading to even higher minimum wages. This feeds a continuing cycle of further price hikes (resulting in further increases in the minimum wage) and/or lay-offs and benefit reductions. As this cycle continues for years, the number of businesses that initially found they could absorb the increases in the minimum wage without raising prices, laying off workers, or reducing benefits, becomes fewer and fewer. *See generally*, Appendix G.

All of this leads to a business climate and labor market that is both unpredictable and unfavorable when compared to neighboring states, let alone when compared with markets overseas. This vicious cycle would be compounded even further if it took place in an inflation environment in which prices were already rising at a double-digit rate.

The sponsor of the minimum wage initiative improperly seeks to camouflage the much more complex and divisive question of increasing the minimum wage annually with inflation behind the more politically "saleable" concept of a one-time $1 increase in the minimum wage. These questions are sufficiently distinct that a voter could reasonably be expected to reach different conclusions from one to the other. As such, the minimum wage initiative presents voters with not a single question, but

at least two fundamentally distinct questions, in violation of the single-subject requirement.

CONCLUSION

The sponsor of the minimum wage 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 minimum wage initiative sponsor has failed to do so. As a consequence, this Court must prevent the minimum wage initiative from proceeding to the ballot.

Respectfully submitted on this 18th day of June, 2004.

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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 18th day of June, 2004, to the following:

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

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