IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 04-947

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: FAIRNESS INITIATIVE REQUIRING LEGISLATIVE DETERMINATION THAT SALES TAX EXEMPTIONS AND EXCLUSIONS SERVE A PUBLIC PURPOSE
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BRIEF OF INTERESTED PARTIES, FLORIDA ASSOCIATION OF REALTORS, INC.; FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS and FLORIDA INSTITUTE OF ACCOUNTANTS, INC.; FLORIDA PHOSPHATE COUNCIL, INC.; NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, INC.; FLORIDA MANUFACTURING AND CHEMICAL COUNCIL, INC.; FLORIDA FRUIT AND VEGETABLE ASSOCIATION, INC.; FLORIDA FARM BUREAU FEDERATION, INC.; FLORIDA CATTLEMEN'S ASSOCIATION, INC.; AND SUNSHINE STATE MILK PRODUCERS, INC., IN OPPOSITION TO THE PROPOSED INITIATIVE

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On Petition for a Written Opinion of the Justices
as to the Validity of an Initiative Petition

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STATEMENT OF INTERESTS

Interested Party Florida Association of Realtors, Inc. ("FAR") is a Florida not-for-profit corporation with its principal place of business at 7025 Augusta National Drive, Orlando, Florida 32872-5025. The vast majority of FAR's approximately 100,000 members are professionals in the Florida real estate industry. FAR is a membership organization that has for many years actively participated on behalf of its members in public policy-making. Professional services provided by FAR members, and residential rentals managed by FAR members, are among the transactions that would be subject to review and potential taxation pursuant to the Proposed Tax Amendment. FAR members are individual consumers of many goods and services that are the subject of potential taxation pursuant to the Proposed Tax Amendment, including appraisal services, title services, data processing services, accounting services, and legal services.

Interested Party Florida Institute of Certified Public Accountants and Florida Institute of Accountants, Inc. ("FICPA") is a Florida not-for-profit corporation with its principal place of business at 325 West College Avenue, Tallahassee, Florida 32303. The vast majority of FICPA's approximately 18,500 members are individuals who are certified public accountants licensed to perform professional accounting services in Florida. FICPA is a member-driven professional society that has for many

years actively participated on behalf of its members in public policy-making. Professional services provided by FICPA members are among the transactions subject to review and potential taxation pursuant to the Proposed Tax Amendment. Additionally, FICPA members are consumers of many goods and services that are subject to potential taxation under the Proposed Tax Amendment, including secretarial and data-processing services.

Interested Party National Federation of Independent Businesses, Inc. ("NFIB"), is a California not-for-profit corporation with it principal address at 53 Century Boulevard, Nashville, Tennessee 37214, and its principal Florida address at 110 East Jefferson Street, Tallahassee, Florida 32301. NFIB represents approximately 15,000 members located and doing business in Florida. NFIB provides small business advocacy services in Washington D.C., and the capitals of all 50 states. NFIB's Florida members buy and sell goods and services that are subject to potential taxation under the Proposed Tax Amendment.

Interested Party Florida Phosphate Council, Inc. ("FPC"), is a Florida not-for-profit corporation with its principal place of business at 1435 E. Piedmont Drive, Suite 211, Tallahassee, Florida 32308. FPC is a trade association that represents five member companies in statewide governmental relations and public affairs. Activities performed by FPC members include phosphate mining, fertilizer manufacturing, and

land reclamation. FPC members are consumers of many goods and services subject to potential taxation under the Proposed Tax Amendment, including electricity used for mining and manufacturing, repair and maintenance services of mining and manufacturing equipment, boiler fuels, purchase of raw materials that are incorporated into a finished product and equipment purchased for use in new and expanded mining operations.

Interested Party Florida Cattlemen's Association, Inc. ("FCA") is a Florida not-for-profit corporation with its principal place of business at 800 Shakerag Road, Kissimmee, Florida 34742. The FCA is a trade association representing more than 4,500 members, all of whom are in the cattle/ranch business. Members of the FCA raise cattle and transport and sell calves, hay, and food for cattle, among other services. The proposed tax amendment would affect many aspects of FCA's business, including the cost of machinery and equipment, and transportation. FCA members are also individual consumers of many goods and services that are the subject of review and potential taxation pursuant to the Proposed Tax Amendment.

Interested Party Florida Farm Bureau Federation, Inc. ("FFBF") is a Florida not-for-profit corporation with its principal place of business at 5700 Southwest 34th Street, Gainesville, Florida 32608. FFBF represents the interests of more than 150,000 member families, including more than 40,000 commercial farmers, through agricultural,

educational, and informational services. Services provided by FFBF members are among the transactions that would be subject to potential taxation under the Proposed Tax Amendment. FFBF members are individual consumers of many goods and services that are the subject of potential taxation under the Proposed Tax Amendment, such as various agricultural products.

Interested Party Florida Manufacturing and Chemical Council, Inc. ("FMCC") is a Florida not-for-profit corporation with its principal place of business at 1311 Executive Center Drive, Suite 225, Tallahassee, Florida 32301. FMCC's membership includes approximately 50 businesses involved in manufacturing or associated industries. FMCC participates on behalf of its members in public policy-making with respect to issues that affect manufacturing by its members. Goods sold by FMCC members to wholesalers for resale to retailers of the goods are subject to potential taxation under the Proposed Tax Amendment. Component parts of manufactured products, manufacturing services, electricity used in manufacturing, and machinery and equipment used in manufacturing are goods purchased by FMCC members that are subject to potential taxation under the Proposed Tax Amendment.

Interested Party Florida Fruit and Vegetable Association, Inc. ("FFVA") is a Florida not-for-profit corporation with its principal place of business at 4401 East Colonial Drive, Orlando, Florida 32803. FFVA is a trade association that aims to

enhance the fruit and vegetable business by fostering a competitive environment for producing and marketing fruits, vegetables, and other crops. Although FFVA does not officially list its number of members, the membership produces fruit and vegetable crops in approximately 50 counties statewide. Various inputs necessary in the production of fruits and vegetables, such as seed, fertilizer, and pesticides are among the components subject to review and potential taxation under the Proposed Tax Amendment. Additionally, FFVA members are individual consumers of the goods they produce.

Interested Party Sunshine State Milk Producers, Inc. ("SSMP") is a Florida not-for-profit corporation with its principal place of business at 3334 North Westmoreland Drive, Orlando, Florida 32804. SSMP is a trade association that represents over 250 dairy farms throughout the southeast United States, specifically Florida, Georgia, Alabama, and Tennessee, on public policy-making. Many products that SSMP members utilize in the production of dairy products are subject to potential taxation under the Proposed Tax Amendment, including farm equipment and machinery, and cattle feed. Additionally, SSMP members are individual consumers of the goods they produce.

STATEMENT OF THE CASE

On August 11, 2003, the Secretary of State approved the format for the initiative sponsored by Floridians Against Inequities in Rates, Inc. (FAIR), a political action committee registered with the Department of State. [A. 2][1] The initiative was entitled "Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose" (No. 03-30) [A. 3]. The full text of the proposal is included in the Appendix. [A. 3].

On May 26, 2004, the Secretary of State submitted initiative No. 03-30 to the Attorney General pursuant to section 15.21, Florida Statutes, and represented that FAIR had "successfully met the signature requirements" to request a written opinion of the Justices as to the validity of the initiative. [A. 5].

On June 8, 2004, the Attorney General filed a petition with the Court pursuant to Article IV, section 10, Fla. Const., and section 16.061, Florida Statutes, requesting a written opinion of the Justices as to the validity of the initiative. [A. 6].

On June 10, 2004, this Court entered an Interlocutory Order in Case No. SC04-947 requesting that interested parties file briefs by June 18, 2004.

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[1]This brief includes an Appendix with certain pertinent documents from the official records of the Division of Elections and of this Court. References to the Appendix are denoted by brackets containing "A." followed by a page number.

SUMMARY OF THE ARGUMENT

This initiative is clearly and conclusively defective because it violates the single-subject requirement of Article XI, section 3 of the Constitution by combining two basic tax policy issues into one proposal. It would force voters who wish to end current exemptions to the sales and use tax on goods to accept automatic creation of a new sales and use tax on services. Thus, the initiative engages in impermissible log-rolling and presents this Court with "a classic example of the very evil which the one subject limitation is designed to prevent."

The Proposed Tax Amendment engages in a more subtle form of log-rolling by lumping together all of the current express exemptions from the sales and use tax on goods – such as the exemptions for skyboxes and ostrich feed – and sets the wheels in motion for their automatic repeal by forcing voters to accept the prospective repeal of other current exemptions.

This initiative also violates the single-subject requirement because, if adopted, it would leave so many questions unanswered. Florida's experience in imposition of a services tax in 1987 – followed soon thereafter by its repeal amid great controversy – points up the multitude of profound policy issues that must be addressed in detail to implement a new sales and use tax on services. This initiative fails to answer those questions, or make clear how they will be answered.

This initiative would substantially alter the functions of the Legislative, Executive and Judicial branches. It would short-circuit a variety of procedural safeguards for the making of laws. It would negate the Governor's power to review and approve or veto legislation that would repeal existing exemptions and impose the sales and use tax on services. And it could vest in the Judicial Branch the authority to direct official actions by either of the other branches in the event that the sales and use tax is extended under auspices of this measure through a failure to act by the other two branches.

The Proposed Tax Amendment also is clearly and conclusively defective because the ballot summary fails to give voters fair and adequate notice of the decisions they would be asked to make. It does not disclose the specific roles of the three branches of government in imposition of a new sales and use tax on services or disclose any proposed change to the constitutional requirement for taxes to be imposed only by law. Further, it inserts improper "political rhetoric" into the title, and does not support that "emotional language" in the proposed text. The effects on other current constitutional provisions – the Governor's veto power and the constitutional limitation on unfunded legislative mandates, among others – also are not disclosed in the ballot summary.

Finally, the Proposed Tax Amendment erroneously states that exemptions or exclusions from tax may be re-enacted, retained or created by a simple three-fifths

vote of those House and Senate members who are present and voting. However, the proposed constitutional text would require such legislative action to be taken only by a three-fifths vote of the entire membership of each house, misleading the voters on the extraordinary vote required for legislative action concerning the sales and use tax.

While some of these deficiencies standing alone are sufficient to invalidate the initiative, when taken together they "combine to produce a summary that is fatal to the proposed amendment." Accordingly, the Proposed Tax Amendment should be declared clearly and conclusively defective and should be invalidated by this Court.

STANDARD OF REVIEW

This Court's review of the validity of an initiative petition is limited to two issues: (1) whether the proposed amendment satisfies the single-subject limitation of Article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary satisfy the requirements of Article XI, section 5 of the Florida Constitution and section 101.161(1), Florida Statutes. *Advisory Opinion to the Attorney General re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, No. SC03-857 (Fla. 2004); *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). In order to be declared invalid, a proposed initiative must be "clearly and conclusively defective on either ground." *Advisory Opinion to the Attorney General re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 891 (Fla. 2000) [hereinafter *Treating People Differently*].

ARGUMENT

I. THE PROPOSED TAX AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT BECAUSE IT IS A CLASSIC EXAMPLE OF LOG-ROLLING, IT PERFORMS MULTIPLE FUNCTIONS OF GOVERNMENT, AND IT AFFECTS MULTIPLE CONSTITUTIONAL PROVISIONS

Article XI, section 3 of the 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, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith....

The single-subject requirement serves two purposes. First, it prohibits log-rolling, the discredited practice of combining separate proposals into one measure "in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of having to choose which subject they feel most strongly about." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). Second, it prevents an initiative "from substantially altering or performing the functions of multiple aspects of government, or from affecting other provisions of the constitution." *Advisory Opinion to the Atty. Gen. re: Voluntary Universal Pre-Kindergarten Education*, 824 So. 2d 161, 165 (Fla. 2002) [hereinafter *Universal Pre-Kindergarten Education*].

The Court enforces "strict compliance" with this requirement, *Fine*, 448 So. 2d at 989, as a safeguard against "precipitous and cataclysmic change." *In re Advisory Opinion to the Attorney General – Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) [hereinafter *Save Our Everglades*]. This initiative violates both evils addressed

by the single-subject requirement. It would bring about exactly the sort of change which Article XI, section 3 is intended to prohibit.

A. The Single-Subject Requirement Applies to this Initiative Because it Does Not Limit Taxes and it Affects Multiple Functions and Levels of Government

The Proposed Tax Amendment is subject to the single-subject requirement of Article XI, section 3 because the only express exception does not apply. That exception was added to Article XI, section 3 by initiative in 1994. It provides that the single-subject requirement applies to initiatives "except for those limiting the power of government to raise revenue[.]" In validating the 1994 initiative, the Court stated that the exception would apply to "initiatives that deal solely with limiting 'the power of government to raise revenue'[.]" *In re Advisory Opinion to the Attorney General re: Tax Limitation*, 644 So. 2d 486, 496 (Fla. 1994) (emphasis added) [hereinafter *Tax Limitation I*]. The Court recognized that "[t]he single subject requirement would remain for all other types of initiative petitions and for petitions that combine revenue limitations and other subjects." *Tax Limitation I*, 644 So. 2d at 496. Moreover, the Court has said this exception "does not authorize revenue-limitation initiatives which substantially change the powers or functions of more than a single level or branch of government." *Advisory Opinion to the Attorney General re: Peoples' Property Rights*

Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So. 2d 1304, 1310 (Fla. 1997) [hereinafter *Property Rights Amendments*].

The exception does not apply here for two reasons. First, the Proposed Tax Amendment does not limit the power of government to raise revenue. Rather, it is intended to impose new taxes and thereby increase government revenues. Second, as discussed more fully below, *infra* at 19-31, the Proposed Tax Amendment "substantially change[s] the powers or functions of more than a single level or branch of government," *Property Rights Amendments*, 699 So. 2d at 1310. Thus, the single-subject requirement applies to this initiative.

B. This Initiative Forces Voters Who Want to End Current Sales and Use Tax Exemptions on Goods to Acquiesce in a New Sales and Use Tax on Services

The Proposed Tax Amendment combines two separate tax policy issues into one proposal, forcing voters "to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." *Fine*, 448 So. 2d at 988. At its most basic level, it would force voters who wish to end current exemptions to the sales and use tax – for such ballyhooed examples as skyboxes and ostrich feed – to accept automatic creation of a new sales and use tax on services

should the Legislature fail to act, or should the Governor veto the Legislature's decision not to create such a tax.

The statutory framework of Florida's sales and use tax illuminates the separate policy issues that have been combined here. At present, Chapter 212, Florida Statutes, generally imposes the sales and use tax on goods, but also includes enumerated exemptions for goods which are not to be taxed.[2] Some are stand-alone exemptions; others are incorporated into definitions or other provisions of Chapter 212. By contrast, Chapter 212 does not expressly "exclude" identified services from the sales and use tax. With very limited exceptions, services generally are not within the scope of the sales and use tax because the tax was enacted in 1949 to apply to goods.[3]

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[2]The sales and use tax is the mainstay of Florida's general revenue structure. In fiscal year 2002-2003, it produced $14.488 billion, or 73% of the General Revenue Fund. *See* 2004 Florida Tax Handbook, Florida Senate.

[3]Section 212.05(1)(i), Florida Statutes, declares an intent to tax the privilege of furnishing "services taxable under this chapter." The only pure services taxable under Chapter 212 are enumerated in section 212.05(1)(i) (detective and security and non-residential cleaning and pest control), and "services that are part of the sale"of tangible personal property pursuant to section 212.02(16), unless exempted by section 212.08(7)(v) (exemption for "professional, insurance or personal service transactions that involve sales [of tangible personal property] as inconsequential elements for which no separate charges are made.").

This important distinction is illustrated further by recalling the services tax enacted by the Legislature in 1987 and repealed amid great controversy six months and three special sessions later. The 1987 experience actually began in 1986, when the Legislature enacted Chapter 86-166, Laws of Florida. Lawmakers set the process in motion by imposing a sales and use tax, effective July 1, 1987, on "the consideration for performing or providing any service." Ch. 86-166, § 3, at 820, Laws of Fla. The 1986 legislation provided little additional detail, and served simply as the proverbial "gun to the head" to force legislators to act. At the time, commentators observed that the 1986 law would bring about "sweeping revisions" to the sales and use tax, but that its imposition on a broad range of services would have by far the most profound effect. Pierce and Peacock, *Broadening the Sales Tax Base: Answering One Question Leads to Others*, 14 Fla. St. U. L. Rev. 463, 475-76 (1986). Without careful legislative attention to the implementing legislation, they warned, "the tax may be almost impossible to administer and apply." *Id.*

In 1987, the Legislature's starting point was a statutory definition of "services." *See* § 212.02(22), Fla. Stat. (1987), *repealed by* Ch. 87-548, § 1, at 25, Laws of Fla. Nowhere was the concept of "services" then, nor is it now, defined for purposes of the sales and use tax. Subsequently, the new definition was elaborated upon in 130 pages of emergency rules adopted by the Department of Revenue, *see* Rules 12AER

87-1 through 12AER 87-91, Fla. Admin. Code (1987), under a delegation of legislative authority, to more precisely delineate the tax. *See* § 212.0599, Fla. Stat. (1987), *repealed by* Ch. 2000-210, § 12, at 2094, Laws of Fla. The nature and the extent of those long-ago decisions amply illustrate how a sales and use tax on services would be a distinctly different revenue measure, with very different policy challenges, from the existing sales and use tax on goods. The different nature of the two levies is the central way in which this initiative engages in log-rolling.

This Court addressed a similar situation in *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). There, the Court held that a proposed initiative addressed three distinctly different subjects -- taxes, user fees and revenue bonds. "The very broadness of the proposed amendment amounts to logrolling because the electorate cannot know what it is voting on – the amendment's proponents' simplistic explanation reveals only the tip of the iceberg." *Fine*, 448 So. 2d at 995 (McDonald, J., concurring). *See also Tax Limitation I*, 644 So. 2d at 491.

Here, the Proposed Tax Amendment also deals with distinctly different subjects – the existing sales and use tax on goods, as well as a new sales and use tax on services whose true scope and incidence the voters can only guess at. It is the sort of horse-trading that forces voters "to accept part of an initiative proposal which they

oppose in order to obtain a change in the constitution which they support." *Fine*, 448 So. 2d at 988.

The voters have a right to decide, directly through constitutional amendment or through their elected representatives, whether they want to subject themselves to additional taxes on transactions involving any of the various goods and services they buy or use. Voters who favor repeal of some (or even all) current sales tax exemptions – skyboxes and ostrich feed, again – should not have to subject themselves to new taxes on services not currently subject to tax – such as legal services – in order to accomplish such a repeal. "There is no 'oneness of purpose,' but rather a duality of purposes." *Save Our Everglades*, 636 So. 2d at 1341.

The proponents engaged in log-rolling in a more subtle way by lumping all of the current sales and use tax exemptions together for elimination, save those which it carves out for protection in proposed subsection (a). [A. 3]. In this respect, the Proposed Tax Amendment is analogous to an initiative which the Court invalidated on grounds of log-rolling because it enumerated specific categories of discrimination against which state and local governments could provide protection, precluding all others. *In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) [hereinafter *Laws Related to Discrimination*]. The Court reasoned:

> The proposed amendment also violates the single-subject requirement because it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

Id. at 1020 (emphasis added). Here, the voter is being asked to give one "yes" or "no" answer to a proposal that addresses a multitude of exemptions. While it is tempting to evaluate an initiative only "on its face," the Court should look "beyond the surface" to see what this measure would do. *Laws Related to Discrimination,* 632 So. 2d at 1019.

Log-rolling is just as impermissible when trading off the creation of a new services tax for elimination of current exemptions from the sales and use tax on goods. It is "a classic example of the very evil which the one subject limitation is designed to prevent." *Floridians Against Casino Takeover v. Let's Help Florida,* 363 So. 2d 337, 342 (Fla. 1978) (Alderman, J., dissenting).

This Court is a bulwark against ill-conceived measures intended to force a voter to cast her one vote for multiple propositions. Historically, it has protected the voter's right "to vote intelligently for the amendments he favors and against the ones he disapproves." *Rivera-Cruz v. Gray*, 104 So. 2d 501, 505 (Fla. 1958) (invalidating so-called "daisy-chain"amendments). It can do no less in this case. The Proposed Tax Amendment should be invalidated for log-rolling.

C. The Proposed Tax Amendment Violates the Single-Subject Requirement by Altering the Functions of Multiple Branches of Government

An initiative violates the single-subject requirement where it "substantially alter[s] or perform[s] the functions of multiple aspects of government, or ... affect[s] other provisions of the constitution." *Universal Pre-Kindergarten Education*, 824 So. 2d at 165. The Proposed Tax Amendment alters functions of the Legislative and Executive branches, and conceivably the Judicial Branch also. More importantly, it leaves so many questions unanswered it is impossible to tell which branches will perform the functions necessary to effectuate this measure.

1. The Proposed Tax Amendment Leaves Too Many Questions Unanswered

Equally important as the tax policy trade-offs that voters would be asked to make – creation of a new sales and use tax on services in exchange for elimination of

current exemptions from the sales and use tax on goods – is the uncertain manner in which the new services tax would be imposed. "The very broadness of the proposal makes it impossible to state what it will affect and effect and violates the requirement that proposed amendments embrace only one subject." *Fine*, 448 So. 2d at 995 (McDonald, J., concurring).

The Constitution dictates that no taxes may be imposed "except in pursuance of law." Art. VII, § 1(a), Fla. Const. And "[t]he word law means a statute adopted by both Houses of the Legislature." *Advisory Opinion to the Governor*, 22 So. 2d 398, 400 (Fla. 1945). Thus, the Constitution requires that the Legislature affirmatively enact a law in the manner prescribed by Article III in order to impose a tax, with all the constitutional checks and balances which assure that both the public and the lawgivers are aware of the decision to be made. *See* Art. III, §§ 6, 7 and 8, Fla. Const.

The magnitude of the decisions that will have to be made to impose a new services tax was identified in conjunction with the 1987 services tax. Pierce and Peacock, *supra*, 14 Fla. St. U. L. Rev. at 475-81. The principal shortcoming in the 1986 enactment was its failure to "characterize the nature of the tax on services, its incidence, or the scope of its intended coverage." Pierce and Peacock, *supra*, 14 Fla. St. U. L. Rev. at 480. The Proposed Tax Amendment suffers from the same defect and more – it lacks the simple 1986 command, as inadequate as that was, to impose

tax on "the consideration for performing or providing any service." Ch. 86-166, § 3, at 820, Laws of Fla. Here, voters would be asked to give the Proposed Tax Amendment binding legal effect without being told about the "precipitous and cataclysmic change" it would wreak on Florida's system for making tax policy. *Save Our Everglades*, 636 So. 2d at 1339.

The Proposed Tax Amendment does not establish who will make the fundamental decisions about a new sales and use tax on services. For starters, some branch of government will have to act in the affirmative to define "services" for purposes of sales and use taxation, because Chapter 212 does not do so.[4] More questions will follow: "What constitutes the sale or use of a service?" "Where is a service sold?" "Where is a service used?" "How are multi-state services taxed?" "In a series of transactions, how many times can a single service be bought and taxed and sold and taxed again?" If these questions could be asked about a statute, the Court

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[4]The significance of this issue to Florida taxpayers should not be under-estimated. By the proponents' own reckoning, this year "Florida will collect $17.5 billion but exempt almost $25 billion in taxes." *See Floridians Against Inequities in Rates, Inc.*, www.fairamendment.com/tax.htm. Indeed, the magnitude of such a tax on services was the rationale for members of this Court to provide former Governor Martinez with an advisory opinion on the services tax enacted in 1987. *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987) (citing "the potentially chaotic impact upon your constitutional duties as fiscal manager of Florida which could be caused by finding chapter 87-6 invalid.")

would recall that "a cardinal rule for construing taxing statutes requires that they impose the tax in clear and specific terms, otherwise they will be held not to impose it." *Overstreet v. Tytan, Inc.*, 48 So. 2d 158, 160 (Fla. 1950).

One need only contemplate the single example of accounting services to see the multitude of critical questions to be answered if the "exclusion" for accounting services is eliminated due to legislative inaction with no further direction. How should accounting services be taxed if sold by a multi-state firm based in New York, with offices in Florida, to a multi-state corporate client based in Texas, with offices in Florida, who will use the accounting services, performed in Florida, Ohio and California, in class action litigation occurring in a court in California?

Is the Legislature required to make these decisions by law? If the Legislature fails to act – or if the Governor vetoes such legislation and the Legislature fails to override his veto by a two-thirds vote – who will act? Will this Court be empowered, based only on the text of the Proposed Tax Amendment, to extend the sales and use tax to services under the doctrine of *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972)? Which agency of the Executive Branch, if any, will address details of implementation? In the absence of legislation, how will an agency do so without violating the separation of powers doctrine of Article II, section 3? The Proposed Tax Amendment simply has "too many possible collateral

effects[.]" *Laws Related to Discrimination*, 632 So. 2d at 1022 (Kogan, J., concurring).

One who is serious about stepping into the shoes of the Legislature and making tax law by constitutional amendment can do so. But it cannot be done simply by leaving a half-baked cake on the steps of the Court and expecting the judiciary, in the face of legislative inaction, to choose among the following unpalatable options: (1) entering an order of mandamus forcing the Legislature to enact implementing legislation; (2) turning a blind eye to the state's longstanding doctrine on unlawful delegation when the Department of Revenue steps in to write the services tax via rule-making; or (3) taking upon itself the task of drafting the implementing statute out of whole cloth or one case at a time.

In the past, those concerned with ensuring timely implementation of a constitutional provision have resorted to use of a schedule. As explained by one constitutional scholar, "[t]he purpose of the schedule is to provide the rules of transition and implementation of the constitution." *See* D'Alemberte, *The Florida Constitution, A Reference Guide*, Greenwood Press, 1991 at 153. A schedule can be used to elaborate upon details not appropriate for inclusion in the Constitution, and serves the purpose of lawmaking until such time as the Legislature modifies it. It

prevents disruption of government. And it minimizes interference with the lawmaking function preserved to the Legislature by the Constitution.

A schedule was used when the Florida Constitution was revised in 1968. Art. XII, §§ 1-11, Fla. Const. It was used again when Article V was substantially revised in 1972. Art. XII, § 25. And it was used as recently as 1998 when the Cabinet was reorganized and the new Fish and Wildlife Conservation Commission was created. Art. XII, §§ 23 and 24, Fla. Const. The Court has expressly upheld a schedule as a permissible component of a constitutional initiative. *Carroll v. Firestone*, 497 So. 2d 1204, 1207 (Fla. 1986).

Creation of a schedule to implement a new sales and use tax on services would no doubt be cumbersome. The proponents would be forced to make the difficult but fundamental decisions that have to be made when implementing a tax, which here they have left for others to decide as circumstances require. Expecting the proponents to address such issues in a schedule is not expecting too much. "[I]t is hard to amend the Constitution and it ought to be hard." *Fine*, 448 So. 2d at 999 (Shaw, J., concurring) (citing *Weber v. Smathers*, 338 So. 2d 819, 824 (Roberts, J., dissenting)).

In the absence of constitutional text to address these many questions, and of a schedule to set forth the mechanics of implementation of this far-reaching measure, this Court can only conclude that the Proposed Tax Amendment fails to set for a

proposition that is "sufficiently complete within itself[.]" *Fine*, 448 So. 2d at 990 (quoting *Weber v. Smathers*, 338 So. 2d at 822). For these reasons, this initiative violates the single-subject requirement and should be declared invalid.

2. The Proposed Tax Amendment Substantially Alters Legislative Functions

The initiative would substantially alter the function of the Legislature by restricting the Legislature's prerogative under Article VII, section 1(a), to set tax policy and impose taxes by general law; by making the taxation of many kinds of transactions off limits to the normal give-and-take of the legislative process; and by requiring an extraordinary majority approval of legislation creating or continuing exemptions.

The initiative would alter the way the Legislative Branch makes law, at least when it comes to sales and use taxation. Article III, section 6 provides that every law shall contain only a single subject, which is to be expressed in a title, and every law shall have an enacting clause as worded in the Constitution. This requirement is designed to inform the public of bills under consideration by prohibiting a plurality of subjects in a single act and preventing an act from becoming a cloak for dissimilar legislation. *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978). This initiative would alter the function of the Legislative Branch as, by inaction, laws could be changed without the requisites of a legislative enactment.

The Proposed Tax Amendment would further alter the legislative power by eliminating the constitutional requirements in Article III, section 7 regarding the passage of bills, concerning sales and use taxation. This requirement states that bills must be read in each house on three separate days, and a vote of each member voting on passage shall be entered on the journal of the respective house.

Passage of legislation also requires a majority vote in each house. The Proposed Tax Amendment would require that any exclusion or exemption be re-enacted or retained only by a three-fifths vote of the membership of each house. And Article III, section 7 requires that legislation be prepared and signed by the officers of each house and ultimately be presented to the Secretary of State so the public can read the law as enacted to know how to conduct their affairs. All these procedural safeguards would be short-circuited by this initiative.

In sum, the Proposed Tax Amendment would allow tax laws to spring forth by legislative inaction and without legislation for signature by the officers or presentation to the custodian of records. Thus, the fundamental "filtering mechanism" of the legislative process would be thwarted. *Fine*, 448 So. 2d at 988.

3. The Proposed Tax Amendment Substantially Alters Executive Functions

This initiative would substantially alter the function of the Executive Branch by eliminating the Governor's power under Article III, section 8 to review and approve or veto legislation that would repeal existing exemptions or create a new sales and use tax on services.

Article III, section 8 provides that every bill passed by the Legislature shall be presented to the Governor for approval or veto. The Legislature, through a prescribed process, considers the Governor's veto message and may override the Governor and reinstate the law. Under the Proposed Tax Amendment, the creation or re-enactment of an exclusion or exemption in legislation would be subject to veto, while by inaction taxes could be imposed without an affirmative act of the Legislature – and thus without the opportunity for the Governor to review and approve or veto such a decision. This initiative thus would upset the system of checks and balances essential to the functioning of our government.

This Court recently invalidated an initiative because "its rigid funding percentage actually performed the appropriation function of the Legislature and removed entirely the Governor's ability to veto any portion of that appropriation." *Universal Pre-Kindergarten Education*, 824 So. 2d at 165; *see also Advisory Opinion to the*

Attorney General re: Adequate Public Education Funding, 703 So. 2d 446 (Fla. 1997). Likewise, when it invalidated the *Save Our Everglades* initiative, this Court noted that the trustees' exercise of "traditionally legislative functions" would not have been "subject to the constitutional check of executive branch veto." 636 So. 2d at 1340. Here, the negation of the Governor's veto power is a substantial alteration of a second branch of government, and thus violates the single-subject requirement.

The Proposed Tax Amendment also could substantially alter the function of the Executive Branch by requiring the Department of Revenue to collect the sales and use tax without legislative authorization.[5] If the Legislature does not timely act – and the Proposed Tax Amendment does not require that it do so – the Department will have to take steps to perform its tax collection function. And yet the Department of Revenue would require legal authorization to exercise any policy-making authority to implement a new sales and use tax on services.

This legal conundrum should not be dismissed. "The Department of Revenue has no power to tax. That power is reposed solely in the legislature." *Department of Revenue v. Young American Builders*, 358 So. 2d 1096 (Fla. 1st DCA 1978),

[5]Without implementing legislation, it is unclear how the Department could penalize non-compliant taxpayers without running afoul of the Due Process Clause and its commands against vagueness. Taxpayers are entitled to notice of how a services tax resulting from elimination of an "exclusion" is to apply.

approved sub nom., Department of Revenue v. Silver Springs Shores, Inc., 376 So. 2d 849 (Fla. 1979). Absent legislative direction, there is only one place for the Department of Revenue to look for lawful authority to implement the tax – to the Judicial Branch and ultimately to this Court.

4. The Proposed Tax Amendment Substantially Alters Judicial Functions

And then there are the "possible collateral effects" that could substantially alter the functions of the Judicial Branch. *Laws Related to Discrimination*, 632 So. 2d at 1022 (Kogan, J., concurring). If adopted by the voters, this proposal could result in imposition of a new sales and use tax on services by legislative inaction. That is one of the avowed aims of its proponents. In that circumstance, none of the necessary laws or implementing rules would be in place to guide the Executive Branch in imposition and collection of the tax. Absent legislative authorization, the Executive Branch would in all likelihood ask the Judiciary for direction, presenting a separation-of-powers issue of unequalled challenge.

"It is not within the power of the taxing offices or this Court to say who shall be taxed or to impose a tax on any person or class unless the legislature in clear and specific terms authorizes the tax." *Overstreet*, 48 So. 2d at 160 (emphasis added). For the Proposed Tax Amendment to potentially require such an assumption and

performance of legislative power by the Judicial Branch clearly violates the single-subject requirement. This initiative must be invalidated.

5. This Initiative Substantially Affects Other Constitutional Provisions

The *Fine* Court held that "how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal." *Fine,* 448 So. 2d at 990. There, the Court said the identification of other portions of the Constitution which may be affected is "necessary for the public to be able to comprehend the contemplated changes in the constitution . . . ." *Fine*, 448 So. 2d at 989. This Court has noted that it "is also important so that the question of the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations." *Tax Limitation I,* 644 So. 2d 486, 490 (Fla. 1994).

The Proposed Tax Amendment would affect various provisions of the Constitution. It would affect Article III, section 6 (laws must be passed by the Legislature); Article III, section 7 (passage of bills); Article III, section 8 (executive review of passed legislation and approval or veto); Article VII, section 1 ("No tax shall be levied except in pursuance of law"); Article VII, section 18 (local government mandates); Article XI, section 6 (Taxation and Budget Reform Commission).

The Proposed Tax Amendment would alter the function of the Taxation and Budget Reform Commission as provided in the Constitution at Article XI, section 6. Every 20 years, the Constitution requires establishment of a Taxation and Budget Reform Commission and its membership and procedures. Its duties include, among others, examining the state's "revenue needs," "the appropriateness of the tax structure of the state," and "alternative methods for raising sufficient revenues for the needs of the state[.]" Art. XI, § 6(d), Fla. Const.

The next commission is scheduled to begin in 2007 and has 18 months to complete its work. The Proposed Tax Amendment and the review process it would put into place would overlap the time period within which the commission is charged with reviewing the state's tax structure and finances. The commission could effectively lose one year of deliberations, robbing the commission of its lengthy and deliberative review which might be more meaningful and have more lasting import to the citizens and the state.

For all the foregoing reasons, the Proposed Tax Amendment violates the single-subject requirement of Article XI, section 3 and must be invalidated.

II. THE PROPOSED TAX AMENDMENT VIOLATES THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS TO GIVE THE VOTERS FAIR AND ADEQUATE NOTICE OF THE DECISIONS THEY WOULD BE ASKED TO MAKE

This Court must declare a proposed constitutional initiative invalid and order its removal from the ballot where the ballot summary is "clearly and conclusively defective" because it fails to give voters fair and accurate notice of the decision they are asked to make. *Armstrong*, 773 So. 2d at 11. As the Court explained in *Armstrong*, this imperative is grounded in Article XI, section 5 of the Constitution and codified in section 101.161(1), Florida Statutes. The ballot summary for a proposed constitutional amendment is clearly and conclusively defective if it "flies under false colors" or "hides the ball." *Armstrong*, 773 So. 2d at 16. This initiative does both.

A. The Proposed Tax Amendment Fails to Disclose to Voters Which Branches of Government Are Empowered to Enact a New Sales and Use Tax on Services

The Proposed Tax Amendment fails to disclose to voters which branches of state government – the Legislative, the Executive, the Judicial or all of them – would be empowered to impose the sales and use tax on services that are presently not the subject of any tax, and whether that change would be effectuated by law. In this respect, the Proposed Tax Amendment hides more than the ball; it hides the game.

"The problem, therefore, lies not with what the summary says, but, rather, with what it does not say." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

We have discussed above the magnitude of the public policy issues that would have to be addressed to impose and implement a new sales and use tax on services by revisiting the services tax experience of 1987. *Infra*, at 15-16. Under the Proposed Tax Amendment, many of those same difficult issues would have to be confronted, potentially without the benefit of express legislative authorization.

While the proponents may believe it would be expedient to put the lawmaking process on automatic pilot for imposition of taxes, the Constitution does not allow such a change in our organic law without explaining the "true meaning, and ramifications" of the measure. *See Askew*, 421 So. 2d at 156. The summary of this initiative advises the voter that exclusions from the sales tax will be eliminated, [A. 3] but it does not explain how words imposing a tax will end up in Florida law. Someone must make major decisions about the new sales and use tax on services, as well as the mechanics of its collection. There will be broad discretion in making those decisions, yet "[t]he ballot summary fails to inform the public that [one or more branches] would be granted discretionary constitutional powers" in making these decisions. *Advisory Opinion to the Att'y. Gen. re: Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998).

Thus, the Proposed Tax Amendment is fatally flawed in one of two ways: Either it is deficient because it does not explain how the Legislature will be compelled to enact a law in order to extend the sales and use tax to services, or it is deficient because it does not disclose that the safeguard of Article VII, section 1(a) – which requires that taxes be imposed only "in pursuance of law" – would be effectively repealed as to Florida's chief revenue source, the sales and use tax.

If the Proposed Tax Amendment is not deficient in one way, it is surely deficient in the other. Whichever circumstance may occur, these "legal differences are significant and are not revealed to the voter." *Advisory Opinion to the Att'y. Gen. re: Amendment to Bar Gov't. from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 897 (Fla. 2000) [hereinafter *Treating People Differently*]. The Proposed Tax Amendment is clearly and conclusively defective for failing to fairly and accurately explain which branches of government are authorized to impose the new sales and use tax on services and how they may do it.

B. The Proposed Tax Amendment Includes Emotional Political Rhetoric in its Title and Does Not Provide Support for it in the Proposed Constitutional Text

The ballot title for this initiative reads as follows: "Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public

Purpose." [A. 3] (emphasis added) The title meets the statutory requirement to have no more than 15 words. However – including, as it does, the politically loaded term "fairness" – the Proposed Tax Amendment's title once again tests this Court's resolve in ensuring that constitutional propositions are put to the voters in a neutral, informative manner without overt campaigning on the ballot.

There are two ways in which the use of the word "fairness" runs afoul of this Court's teachings on ballot accuracy. For one thing, the word itself is the very type of "editorial comment" which prompted this Court to invalidate a tort reform initiative in *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). There, the Court held that a ballot summary which described a proposed summary judgment rule as "avoiding unnecessary costs" was improper electioneering. Here, the proponents have employed the same stratagem. The word "fairness" in this initiative, concerning the politically sensitive subject of taxation, is "political rhetoric" which has no place in an initiative title. *Save Our Everglades*, 636 So. 2d at 1342.[6] *See also Advisory Opinion to the*

[6]The proponents tout the Proposed Tax Amendment as a "fairness" measure in its title, but they have done more. They made the word a campaign name for the measure, calling it the "FAIR Amendment." They concocted a name for their organization, "Floridians Against Inequities in Rates, Inc.", from which they use the acronym "FAIR" in the campaign, even though the proposal would make no change at all in any rate of taxation. *See* www.fairamendment.com. While proponents may choose any name they wish for the sponsoring organization, and give the measure any name they like for purposes of electioneering, it is improper for the initiative to be given a ballot title which utilizes such "emotional language." *Save Our Everglades*, 636 So. 2d at 1341.

Att'y. Gen. re: Casino Authorization, Taxation and Regulation, 656 So. 2d 466, 469 (Fla. 1995) [hereinafter *Casino Authorization*].

Beyond the impropriety of this word choice in the title is a second way in which the Proposed Tax Amendment is clearly and conclusively defective due to its use of the word "fairness." It has no place in a ballot summary because it does not promote an objective understanding of the effect of the proposition, if adopted. Just as the "Save Our Everglades" name was "misleading" because there was nothing in the proposed constitutional text which demonstrated that the Everglades was "lost" or "in peril," *Save Our Everglades*, 636 So. 2d at 1341, so there is nothing in the text of this "fairness" initiative which demonstrates that sales and uses taxes in Florida are unfair.

It is true that the proposed constitutional text asserts that the current exemptions for food, prescription drugs, health services, and residential rent, electricity, and heating fuel "secure tax fairness." [A. 3] However, this subjective statement does not remedy the fatal flaw in the ballot title. In this particular instance, to merely repeat the offending word from the ballot title in the proposed constitutional text cannot make it legitimate. To assert that an exemption for food – such as caviar – "secure[s] tax fairness" does not demonstrate that other exemptions and exclusions from tax – such as for city bus service, NAIC Code 4851, Urban Transit Systems, *reproduced at* 2004

Florida Tax Handbook, Florida Senate, p. 120 [A. 11] – render the sales and use tax "unfair."

In this context, the word "fairness" is objectionable *per se* as part of the ballot title. While the standard of "fairness" may be seen by some as objective, as this Court has explained: "This fairness standard is a subjective standard; it is within the subjective understanding of each voter to interpret the meaning of the 'in fairness' standard." *Property Rights Amendments*, 699 So. 2d at 1309. Thus, the "fairness" name contributes nothing to assist the voters in understanding the "true meaning, and ramifications" of this initiative. *Askew*, 421 So. 2d at 156.

Early in the development of this Court's jurisprudence on initiatives, Justice Roberts warned against the constitutional mischief that a clever proponent could make when drafting a proposal and by-passing the checks and balances that apply to all other means of constitutional change. "It only takes one person, not even required to be a resident of the State, nor learned in the law, to pencil an amendment, giving it a popular name, get the signatures, and place it on the ballot without any [. . .] committee action, study or debate." *Weber v. Smathers*, 338 So. 2d 819, 824 (Roberts, J., dissenting) (1976) (emphasis added).

Since then, the Court has resisted efforts to allow initiative proponents to electioneer in the voting booth by the way they draft a ballot summary. "The ballot

summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth." *Evans*, 457 So. 2d at 1355. Because the Proposed Tax Amendment improperly utilizes the word "fairness" in the ballot title, and does so without elsewhere demonstrating that the sales and use tax is presently unfair, it is clearly and conclusively defective.

C. The Ballot Summary Fails to Inform Voters that Approval of the Proposed Tax Amendment Will Amend the Mandates Provision of Article VII, Section 18

Article VII, section 18(b) of the Florida Constitution provides: "Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989." (emphasis added). This "mandates" provision was designed to guard against the Legislature further restricting local government revenue sources.

This initiative would in effect amend this limitation by allowing the Legislature to enact new exemptions with a lesser three-fifths vote, rather than the two-thirds vote now required. Nothing in the ballot summary alerts the voters that the mandates

provision will be amended in this fashion. As in other cases, the voters will be unable "to comprehend the sweep of [the] proposal from a fair notification in the proposition itself[.]" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)).

This example illuminates the interplay between these two provisions: Section 212.05, Florida Statutes, imposes a sales and use tax on goods. Sections 212.054 and 212.055, Florida Statutes, authorize counties to impose a local option sales tax on the goods that are subject to state tax under section 212.05. *See* § 212.054(2)(a), Fla Stat. (2003). In recent years, including 2004, the Legislature has granted a temporary "sales tax holiday" during which families could undertake "back-to-school" shopping without paying sales tax. This temporary sales tax exemption for clothing and school supplies typically applies for a defined period.

As evidenced by the legislative staff report for the 2004 Sales Tax Holiday legislation, "[t]he estimated reduction in Local Option Sales tax by this bill is $2.4 million. The bill therefore reduces the authority of cities and counties to raise revenues in the aggregate and is a mandate to local governments. The Florida Constitution requires a 2/3 vote of the membership of both houses of the Legislature for this bill to be enacted." *See House of Representatives Staff Analysis*, HB 237, 2004 (*available at* http://www.flsenate.gov/data/session/2004/ House/bills/analysis/pdf/h0237c.ap.pdf).

However, upon adoption of the Proposed Tax Amendment, "[e]ach law creating or reenacting a sales tax exemption or creating or continuing an exclusion shall require approval by three-fifths vote of the membership of each house of the Legislature." [A. 3]. Voters are entitled to know of this change to the mandates provision. The failure to disclose it renders the ballot summary clearly and conclusively defective.

D. The Proposed Tax Amendment Fails to Give Adequate Notice of a Significant Change in the Governor's Role in Lawmaking

The Proposed Tax Amendment fails to disclose the substantial effect that this measure would have on the Governor's role in the making of laws that concern the sales and use tax. Article III, section 8 provides that "every bill passed by the legislature" must be presented to the Governor for executive review and approval or veto. "Any reasonably well-informed voter in this state knows" that the Governor's veto power is one of the constitutional checks and balances. *Florida Association of Realtors, Inc. v. Smith*, 825 So. 2d 532, 536-37 (Fla. 1st DCA 2002), *review denied*, 826 So. 2d 991 (Fla. 2002). In their zeal to eliminate various exemptions and exclusions from the sales and use tax, the proponents of this initiative would alter the dynamics of the lawmaking process for the sales and use tax without fairly and adequately describing this change for voters.

The ballot summary provides that "exemptions and exclusions not reenacted by the Legislature are eliminated" by operation of the Proposed Tax Amendment. [A. 3]. While this curtailment of the Legislature's lawmaking power on the momentous subject of taxation is at least implied in the ballot summary, the Proposed Tax Amendment goes further. It also would eliminate the Governor's power to review and approve or veto decisions to repeal a sales and use tax exemption or exclusion, and thus "insulate this legislative action from executive veto . . . ." *Florida Association of Realtors, Inc.*, 825 So. 2d at 539. Nowhere is this change disclosed to the voter, rendering this initiative clearly and conclusively defective.

E. The Ballot Summary Erroneously States the Extraordinary Vote to be Required for the Legislature to Retain an Exemption or Exclusion

The ballot summary for the Proposed Tax Amendment states that an exemption or exclusion may be "approved by three-fifths vote of each legislative house." [A. 3] (emphasis added). This percentage requirement applies only to the members of each house who are present and voting. Art. X, § 12(e), Fla. Const. In light of the provision allowing a simple majority of each house to constitute a quorum for purposes of doing business, Art. III, § 4(a), Fla. Const., the ballot summary in effect asserts that an exemption or exclusion may be retained by as few as 37 members of the House and 13 members of the Senate.

By contrast, the proposed constitutional text provides that an exemption or exclusion from the sales and use tax may be re-enacted, created or continued only "by three-fifths vote of the membership of each house of the Legislature[.]" [A. 3] (emphasis added). Article X, section 12(e), Fla. Const. provides that the phrase "[o]f the membership" means "of all members thereof." Therefore, the proposed constitutional text expressly requires an affirmative vote of 72 members of the House of Representatives and 24 members of the Senate to retain an exemption or exclusion. The ballot summary thus significantly misstates the extraordinary majority of the House and Senate required to retain an exemption or exclusion.

The inconsistent use of terminology in a proposed constitutional text and ballot summary has been a basis for declaring proposed constitutional amendments clearly and conclusively defective. In one case, the Court struck a proposed amendment based in part upon a determination that the use of the term "person" in the constitutional text and the term "people" in the ballot summary were materially different. *Treating People Differently*, 778 So. 2d at 897. *See also Advisory Opinion to the Att'y. Gen. re: Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998); *Property Rights Amendments*, 699 So. 2d at 1308.

Here, the discrepancy is significant because "[a]ny reasonably well-informed voter in this state knows" that the Legislature passes laws by simple majority vote.

Florida Association of Realtors, Inc., 825 So. 2d at 536. Because the Proposed Tax Amendment would change this constitutional requirement for purposes of exemptions and exclusions from the sales and use tax, voters should be told accurately what the new constitutional requirement would be. This initiative fails to do so and accordingly should be invalidated.

F. The Proposed Tax Amendment Fails to Disclose Details or Identify Pertinent Terms Which Will Have an Effect on its Implementation

There are other salient points about the Proposed Tax Amendment which the ballot summary does not disclose:

- The ballot summary does not define the term "exemption," and the proposed constitutional text does not either, although it does define an "exclusion." "[T]he absence of a … definition of the term 'exemption' is misleading because the voting public would not readily understand the distinction between an exemption and immunity from taxation." *Property Rights Amendments*, 699 So. 2d at 1311.
- The ballot summary does not disclose the potential effect of this new sales and use tax exemption and exclusion review and elimination process on the existing Taxation and Budget Reform Commission established by Article XI, section 6. *See infra*, at 31.

While some of these errors, standing alone, may not justify invalidation of the Proposed Tax Amendment, they do constitute "additional evidence" that "the ballot summary does not provide fair notice of the contents of the proposed constitutional amendment." *Florida Association of Realtors, Inc.*, 825 So. 2d at 540.

In summary, the cumulative weight of the ballot summary defects identified *infra*, pages 32 through 44, "combine to produce a summary that is fatal to the proposed amendment." *Casino Authorization*, 656 So. 2d at 469. Accordingly, the Proposed Tax Amendment should be invalidated.

CONCLUSION

For the foregoing reasons of law and policy, FAR respectfully requests that the Justices render a written opinion which determines that the Proposed Tax Amendment:

(a) Violates the single-subject requirement of Article XI, section 3;

(b) Contains a ballot summary which is clearly and conclusively defective under the standards set forth in Article XI, section 5, Fla. Const., and section 101.161(1), Florida Statutes; and

(c) Is therefore invalid and unsuitable for further circulation as a proposed constitutional amendment.

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief was provided by United States Mail, postage pre-paid, to CHARLES J. CRIST, JR., ESQUIRE, Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-0250, this 18th day of June, 2004.

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CERTIFICATE OF COMPLIANCE

I further certify that this brief is presented in 14-point Times New Roman and complies with the font requirements of Rule 9.210.

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APPENDIX