IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-1564

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: EXTENDING EXISTING SALES TAX TO NON-TAXED SERVICES WHERE EXCLUSION FAILS TO SERVE PUBLIC PURPOSE

BRIEF OF INTERESTED PARTIES FLORIDA ASSOCIATION OF REALTORS, INC.; FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS; FLORIDA RETAIL FEDERATION; FLORIDA CHAMBER OF COMMERCE, INC.; FLORIDA ASSOCIATION OF BROADCASTERS; FLORIDA MANUFACTURERS ASSOCIATION; NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, INC.; FLORIDA FARM BUREAU FEDERATION, INC.; FLORIDA MINERALS AND CHEMISTRYCOUNCIL, INC.; FLORIDA FRUIT AND VEGETABLE ASSOCIATION, INC.; FLORIDA CATTLEMEN'S ASSOCIATION, INC.; SUNSHINE STATE MILK PRODUCERS, INC., FLORIDA NURSERY GROWERS AND LANDSCAPE ASSOCIATION; AND PRINTING ASSOCIATION OF FLORIDA. IN OPPOSITION TO THE PROPOSED INITIATIVE

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

Cynthia S. Tunnicliff (FB # 134939)
Howard E. Adams (FB # 322210)
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, FL 32302
Telephone: 850/222-3533
Facsimile: 850/222-2126

Victoria L. Weber (FB # 266426)
Dan R. Stengle (FB # 352411)
David L. Powell (FB # 656305)
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314
Telephone: 850/222-7500
Facsimile: 850/224-8551

Attorneys for Interested Parties

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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 in Orlando. The vast majority of FAR's approximately 140,000 members are professionals in the Florida real estate industry. Professional services provided by FAR members are among the transactions that would be subject to review and potential taxation under the Services Tax Amendment. FAR members also are individual consumers of many services that are the subject of potential taxation, including appraisal, title, data processing, accounting, 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 in Tallahassee. 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. Professional services consumed by and provided by FICPA members are among the transactions subject to review and potential taxation pursuant to the Services Tax Amendment.

Interested Party Florida Retail Federation ("FRF") is a statewide not-for-profit trade association, with its principal offices located in Tallahassee, Florida. FRF's membership consists of 10,500 member companies and includes persons

and entities in the business of retail sales. The members of the Florida Retail Federation consume many of the services that are the subject of the Services Tax Amendment currently before the Court.

Interested Party Florida Chamber of Commerce ("FCC") is a not-for-profit corporation encompassing Florida's largest federation of businesses, chambers of commerce and business associations with its principal place of business at Tallahassee. The Federation's more than 137,000 member businesses represent more than three million employees and are individual consumers of many services that are the subject of potential taxation pursuant to the Services Tax Amendment.

Interested Party Florida Association of Broadcasters ("FAB") is a Florida not for profit corporation with its principal place of business in Tallahassee. FAB's more than 300 members are engaged in the business of broadcasting, advertising and production of radio and television services. The members of FAB provide these professional broadcasting services to businesses and to the public and these services are among those that would be subject to review and potential taxation pursuant to the Services Tax Amendment. FAB members are also consumers of many services that are subject to potential taxation.

Interested Party Florida Manufacturers Association, Inc. ("FMA") is a Florida not-for-profit corporation with its principal place of business in Pompano Beach. FMA's membership includes approximately 10 manufacturing associations

and organizations whose members are businesses involved in manufacturing or associated industries. FMA's constituency consumes services that are subject to potential taxation under the Services Tax Amendment.

Interested Party National Federation of Independent Businesses, Inc. ("NFIB"), is a California not-for-profit corporation with its principal Florida office in Tallahassee. NFIB represents approximately 15,000 members located and doing business in Florida. NFIB's Florida members purchase and sell services that are subject to review and potential taxation under the Services Tax Amendment.

Interested Party Florida Farm Bureau Federation ("FFBF") is a Florida not-for-profit incorporated membership association with its principal place of business in Gainesville. 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 Services Tax Amendment.

Interested Party Florida Minerals and Chemistry Council, Inc. ("FMCC") is a Florida not-for-profit corporation with its principal place of business in Tallahassee. FMCC's membership includes approximately 50 businesses involved in manufacturing or associated industries. Services consumed by FMCC members are subject to potential taxation under the Services Tax Amendment.

Interested Party Florida Fruit and Vegetable Association ("FFVA") is a Florida not-for-profit corporation with its principal place of business in Maitland. 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. FFVA's producer members grow fruit, vegetables, and other crops such as sod and sugarcane in approximately 50 counties statewide. FFVA members are consumers of services, including transportation, affected by the Services Tax Amendment.

Interested Party Florida Cattleman's Association, Inc. ("FCA") is a Florida not-for-profit corporation with its principal place of business in Kissimmee. The FCA is a trade association representing more than 4,500 members, all of whom are in the cattle/ranch business. The Services Tax Amendment would affect the costs of business, including transportation, incurred by FCA members businesses.

Interested Party Sunshine State Milk Producers, Inc. ("SSMP") is a Florida corporation with its principal place of business in Orlando. SSMP represents over 250 dairy farms throughout the southeastern United States, specifically Florida, Georgia, Alabama, and Tennessee, on public policy-making. Many services that SSMP members utilize in the production of dairy products are subject to potential taxation under the Services Tax Amendment

Interested Party Florida Nursery Growers and Landscape Association, Inc. ("FNGLA") is a Florida not-for-profit association with its principal place of business in Orlando. Members of the FNGLA include production nurseries, landscape firms, retail garden centers, and horticultural supply firms. FNGLA members are individual consumers of many services that are the subject of review and potential taxation pursuant to the Services Tax Amendment.

Interested Party Printing Association of Florida, Inc. ("PAF") is a Florida not-for-profit corporation with its principal place of business in Orlando. The vast majority of PAF's approximately 520 member companies are in the graphic arts related industry in Florida, the largest manufacturing industry in the state. The Services Tax Amendment would affect many aspects of PAF member businesses, including the costs of preparatory services used in the printing process. PAF member companies are also consumers of many services that would be subject to review and potential taxation under the Services Tax Amendment.

STATEMENT OF THE CASE AND OF THE FACTS

The Interested Parties accept the Statement of the Case and of the Facts presented in the Initial Brief of the sponsor, Floridians Against Inequities in Rates, except for the inappropriate argument therein, concerning the initiative entitled "Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Service Public Purpose" [hereinafter "Services Tax Amendment"].

SUMMARY OF THE ARGUMENT

This is the third time that some of these proponents have sought to change Florida's sales tax by constitutional amendment. Their two earlier proposals violated the requirements which govern the manner in which proposed constitutional changes are to be presented to the voters. This time, two of the three initiatives they are circulating also fail to meet constitutional muster. The commands of the Constitution must be enforced just as rigorously now even though this is the proponents' third time around.

The Services Tax Amendment epitomizes logrolling. It addresses two of the three disparate subjects cited by the Court when it struck down the proponents' last attempt: It mandates the "creation of a sales tax on services that currently does not exist," and it imposes "limitations on the Legislature's ability to create or continue … exclusions from the sales tax."

Further, this initiative bundles together all but one of the current exclusions from the sales tax for services, thus forcing a voter to accept potential taxation of services he or she may not wish to see taxed – such as day-care services -- in exchange for achieving potential taxation of others he or she may wish to see taxed – such as hairdressing services. Finally, it would compel a voter to accept a permanent exemption of "employee salaries and benefits" from the new tax in exchange for the potential extension of the sales tax to other services.

The uncertain manner in which this constitutional services tax would be implemented is an equally important single-subject violation. This initiative leaves so many questions unanswered that it is impossible to "perceive its limits" and determine which branches will perform the tasks needed to give it effect.

The Services Tax Amendment would perform the legislative function by imposing a sales tax on services. Further, it would alter the Legislature's constitutional prerogatives to impose taxes by general law, making some tax issues off-limits to the normal give-and-take of the lawmaking process. It would delegate to a federal agency the authority to determine which services are subject to review, and it would perform the appropriations function by effectively directing additional funds to cities and counties pursuant to section 212.20, Florida Statutes.

Because the tax would be extended to each service through legislative inaction, there would be no bill passed by the House and Senate for the Governor to review and approve or veto. Therefore, this initiative also would substantially alter or perform the functions of the Executive Branch by eliminating the Governor's veto power under Article III, section 8.

Because the necessary laws or implementing rules would not necessarily be in place to guide the Executive Branch in imposition and collection of the tax, the Services Tax Amendment would in effect "grant to this Court broad discretionary authority" to make those decisions, thus substantially altering the functions of the

Judicial Branch. In these ways, this initiative would upset the system of constitutional checks and balances.

The Services Tax Amendment also fails to give the voter fair and adequate notice of the true decision which he or she is asked to make. For one thing, the proponents' prior efforts addressed exemptions and exclusions from both the sales tax and the use tax, but this initiative deals only with the sales tax. The voter is entitled to know that this measure would change Florida tax law to favor out-of-state sellers of services for consumption inside Florida.

Also, this initiative would eliminate the Governor from most decisions in the lawmaking process on the services tax, but the ballot summary is silent on that issue. Nor does it disclose which branch of government – the Executive, the Judicial or both – would act to implement the tax if the Legislature fails to do so.

Finally, the Services Tax Amendment misleads a voter into believing that communications services – which already are taxed –would not be covered by this new levy when in fact they would. So too does this initiative mislead a voter into believing that employee services and benefits would be subject to tax if they are not granted a legislative exemption, even though the measure's operative language provides they would not be taxed.

For all these reasons, this initiative is 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 Op. to the Att'y Gen. re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities,* 880 So. 2d 522, 523 (Fla. 2004) [hereinafter *Slot Machines*]. In order to be declared invalid, a proposed initiative must be "clearly and conclusively defective on either ground." *Advisory Op. to the Att'y Gen. re: Amendment to Bar Government from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 891 (Fla. 2000) [hereinafter *Treating People Differently*].

ARGUMENT

This is the third time that some of these proponents have sought to bring about far-reaching change in Florida's sales tax by constitutional amendment. Their two earlier proposals violated the requirements which govern the manner in which proposed constitutional changes are to be presented to the voters.

In 2002, the First District Court of Appeal struck from the ballot a proposed constitutional amendment for a mandatory review of exemptions and exclusions from the sales and use tax because the summary contained misstatements and did not "provide fair notice of the contents of the proposed constitutional amendment." *Florida Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532, 540 (Fla. 1st DCA 2002), *rev. denied*, 826 So. 2d 991 (Fla. 2002). In 2004, this Court invalidated a second attempt, offered as an initiative, because it engaged in "impermissible logrolling" and failed directly to inform voters of at least one important effect. *Advisory Op. to the Att'y Gen. re: Fairness Initiative Requiring Legis. Determination that Sales Tax Exemptions and Exclusions Serve a Pub. Purpose,* 880 So.2d 630, 635 (Fla. 2004) [hereinafter *Sales Tax Initiative*].

This time, as before, the proponents have made only the minimal changes required by the most recent judicial ruling. Consequently, they are circulating three initiatives. This and another one fail to meet the basic requirements of law.

If the commands of the Constitution mean anything, they must be rigorously enforced each time an initiative comes before this Court for review.

I. THE SERVICES TAX AMENDMENT IS A CLASSIC EXAMPLE OF LOGROLLING AND PERFORMS MULTIPLE FUNCTIONS OF STATE GOVERNMENT IN A MANNER WHICH PREVENTS ONE FROM PERCEIVING ITS LIMITS.

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. ...

This Court has described the purpose of the single-subject requirement in many ways over the years. In its most recent decision invalidating an initiative for violation of the single-subject requirement, the Court explained that this constitutional mandate is intended to prohibit the evil of log-rolling, and to prevent an initiative from "substantially altering or performing the functions of multiple branches of state government." *Sales Tax Initiative,* 880 So. 2d at 633.

Some years ago, Justice Shaw offered a different explanation that is more instructive because it focuses on the practical aspects of an initiative from the perspective of the voters who must decide whether to support or oppose it, and the government officials and judges who must implement and enforce it. He said that the single-subject requirement is intended (1) to ensure that "the reader, whether

layman or judge, can understand what [the initiative] purports to do and perceive its limits," and (2) to ensure that "a vote for or against the initiative is an unequivocal expression of approval or disapproval of the entire initiative." *Slot Machines*, 880 So.2d at 528-29 (Bell, J., specially concurring) (quoting *Fine v. Firestone*, 448 So. 2d 984, 998 (Fla. 19984) (Shaw, J., concurring in result only)).

No matter which formulation is applied, the Services Tax Amendment embodies the evils which the single-subject requirement forbids. It would bring about exactly the sort of "precipitous and cataclysmic change" which Article XI, section 3 seeks to prohibit. *In re Advisory Op. to the Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) [hereinafter *Save Our Everglades*]. Because it must enforce "strict compliance" with this mandate, *Fine*, 448 So.2d at 989, this Court should invalidate the Services Tax Amendment.

A. This Initiative Would Force a Voter Who Wants to End One or More Exclusions Which Protect Services from Tax to Accept Other Changes Which He or She May Not Want.

This initiative would impose a constitutional sales tax on services and, in doing so, it bundles together a multitude of tax policy issues into one measure. It epitomizes logrolling. It would force a voter to accept important permanent changes to the process for legislative decision-making on the sales tax in exchange for achieving a one-time legislative review of existing exclusions from the sales tax. It would force a voter to accept the extension of the sales tax to some services

which he or she may wish to remain free from tax, in exchange for achieving the extension of the sales tax to other services which he or she believes should be taxed. And it would force a voter to accept a permanent exemption of "employee salaries and benefits" — however one might define that -- in exchange for extension of the sales tax to other services.

When this Court invalidated the proponents' 2004 attempt to bring about myriad changes to the sales and use tax, it held that initiative contained

> three disparate subjects: (1) a scheme for the Legislature to review existing exemptions to the sales tax under chapter 212; (2) the creation of a sales tax on services that currently does not exist; and (3) limitations on the Legislature's ability to create or continue exemptions and exclusions from the sales tax.

Sales Tax Initiative, 880 So. 2d at 634. The Court found that lumping those three subjects together into one amendment constituted "impermissible logrolling" and violated the single-subject requirement "because of the substantial, yet disparate, impact they may have." *Id.*, at 635.

The proponents responded by dividing the earlier initiative into three measures; however, the proponents have not cured the infirmity identified by the Court two years ago: The Services Tax Amendment mandates the "creation of a sales tax on services that currently does not exist," and it imposes "limitations on the Legislature's ability to create or continue … exclusions from the sales tax." *Id.*, at 634.

The Services Tax Amendment requires the Legislature to examine all exclusions from tax for services not taxed under Chapter 212, Florida Statutes, and allows lawmakers to continue that favored treatment for a service where doing so would serve a public purpose. If the Legislature fails to identify a particular service as meeting a public purpose prior to July 1, 2008, the then-existing sales tax automatically would be extended to include Florida sales of that service.[1] This Court has held before that such a scheme creates "a sales tax on services that currently does not exist." *Id.*, at 635.

The proponents' word choice confirms this understanding of the measure. As this Court explained in 2004, generally services are not subject to the sales tax today because they are excluded from the scope of Chapter 212. "[E]xclusions are not enumerated or expressly listed in the statutes." *Id.*, at 634. Unlike the 2004 measure, the Services Tax Amendment here does not use the word "exclusion" in the proposed constitutional text. Rather, section (a) of the proposed constitutional text commands that the legislature shall "review each service rendered for compensation that is not taxed under the existing sales tax, authorized in Chapter

[1] As discussed below, *infra* at 33-36, this initiative differs from the prior two efforts in a material respect because it addresses only "the sales tax" codified in Chapter 212, Florida Statutes. [A. 1] It does not address the separate use tax found in Chapter 212. *See* 212.05(1)(b), Fla. Stat. (2004). While this decision by the proponents has important policy implications, the Interested Parties believe that this issue is pertinent only to the fairness and adequacy of the ballot summary.

212, Florida Statutes, and shall exempt from future taxation only those services whose exemption is determined to advance or serve a public purpose." [A. 1 (emphasis added)] The use of the word "exemption" is telling: It confirms that this initiative extends the sales tax to services and directs the Legislature to decide which services shall receive an affirmative "exemption" from the new tax.

The second subject from the 2004 initiative also evident in the Services Tax Amendment is the imposition of "limitations on the Legislature's ability to create or continue … exclusions from the sales tax." *Sales Tax Initiative,* 880 So.2d at 634. It is true that the proponents are offering a third initiative which limits legislative decision-making on taxes, *Advisory Op. to the Att'y Gen. re: Initiative Directing Manner by Which Sales Tax Exemptions are Granted by the Legis.*, Case No. SC05-1566; however, the Services Tax Amendment also limits the Legislature's authority to enact exemptions. First, it requires lawmakers to determine a public purpose for each service which will receive an exemption from the new tax. Second, it mandates that the Legislature organize its decision-making process by utilization of the North American Industry Classification System ("NAICS"). Third—and most importantly—it appears to establish a deadline, after

which the Florida Legislature may not be authorized to enact additional exemptions from the services tax.[2]

Combining these limitations on legislative authority with the creation of a new services tax constitutes logrolling. Therefore, the Services Tax Amendment impermissibly combines the creation of a services tax on transactions that previously were not subject to tax and restricts the legislative power in clear contravention of this Court's decision in *Sales Tax Initiative, supra.*

This Court addressed a similar situation in *Fine, supra.* There, the Court held that an 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).

Another way in which the Services Tax Amendment engages in logrolling is more subtle. It bundles together all but one of the current exclusions from the sales tax for services for purposes of review and potential elimination. It thus would force a voter to accept the potential taxation of some services that he or she may

[2] The Services Tax Amendment provides the Legislature may "exempt" a specific service from the new services tax "prior to July 1, 2008[.]" With one exception, "all services that are not exempted … shall be subject to the existing sales tax effective January 1, 2009." [A. 1 (emphasis added)] On and after July 1, 2008, lawmakers may be without authority to grant other exemptions from the tax.

not wish to see taxed – such as day-care services -- in exchange for achieving the potential taxation of other services that he or she may wish to see taxed – such as hairdressing services.

In this respect, the Services Tax Amendment is just like the initiative the Court invalidated because it lumped together 10 specific kinds of discrimination against which state and local governments could provide legal protection, precluding all others. *In re Advisory Op. to the Att'y Gen. – Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) [hereinafter *Laws Related to Discrimination*]. There, 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 asked to give one "yes" or "no" answer to a proposal addressing hundreds of services now excluded from taxation.

Under the Court's reasoning in *Laws Related to Discrimination, supra,* this initiative can be no less a violation of the single-subject requirement.

Finally, the Services Tax Amendment engages in logrolling in that it would compel a voter to accept a permanent exemption of "employee salaries and benefits" from the new services tax in exchange for taxation of other services. (While superficially attractive, such an exemption would permanently favor services provided by an employee over those provided by independent contractors, thus establishing the type of discrimination against small homebuilders relative to large homebuilders that was addressed during the 1987 services tax.) This impermissible dilemma for the voter comes from "pairing a popular measure with an unpopular one in order to enhance the likelihood of passing the less-favored measure." *Slot Machines,* 880 So.2d at 528 (Bell, J., concurring specially) (quoting *Fine,* 448 So.2d at 995-96 (Ehrlich, J., concurring in result only)).

This Court is a bulwark against ill-conceived measures intended to force a voter to accept multiple propositions in one initiative. 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 Services Tax Amendment should be invalidated for logrolling.

B. The Services Tax Amendment Would Alter the Functions of Multiple Branches of Government in a Way that Prevents Anyone from Perceiving the Limits of the Proposed Change.

An initiative also violates the single-subject requirement where it is seen as "substantially altering or performing the functions of multiple branches of state government." *Sales Tax Initiative,* 880 So. 2d at 633. Without question, the Services Tax Amendment would alter or perform functions of the Legislative and Executive branches, and conceivably the Judicial Branch also. Equally important, this initiative leaves so many questions unanswered that it is impossible to "perceive its limits" and determine which branches will perform the tasks needed to give it effect. *Slot Machines,* 880 So. 2d at 529 (Bell, J., specially concurring) (quoting *Fine,* 448 So. 2d at 998 (Shaw, J., concurring in result only)).

1. The Services Tax Amendment Leaves Too Many Questions About Its Implementation Unanswered for Everyone.

The uncertain manner in which the new services tax would be implemented under this initiative constitutes an equally important violation of the single-subject requirement. "The very broadness of the proposal makes it impossible to state what it will affect and violates the requirement that proposed amendments embrace only one subject." *Fine,* 448 So. 2d at 995 (McDonald, J., concurring).

The extent of the important questions which are not answered by the Services Tax Amendment is illustrated 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 lawmakers enacted Chapter 86-166, Laws of Florida. They initiated the process 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., however, they provided virtually no details in the 1986 legislation.

At the time, commentators observed that the 1986 law, which addressed many issues, would bring about "sweeping revisions" to the sales and use tax, but they concluded that its imposition on a broad range of services would have by far the most profound effects. 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 attention during implementation, they warned, the new services tax "may be almost impossible to administer and apply."

So the Legislature's starting point in 1987 was a statutory definition of "services." *See* § 212.02(22), Fla. Stat. (1987), *repealed by* Ch. 87-548, § 1, at 25, Laws of Fla. That definition was refined and details and nuances added in 130 pages of emergency rules adopted by the Department of Revenue ("DOR"), *see* Rules 12AER 87-1 through 12AER 87-91, Fla. Admin. Code (1987), under a delegation of legislative authority. *See* § 212.0599, Fla. Stat. (1987), *repealed by* Ch. 2000-210, § 12, at 2094, Laws of Fla.

The central shortcoming of the 1986 law 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, and the Services Tax Amendment suffers from the same defect. It merely requires that, as of January 1, 2009, the "existing sales tax" be extended to cover "each service rendered for compensation that is not taxed under the existing sales tax." [A. 1]

This superficial command begs many important questions.[3] "What is a 'service' for purposes of the new tax?" "What constitutes the sale of a service?" "Where is a service sold?" "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 a taxing statute failed to address questions as fundamental as these, the Court would have no difficulty in ruling the statute a nullity on grounds 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. Ty-Tan, Inc.*, 48 So. 2d 158, 160 (Fla. 1950).

[3]The significance of these questions should not be under-estimated. The complexity of a sales and use tax on services was the rationale for this Court to provide former Governor Martinez with an advisory opinion on the 1987 services tax. *In re Advisory Op. 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" invalidating the 1987 services tax legislation.)

One need only contemplate the example of accounting services to understand the multitude of critical questions to be answered if the "exclusion" for accounting services is eliminated due to legislative inaction. How should accounting services be taxed if they are 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, which will use the accounting services, performed in Florida, Ohio and California, in class-action litigation occurring in a court in California?

An example that is at once simpler, but no doubt affects more taxpayers, involves the definition of "employee services and benefits." The failure of the proponents to define or limit this phrase will provoke endless mischief. For example, parking charges are taxable today. *See* § 212.03(6), Fla. Stat. (2004). Will the language of this amendment render such charges exempt in the future if they are paid by one's employer? Will massage services provided under an employee's health insurance package enjoy a constitutional exemption from tax?

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 bare-bones text of the Services Tax Amendment, to answer these and other questions under the doctrine of *Dade County Classroom Teachers Association, Inc. 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 Services Tax Amendment simply has "too many possible collateral effects[,]" *Laws Related to Discrimination*, 632 So. 2d at 1022 (Kogan, J., concurring), making it impossible to "perceive its limits." *Slot Machines*, 880 So.2d at 529 (Bell, J., specially concurring) (quoting *Fine*, 448 So.2d at 998 (Shaw, J., concurring in result only)). Thus, the Services Tax Amendment violates the single-subject requirement by altering or performing the functions of multiple branches of state government without specifying the limits of the proposed change.

One who is serious about stepping into the shoes of the Legislature to make tax law by constitutional amendment can do so, but should not be allowed to do so simply by commanding that steps occur — as if magically — to impose tax on services if the Legislature fails to act. The proponents apparently expect the judiciary, in the face of legislative inaction, to choose among the following 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 DOR steps in to write rules on the new services tax without the benefit of a statutory enactment; or (3) taking upon itself

the task of drafting the services tax law out of whole cloth, or one case at a time.[4] "They want to leave [these] important choice[s] regarding the application of the proposal to the total discretion of this Court." *Evans v. Firestone,* 457 So.2d 1351, 1356 (Fla. 1984) (Overton, J., concurring). This should not be allowed.

In the past, those concerned with ensuring timely implementation of a constitutional provision have resorted to the use of a schedule. As explained by one 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 prevent the disruption of government. It is a time-honored practice. *See* Art. XII, §§ 1-11, Fla. Const.; Art. XII, § 25; 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).

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[4]A contemporary example can be found in the litigation to determine the consequence of the Legislature's failure to enact legislation to implement Article X, Section 23, which was validated by this Court in *Slot Machines, supra,* and then passed by the voters. The Broward County Circuit Court declared that, even though lawmakers had failed to implement the amendment as required, pari-mutuel facilities in Broward were entitled to operate slot machines, reasoning "where there is a right -- especially a constitutional right -- there must be a remedy if that right is denied." It retained jurisdiction to allow the County "or any other legally authorized legislative body" to enact implementing rules. *See Hartman & Tyner v. Satz*, Case No. 05-07900, (Fla. 17th Cir. Ct. 2005) When faced with the vacuum created by legislative inaction, the court was called upon to fashion a remedy.

In the absence of constitutional text to address these many questions, and of a schedule setting forth the mechanics of implementation, this Court can only conclude that the Services Tax Amendment fails to set forth a proposition that is "sufficiently complete within itself[.]" *Fine*, 448 So. 2d at 990 (quoting *Weber v. Smathers*, 338 So. 2d 819, 822 (Fla. 1976)). It is impossible to "perceive its limits." *Slot Machines*, 880 So.2d at 529 (Bell, J. specially concurring) (quoting *Fine*, 448 So.2d at 998 (Shaw, J., concurring in result only)). For these reasons, this initiative violates the single-subject requirement and should be invalidated.

2. The Services Tax Amendment Would Substantially Alter or Perform the Functions of the Legislative Branch.

The Services Tax Amendment would substantially alter or perform the functions of the Legislative Branch in several ways. Most importantly, it would actually perform the legislative function by imposing a sales tax on services. Further, it would alter the Legislature's prerogatives under Article VII, section 1(a), to set tax policy and to impose taxes by general law because, on and after July 1, 2008, this initiative would make imposition of the sales tax for all services off-limits to the normal give-and-take of the legislative process. It would delegate to a federal agency the authority to determine which services are subject to review for potential exemption from the new services tax. Finally, and contrary to the proponents' assertion to the contrary, it would perform the appropriations function.

We have already explained how this initiative would impose a tax on "each service rendered for compensation that is not taxed under the existing sales tax authorized in Chapter 212, Florida Statutes[.]" [A. 1] *Supra* at 15-16. In that manner, the Services Tax Amendment undeniably performs the legislative function. Even the proponents admit that. *See* Initial Brief and Appendix of the Sponsor, Floridians Against Inequities in Rates, at 12.

Importantly, the automatic imposition of the services tax would necessitate affirmative legislative action to continue an exclusion in the form of an exemption. This would turn the normal legislative decision-making process on its head and thus circumvent the procedural safeguards prescribed in Article III. There would be no notice to the public of the specific services to be taxed in the multiple ways now required during legislative deliberations, or presentment of a tax law to the Secretary of State so the public can read the law as enacted and know how to conduct their affairs. Art. III, § 7, Fla. Const. The Services Tax Amendment would impose the sales tax on specific services by legislative inaction, thwarting the "filtering mechanism" of the legislative process. *Evans*, 451 So. 2d at 1357.

Further, the Services Tax Amendment would alter the Legislature's remaining powers for purposes of future decisions on the services tax. Under Article VII, section 1(a), the Legislature is empowered to set tax policy and to impose taxes by general law. Under this initiative, the Legislature's power to

impose the sales tax on services -- or to grant exemptions from such a tax -- on and after July 1, 2008, would be curtailed. These issues would be simply off-limits to the normal give-and-take of the legislative process.

Finally, the Services Tax Amendment would perform the appropriations function. Section 212.20, Florida Statutes, currently establishes the repositories for sales tax monies collected under Chapter 212. Therein, a specified percentage of sales tax dollars (2.0440% for counties, and 1.3409% for cities) is automatically earmarked and returned to local governments monthly. By imposing a new sales tax on services that is linked to Chapter 212, the Services Tax Amendment automatically would deposit new tax revenues into these repositories and thereby automatically appropriate 2.0440% of all new revenues to the counties, and 1.3409% of all new revenues to cities.

In these ways, the initiative would substantially alter or perform the functions of the Legislature Branch.

3. The Services Tax Amendment Would Substantially Alter or Perform the Functions of the Executive Branch.

This initiative would substantially alter or perform the functions of the Executive Branch by eliminating the Governor's power under Article III, section 8 to review and approve or veto legislation to create a new services tax.

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 veto and reinstate the law. That procedure would be followed today if lawmakers chose to "eliminate an exclusion from Chapter 212" — i.e, enact a tax -- so that a specific service transaction could be taxed. [A. 1]

Under the Services Tax Amendment, the imposition of a constitutional services tax, with a requirement for the Legislature affirmatively to enact an exemption to continue the non-taxed status of a specific service transaction, would rob the Governor of the veto power. Because the tax would be extended to each service through legislative inaction, there would be no bill passed by the House and Senate for the Governor to review and approve or veto. This initiative thus would upset the system of checks and balances which are the bedrock of our republican form of government.

In *Advisory Opinion to the Attorney General re: Adequate Public Education Funding,* 703 So.2d 446 (Fla. 1997) [hereinafter *Public Education Funding*], this Court 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." *Advisory Op. to the Att'y Gen. re: Florida Transp. Initiative for Statewide High Speed Monorail, Fixed*

Guideway or Magnetic Levitation System, 769 So. 2d 367, 370 (Fla. 2000). 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." *Save Our Everglades*, 636 So. 2d at 1340. Here, the negation of the Governor's veto power is a substantial alteration of the functions and duties of a second branch of government, thus violating the single-subject requirement.

The Services Tax Amendment also could substantially alter the function of the Executive Branch by requiring DOR to collect the sales tax on services without legislative authorization and without apparent rulemaking authority. Absent that guidance, it is unclear how DOR could penalize non-compliant taxpayers without running afoul of the Due Process Clause and its command against vagueness. If the Legislature does not timely act – and this initiative does not require that it do anything other than review the current exclusions from tax – DOR will have to take steps to perform its tax collection function. And yet DOR would require statutory authorization to exercise rulemaking authority to implement the tax.

This legal conundrum should not be dismissed lightly. "The Department of Revenue has no power to tax. That power is reposed solely in the legislature." *Dept. of Revenue v. Young American Builders*, 358 So. 2d 1096 (Fla. 1st DCA 1978), *approved sub nom., Dept. of Revenue v. Silver Springs Shores, Inc.*, 376 So.

2d 849 (Fla. 1979). Absent legislative direction, there is only one place for DOR to look for lawful authority to implement the tax – to the Judicial Branch and ultimately to this Court.

4. The Services Tax Amendment Would Substantially Alter the Functions of the Judicial Branch.

DOR's potential conundrum is only one of 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 would result in a new sales tax on services. However, none of the necessary laws or implementing rules necessarily would be in place to guide the Executive Branch in imposition and collection of the tax. Absent legislative authorization, the Executive Branch can be expected to ask the Judiciary for direction, presenting a separation-of-powers issue of unequalled challenge.

In that circumstance, the proponents will have "left to this Court the responsibility of identifying and redrafting those provisions by judicial construction after the initiative proposal's adoption by the people." *Evans,* 457 So. 2d at 1356 (Overton, J., concurring). Seen in that light, the Services Tax Amendment "would grant to this Court broad discretionary authority in determining the effect of a proposed amendment" just like the Citizens Choice amendment which the Court invalidated. *Fine,* 448 So. 2d at 989.

Such a grant of authority would mark a sea-change in Florida jurisprudence on taxation. "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 Services 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.

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

II. THE SERVICES TAX AMENDMENT VIOLATES STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR ADEQUATE NOTICE TO VOTERS OF THE DECISIONS THEY MUST MAKE.

This Court must declare an initiative invalid and deny it a ballot position where the ballot summary is "clearly and conclusively defective" for failing to give a voter fair and accurate notice of the decision he or she must make. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). This imperative is grounded in Article XI, section 5 and codified in section 101.161(1), Florida Statutes. Its purpose is "'to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.'" *See Sales Tax Initiative*, 880 So. 2d at 635 (quoting *Advisory Op. to the Att'y Gen.*

re: Fee on Everglades Sugar Production, 681 So.2d 1124, 1127 (Fla. 1996). The ballot summary of this initiative fails that test.

A. The Ballot Summary Fails to Disclose That, Unlike the Existing Sales Tax on Goods, a Corresponding Use Tax Will Not be Imposed to Protect Florida Sellers of Services.

The 2002 and 2004 efforts by many of these proponents addressed exemptions from both the sales tax imposed by Chapter 212, Florida Statutes, and the corresponding use tax imposed by Chapter 212. The 2002 proposal expressly referred to "exemptions and exclusions from the tax on sales, use, and other transactions." *Florida Ass'n of Realtors, Inc.*, 825 So. 2d at 535. The 2004 initiative defined "sales tax" to include "the tax on sales, use and other transactions." *Sales Tax Initiative*, 880 So. 2d at 631. In contrast, the Services Tax Amendment deals only with the sales tax. This is a crucial distinction that must be disclosed to the voter because of its far-reaching consequences, both for those who sell services in Florida and those who purchase services, whether here or elsewhere, for use in Florida.

The sales tax and the use tax are two separate but corresponding levies intended to work in harmony to ensure that taxes are fairly imposed on comparable transactions, regardless of where the sale occurs. This Court has recognized that "[t]he primary function of the use tax is to complement the sales tax so as to make uniform the taxation of property subject to the tax, whether produced, purchased

and used in this State or produced and purchased in another state or country, but used in this State." *U.S. Gypsum Co. v. Green*, 110 So. 2d 409, 412 (Fla. 1959). In describing how these two taxes operate differently, the Court explained that "[s]ince the samples were purchased in another state the sales tax would not apply, but since they were used, consumed or stored for use, not for resale, by the relator within this State they were subject to the use tax." *Id.*

The import of this distinction becomes apparent when one considers how the Services Tax Amendment would discriminate against Florida sellers of services. By way of example, the sale or use of computer programming services in Florida is currently excluded from taxation under both the sales tax and the use tax. The proposed constitutional text provides that, "[e]xcept for the payment of employee salaries and benefits, all services that are not exempted by the legislature shall be subject to the existing sales tax effective January 1, 2009." [A. 1 (emphasis added)] Thus, absent affirmative legislative action and executive approval or acquiescence, this initiative would subject the sale of computer programming services in Florida to taxation, however, the purchase of the same computer programming services from a Georgia seller would result in no tax because the use tax would not be automatically imposed.

This same situation was threatened in 1986, when the Legislature enacted summary language to tax all services without spelling out any of the critical

details. In anticipation of possibly having to implement that tax law, DOR retained Professor Walter Hellerstein of the University of Georgia to review the legal questions that would arise under Chapter 86-166, 1986 Laws of Florida. Professor Hellerstein's analysis identified the lack of a corresponding use tax as a major shortcoming of the 1986 legislation, noting that:

> Although the policy concerns that motivated the legislature to provide for a use tax on tangible personal property would likewise justify a use tax on services, it seems quite clear that neither Chapter 86-166 nor the preexisting provisions of Chapter 212 impose such a tax. Chapter 86-166 makes no reference to use taxation of services. And the use tax provisions of Chapter 212 refer to the storage, use, or consumption of each or any "item or article of tangible personal property" in the state.

[(A. 2 (emphasis in original)] [5]

Likewise, the Services Tax Amendment makes no reference to use taxation, and "the existing sales tax authorized in Chapter 212," [A. 1] does not automatically impose a corresponding use tax on an out-of-state purchase which otherwise would be taxable if purchased in Florida. The voter is entitled to know of this important change in Florida tax policy – skewing the tax laws to favor out-of-state sellers -- that would be brought about by the Services Tax Amendment.

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[5]W. Hellerstein & P. Willson, Legal Study of Florida's Sales Tax on Services (Jan. 2, 1987), included within Florida Department of Revenue, Report to the Florida Legislature, Legal, Administrative and Revenue Implications of Chapter 86-166, Laws of Florida: Repeal of Sales Tax Exemptions for Services and Selected Transactions, March 1987).

And yet the measure is silent on this important effect. The 15-word ballot title states that the Services Tax Amendment is "[e]xtending existing sales tax to non-taxed services where exclusion fails to serve a public purpose." [A. 1] (emphasis added)] The 66-word substance states that "[u]pon completion of such review, services currently not taxed and which are not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009." *Id.* (emphasis added). Neither mention the absence of a corresponding use tax on services purchased outside of Florida for use in Florida. The failure to make this disclosure renders the ballot summary clearly and conclusively defective.

B. The Ballot Summary Fails to Give Adequate Notice to the Voter of a Significant Change in the Governor's Role in Making Laws Under the Services Tax Amendment.

The ballot summary is silent as to the substantial effect that the Services Tax Amendment would have on the Governor's role in lawmaking. Article III, section 8 provides that "every bill passed by the legislature" shall 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 storied checks and balances devised by the framers of American constitutions to protect us against tyranny and ensure that our chosen leaders are accountable to us. *Florida Ass'n of Realtors, Inc.*, 825 So. 2d at 536-37. The Services Tax Amendment would eliminate the Governor from most decisions in the lawmaking

process for the services tax. A voter is entitled to know of this change in the checks and balances where it would affect taxation of such everyday purchases as day-care and dry-cleaning services.

The Governor's powers are circumscribed in two ways under the Services Tax Amendment. First, if the Legislature fails to grant an exemption prior to July 1, 2008, the sales tax would be imposed on a specific service by virtue of that inaction, and the Governor would have no power to veto those new taxes. In that respect, the Services Tax Amendment in effect would repeal the gubernatorial veto that now could be exercised over decisions to extend the sales tax to services.

Second, if the Legislature acts to exempt a service from the scope of the new services tax, it is possible under the extraordinary process permitted in this initiative for the Legislature to act by joint resolution and thereby side-step any involvement by the Governor in this decision-making process.[6] The Services Tax Amendment does <u>not</u> require that the Legislature pass a law in order to grant an exemption from the services tax. It simply requires that the "legislature shall, prior to July 1, 2008, review each service rendered for compensation … and shall <u>exempt</u> from future taxation only those services whose <u>exemption</u> is determined to advance or serve a public purpose." [A. 1 (emphasis added)] Nothing in this

[6]This approach to legislative action is not without precedent. The 2002 proposal contemplated taxation by a 12-member committee and action by legislative resolution. *See Florida Ass'n of Realtors, Inc.*, 825 So. 2d at 535.

language mandates that the Legislature make these decisions through the enactment of a law.

By contrast, a companion initiative now before this Court, *see Advisory Op. to the Att'y Gen. re: Initiative Requiring Legis. Determination That Sales Tax Exemptions Serve a Pub. Purpose,* Case No. SC05-1565 [hereinafter "Exemption Repeal Amendment"], and sponsored by the same proponents, takes a different approach to retention of the existing exemptions from the sales tax on goods. The Exemption Repeal Amendment provides for "reenactment" of any existing sales tax exemptions which the Legislature elects to retain, clearly specifying the need to pass a law pursuant to the lawmaking process prescribed by Article III, including executive review and approval or veto. That measure's ballot summary advises voters that the Legislature must "reenact" existing sales tax exemptions for them to continue in effect.

By the omission of the crucial terms of art that are so plainly evident in a contemporaneous measure from these same proponents, the Services Tax Amendment suggests that the Legislature may "exempt" a service from the new services tax by some form of legislative action other than enactment of a law, thus precluding executive review and approval or veto pursuant to Article III, section 8. Nowhere in this measure are these changes in the gubernatorial veto power disclosed to the voter, rendering this initiative clearly and conclusively defective.

C. The Ballot Summary Fails to Advise the Voter Which Branches of State Government Are Empowered to Act if the Legislature Fails to Implement the New Services Tax.

We described above the panoply of public policy issues that must be addressed to implement a sales tax on services. The issues are well known as a result of Florida's short-lived services tax experience of 1987. *Supra*, at 20-24. This Court addressed some of the attendant constitutional issues. *See In re Advisory Op. to the Governor*, 509 So. 2d 292 (Fla. 1987). All those policy and legal issues remain and -- if the proponents get their way -- many of these issues will have to be addressed again as a result of adoption of this initiative.

And yet, like the proponents' two prior efforts to create a services tax through legislative inaction, the ballot summary here does not disclose which branch or branches of state government – the Executive, the Judicial or both – would be empowered to implement the services tax if the Legislature fails to act.

The proponents would have the Court and the voters believe that this initiative entails simply "[e]xtending existing sales tax to non-taxed services where exclusion fails to serve [a] public purpose," as suggested in the ballot title. [A. 1] However, someone in government will have to write a new tax law, and that someone may or may not be the body otherwise constitutionally assigned to perform the lawmaking function, namely, the Legislature. The ballot summary does not address this critical point. Instead, it provides a disarming but

misleadingly simple description that conceals more than it reveals. "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).

Florida's Constitution does not allow such a dramatic change in our organic law without explaining the "true meaning, and ramifications" of the change. *See Askew*, 421 So. 2d at 156. The summary of this initiative advises the voter that "[u]pon completion of [legislative] review, services currently not taxed and which are not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009." [A. 1] What the summary fails to do is explain how words imposing a tax will end up in the Florida Statutes and the Florida Administrative Code. For that matter, neither does the proposed constitutional text.

Some individual or collegial body would have to make major policy decisions about the scope of the new services tax, as well as the mechanics of its collection. That individual or collegial body would exercise 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" to make these decisions. *Advisory Op. to the Att'y. Gen. re: Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998). The ballot summary therefore fails to give a voter adequate and fair notice of a material feature of this initiative.

D. The Ballot Summary Fails to Advise a Voter that Some Services that Already Are Taxed Will be Subject to Review and Additional Taxation Under This Initiative.

The ballot title describes the effect of this initiative as extending the sales tax to "non-taxed services." [A. 1] Further, the substance states that, following the legislative review, "services currently not taxed and which are not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009." However, the proposed constitutional text describes a different subset of services to be automatically taxed if voters approve this measure, specifically, "each service rendered for compensation that is not taxed under the existing sales tax authorized in Chapter 212, Florida Statutes." [A. 1 (emphasis added)]

Chapter 212, Florida Statutes, is not the sole means of taxing a limited number of services in Florida today. Indeed, the Legislature recently struggled for several years to establish a separate scheme for taxing communications services in Chapter 202, Florida Statutes. However, a voter reading the ballot summary of the Services Tax Amendment would conclude that communications services would not be captured by the automatic tax trigger in this initiative, because they are already taxed. However, the text of the Services Tax Amendment demonstrates that these

services would be captured because they are "not taxed under the existing sales tax authorized in Chapter 212, Florida Statutes."[7] [A. 1 (emphasis added)] The voter is entitled to notice of this effect of the Services Tax Amendment, but the ballot summary leads the voter to believe just the opposite. For this reason, the ballot summary actually misleads the voter and thus violates the requirements for fair and adequate notice of an initiative's effect.

E. The Ballot Title and Summary Assert That "Employee Salaries and Benefits" Would be Treated Differently From the Treatment Actually Mandated by the Amendment.

The ballot summary misleads the voter in the way it describes how "employee salaries and benefits" will be addressed by the Services Tax Amendment. The 66-word summary states that, "[e]xcept for the payment of employee salaries and benefits, all non-taxed services provided for compensation shall be reviewed by the Legislature … ," [A. 1] thus inoculating employee salaries and benefits from legislative review. However, the summary then continues that, "[u]pon completion of such review, services currently not taxed and which are not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009." [A. 1 (emphasis added)] In that manner, the ballot summary

[7] Ironically, not only are communications services not "non-taxed" in Florida today, they are among the most heavily-taxed services and goods in the state.

indicates that employee services and benefits would be subject to the sales tax on January 1, 2009, unless granted an exemption by the Legislature.

In contrast, the operative language in the text of the Services Tax Amendment provides that "[e]xcept for the payment of employee salaries and benefits, all services that are not exempted by the legislature shall be subject to the existing sales tax effective January 1, 2009." Thus the constitutional text proposed in the Services Tax Amendment provides that employee salaries and benefits would not be subject to the services tax absent further constitutional change.

This is more than an academic issue: The treatment of employee services and benefits -- along with the corresponding treatment of services provided by partners and independent contractors -- were particularly challenging issues in 1987. In the ballot summary for this initiative, the voter should be given accurate information concerning the future treatment of employee services and benefits under the Services Tax Amendment. In the form submitted for review by this Court, the ballot summary does not do so.

In summary, the cumulative weight of the ballot summary defects identified *infra*, pages 32 through 43, "combine to produce a summary that is fatal to the proposed amendment." *Advisory Opinion to the Att'y Gen. re: Casino Authorization*, 656 So. 2d at 469. Accordingly, the Services Tax Amendment should be invalidated.

CONCLUSION

For the foregoing reasons of law and policy, the parties respectfully request that the Justices render a written opinion which determines that the Services 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 22nd day of September, 2005.

Cynthia S. Tunnicliff (FB # 134939)
Howard E. Adams (FB # 322210)
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, FL 32302
Telephone: 850/222-3533
Facsimile: 850/222-2126

Victoria L. Weber (FB # 266426)
Dan R. Stengle (FB # 352411)
David L. Powell (FB # 656305)
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314
Telephone:850/222-7500
Facsimile:850/224-8551

Attorneys for Interested Parties

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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., Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399, and ROBERT L. NABORS, Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308, on this 22nd day of September, 2005.

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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Attorney

APPENDIX

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