

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-1565

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: INITIATIVE REQUIRING LEGISLATIVE DETERMINATION THAT
SALES TAX EXEMPTIONS SERVE A 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 CHEMISTRY COUNCIL, 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

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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. FAR members frequently function as agents of the State to collect sales tax on transactions that are the subject of potential taxation under the Exemption Repeal Amendment

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 certified public accountants licensed to perform professional accounting services in Florida. FICPA members are called upon to advise clients and opine as to the taxability of many transactions that are subject to potential taxation under the Exemption Repeal Amendment.

Interested Party Florida Retail Federation (“RFR”) is a statewide not-for-profit trade association, with its principal office located in Tallahassee, Florida, whose 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 both purchase and sell many of the goods that are the subject of the Exemption Repeal 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 in Tallahassee. The Federation’s more than 137,000 member businesses represent more than three million employees and are consumers of many goods that are the subject of potential taxation pursuant to the Exemption Repeal Amendment.

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. Component parts of manufactured products, manufacturing services, electricity used in manufacturing, and machinery and equipment used in manufacturing are goods purchased by FMA members that are subject to potential taxation under the Exemption Repeal Tax Amendment.

Interested Party Florida Association of Broadcasters (“FAB”) is a Florida not for profit corporation with its principal place of business at Tallahassee. The Association’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 products and services to businesses and the public. These products are among those that would be subject to review and potential taxation under the Exemption Repeal Amendment. FAB members are also consumers of goods that are subject to potential taxation including electronic equipment, and materials used in production.

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 goods that are subject to review and potential taxation under the Exemption Repeal 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, Florida. FFBF represents the interests of more than 150,000 member families, including more than 40,000 commercial farmers, through agricultural, educational, and informational services. Goods purchased and used by FFBF members in agricultural production are among the transactions that would be subject to potential taxation under the Exemption Repeal 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. 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 Exemption Repeal Amendment.

Interested Party Florida Fruit and Vegetable Association (“FFVA”) is a Florida not-for-profit corporation with its principal place of business in Maitland, Florida. 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. Various inputs necessary in the production of fruits and vegetables, such as seed, fertilizer, pesticides, and power farm equipment are among the components subject to review and potential taxation under the Exemption Repeal 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 Exemption Repeal Amendment would affect many products purchased for use in FCA members' businesses.

Interested Party Sunshine State Milk Producers, Inc. ("SSMP") is a Florida corporation with its principal place of business in Orlando, Florida. SSMP represents over 250 dairy farms throughout the southeastern 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 Exemption Repeal Amendment, including farm equipment and machinery, and cattle feed.

Interested Party Florida Nursery, Growers and Landscape Association, Inc. ("FNGLA") is a Florida not-for-profit incorporated membership association with its principal place of business in Orlando, Florida. The FNGLA is a trade association representing more than 2,500 members, all of whom are in the nursery and landscape industry. The Exemption Repeal Amendment would affect many aspects of FNGLA's business, such as the cost of fertilizer, pesticides, machinery and equipment, and transportation.

Interested Party Printing Association of Florida, Inc. ("PAF") is a Florida not-for-profit corporation with its principal place of business in Orlando, Florida.

The vast majority of PAF's approximately 520 member companies are in the graphic arts related industry in Florida. The graphic arts industry in Florida is the largest employing manufacturing industry in the State. The Exemption Repeal Amendment would affect many aspects of PAF members' businesses, including the costs of machinery and equipment, preparatory materials which are necessary and used in the printing process, electricity, and equipment repair.

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, concerning the initiative entitled, “Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose” [hereinafter “Exemption Repeal 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 Exemption Repeal Amendment fails to give the voter fair and adequate notice of the true decision which he or she is asked to make. Under this measure, the ballot summary claims, the Legislature will review all "exemptions" from the sales tax except those "currently provided for ... health services[.]" The summary thus asserts that health services are protected by an express exemption which may be retained by the Legislature. This claim is false and misleading because health services are not taxable by virtue of an exclusion from taxation.

Compounding the error, these proponents are circulating a companion initiative which would create a constitutional services tax that would cover health services, absent legislative action. Thus, the proponents claim to have protected health services from taxation when in fact they have done the opposite.

The Court will recall that the proponents' prior efforts addressed exemptions and exclusions from the sales tax and the use tax. 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.

This initiative fails to inform the voter that taxes no longer could be imposed only pursuant to a duly enacted law, with all the procedural safeguards set forth in Article III of the Constitution. This measure also would eliminate the Governor from most decisions in the lawmaking process in reviewing sales tax exemptions, but the summary is silent on that issue. Nor does it disclose which branch of government would have the discretionary authority to address the details of tax administration and collection if the Legislature fails to make necessary changes to the Florida Statutes and the Florida Administrative Code.

Finally, this initiative contains a defective title which does not inform the voter of the measure's chief purpose and does not call it by the name "by which the measure is commonly referred to or spoken of."

The Exemption Repeal Amendment also violates the single-subject requirement of Article XI, section 3. It is a blatant example of logrolling. It addresses two of the three disparate subjects cited by the Court when it struck down the proponents' last attempt: It includes "a scheme for the Legislature to

review existing exemptions to the sales tax under Chapter 212,” 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 four existing exemptions from the sales tax on goods – food, prescription drugs and residential rent, electricity and heating fuel – thus forcing a voter to accept potential taxation of transactions he or she may not wish to see taxed – such as sales to non-profit organizations – in exchange for achieving potential taxation of others they may wish to see taxed – such as skybox tickets. Finally, it would compel a voter to accept the permanent exemption of food, prescription drugs and residential rent, electricity and heating fuel in exchange for the review and potential taxation of other currently exempt items, such as ostrich feed and skyboxes.

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 proposed 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 it 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. THIS INITIATIVE VIOLATES THE CONSTITUTIONAL AND STATUTORY REQUIREMENTS TO GIVE THE VOTERS FAIR NOTICE OF THE DECISION 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 the voter fair and accurate notice of the decision that he or she is asked to 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 of the Exemption Repeal Amendment Would Mislead the Voter into Believing that “Health Services” Would be Protected from Automatic Taxation.

The ballot summary for the Exemption Repeal Amendment tells the voter that “[t]he legislature shall periodically review all sales tax exemptions except those currently provided for: food; prescription drugs; health services; and

residential rent, electricity and heating fuel.” [A. 1 (emphasis added)] The implication of this statement is that – like food, prescription drugs and residential rent, electricity and heating fuel -- health services are currently protected from the sales tax by an express exemption.¹ The ballot summary also tells voters the exemption for such transactions will receive constitutional protection under the Exemption Repeal Amendment. Indeed, the proponents’ promotional materials underscore this claim, stating: “Tax exemptions would always remain for food, residential rent and utilities, prescription drugs, health services, and employee salaries, and benefits. It specifically says so in the amendment text.” See http://www.fairamendment.com/why_florida_need_tax_reform.htm. (emphasis added).

This claim is false and misleading. From its review of the proponents’ prior initiative in 2004, the Court will no doubt recall that Chapter 212, Florida Statutes, generally imposes the sales and use tax on goods, but also enumerates exemptions for goods which are not to be taxed. Some are stand-alone exemptions; others are incorporated into definitions or other provisions of Chapter 212. By contrast,

¹This initiative differs from the prior two efforts in a material respect in that 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). This drafting decision by the proponents has important, undisclosed

Chapter 212 does not expressly “exclude” identified services from taxation. With very limited exceptions, services are not within the scope of the tax because the sales tax was enacted in 1949 to apply to goods.² *See Sales Tax Initiative*, 880 So. 2d at 634-35.

Florida law presently does not exempt health services from the sales tax because those services would not otherwise be subject to the sales tax. Thus, the ballot summary of the Exemption Repeal Amendment is in error. There is not “currently provided” in Chapter 212, Florida Statutes, an “exemption” for “health services.” In that respect, the Exemption Repeal Amendment fails properly to inform the voter about this initiative because it claims to protect an exemption which does not in fact exist.

Under some circumstances, this misrepresentation in the ballot summary regarding health services might be excused as a harmless scriveners’ error. In this case, however, the error could not be more harmful.

implications for consumers and businesses who buy or sell goods for use in Florida. *See infra* at 17-20.

²Section 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

The same proponents simultaneously are circulating another initiative, which is now before the Court for validation, *Advisory Op. to the Att’y Gen. re: Initiative Extending Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Pub. Purpose*, Case No. SC05-1564 [hereinafter “Services Tax Amendment”], to create a constitutional services tax. If validated and adopted, that initiative – without further legislative action -- would impose a sales tax on “all non-taxed services,” a class of transactions whose scope unquestionably would include health services.

There is no provision in the Services Tax Amendment to protect “health services” from being subject to the proponents’ new services tax, absent a legislative vote to create an express exemption. The only class of services singled-out for protection from the services tax to be created by this second initiative is “employee salaries and benefits.”

If the proponents’ two initiatives are considered *in pari materia* – as they could be if both are placed on the ballot and approved by the voters -- the proponents claim to have protected health services from taxation when in fact they have done the opposite. Their claim in one initiative to protect this basic human necessity from taxation would reassure and lull the voters while their companion initiative, if adopted, would actually set in motion the legal machinery to impose

personal service transactions that involve sales [of tangible personal property] as

the proponents' proposed services tax on that very necessity. As with the summary in *Advisory Op. to the Att'y Gen. re: Additional Homestead Tax Exemption*, 880 So. 2d 646 (Fla. 2004), this ballot summary misleads the voters on what the Exemption Repeal Amendment would deliver.

The broad scope of the proponents' error in the Exemption Repeal Amendment is confirmed by the very classification system which their Services Tax Amendment would compel the Legislature to rely upon – the North American Industry Classification System (“NAICS”), administered by the U.S. Census Bureau. When considered down to the four-digit level as commanded by the Services Tax Amendment, the category of “health services” includes services ranging from those provided by a physician in his or her office to substance abuse services provided on an inpatient basis by a non-profit facility.³ Thus, the magnitude of the proponents' error is revealed by their chosen methodology.

This is a big mistake, not a small one.

“The act of amending the Constitution is serious business.” *State ex rel. Landis v. Thompson*, 163 So. 270, 277 (Fla. 1935). Though the work of preparing

inconsequential elements for which no separate charges are made.”).

³2005 *Florida Tax Handbook* (published annually by the Florida Senate, Florida House of Representatives, Office of Economic & Demographic Research, and Florida Department of Revenue, Office of Tax Research) (on file, Florida Legislative Library).

and submitting an initiative is carried out by citizens, this Court nevertheless must treat it as “a highly important function of government that should be performed with the greatest certainty, efficiency, care, and deliberation.” *Smathers v. Smith*, 338 So. 2d 825, 831 (Fla. 1976) (quoting *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912)).

This error is false in a material respect and thus misinforms and misleads the voter. The Exemption Repeal Amendment should be declared invalid for failing fairly and accurately to inform the voter about the decision he or she must make.

B. The Initiative Fails to Disclose That a Sales Tax Will be Imposed on a Sale in Florida, but a Corresponding Use Tax Will Not Be Imposed to Protect Florida Sellers.

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 transaction.” *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 Exemption Repeal Amendment addresses only the sales tax on goods; it does not address the corresponding use tax. This is a crucial

distinction that must be disclosed to the voter because of its far-reaching consequences, both for those who sell goods in Florida and those who purchase goods, 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 Exemption Repeal Amendment would discriminate against Florida sellers. For example, pollution control equipment now has an exemption from both the sales tax and the use tax. Section 212.051(1), Florida Statutes, provides that: “[n]otwithstanding any provision to the contrary, sales, use, or privilege taxes shall

not be collected with respect to any facility, device, fixture, equipment, machinery, specialty chemical, or bioaugmentation product used primarily for the control or abatement of pollution or contaminants in manufacturing" (emphasis added).

The Exemption Repeal Amendment would require review and automatic repeal of the sales tax exemption for pollution control equipment. As the ballot summary states, "[s]ales tax exemptions not reenacted or continued would be eliminated." [A. 1] In contrast, the proposed constitutional text would not require review and repeal of the use tax exemption for this same equipment. Given the Court's strictures to interpret an unclear law in favor of the taxpayer, the automatic repeal of the corresponding use tax exemption for pollution control equipment cannot reasonably be implied from this initiative.

Thus, the Exemption Repeal Amendment would authorize a situation in which the sales tax exemption was eliminated and a Florida seller of pollution control equipment was required to collect sales tax on its sale, but absent legislative action the purchase of the identical equipment from a Georgia seller would result in no tax because the use tax exemption would remain in effect.

This is not an imaginary predicament, or one with unimportant consequences. This same threat arose in 1986, when the Legislature enacted summary language to tax all services without spelling out critical details. In

anticipation of having to implement that tax law, the Department of Revenue (“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.⁴ Professor Hellerstein’s analysis identified the lack of a corresponding use tax as a major concern, noting:

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))]

Likewise, the Exemption Repeal Amendment makes no reference to use taxation. The proposed constitutional text is directed to “the sales tax,” [A. 1] and does not address the corresponding use tax. A voter is entitled to know of the important change in Florida tax policy – skewing the tax laws to favor out-of-state-sellers -- that would be brought about by this initiative and its effect.

⁴W. 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* (Mar. 1987).

And yet the measure is silent on this issue. The 12-word ballot title and the 60-word summary both address only “sales tax exemptions.” [A. 1] Neither mention the imposition or absence of a corresponding use tax on goods purchased outside Florida for use in Florida when an existing sales tax exemption would be eliminated by operation of law, if this initiative is adopted. The failure to disclose this change in Florida tax law renders the ballot summary clearly and conclusively defective because it does not explain the “true meaning, and ramifications” of the measure. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

C. The Ballot Summary Fails Clearly to Inform a Voter that Sales Taxes Will Not be Imposed “In Pursuance of Law,” but Instead Will Arise From Legislative Inaction.

Article VII, section 1(a) of the Constitution limits the Legislature’s taxation power by mandating that all taxes be imposed only “in pursuance of law.” And “[t]he word law means a statute adopted by both Houses of the Legislature.” *Advisory Op. 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 Exemption Repeal Amendment would turn this mandate on its head. It provides instead for taxation in the event of legislative inaction, or in the event of legislative action coupled with a gubernatorial veto which is sustained. The voter is entitled to be told that the guarantee that taxes will only be imposed by duly enacted law would be rendered inoperative if this initiative is adopted. The ballot summary fails to do so. “The problem, therefore, lies not with what the summary says, but, rather, with what it does not say.” *Askew*, 421 So. 2d at 156.

While the proponents may prefer to place the proverbial “gun to the head” of the Legislature with an automatic tax-exemption repeal process, the Constitution prohibits such a change in our organic law without explaining to the voter the “true meaning, and ramifications” of such a measure. *Askew*, 421 So. 2d at 156. The summary of this initiative merely advises the voter that exemptions from the sales tax will be “eliminated,” [A. 1] as if by magic. It does not explain how the appropriate words to impose the sales tax on currently exempt transactions would be incorporated into the statutes or the administrative code, where necessary.

It is true that some exemptions are neatly listed in Section 212.08, Florida Statutes, and can be excised from the law without disrupting the statutory taxing scheme. As to those exemptions, DOR may have apparent rule-making authority to provide more detail about the taxation of those transactions. However, some

goods currently are not subject to taxation by virtue of definitions or exclusions from taxation. If the Legislature fails to act for some reason -- or if it passes a bill and the Governor vetoes the bill and is sustained⁵-- the imposition of the sales tax as to those transactions is more problematic. In either circumstance, a taxpayer would have reason to turn to the Judicial Branch to rule on whether the definition or exclusion was actually within the ambit of the Exemption Repeal Amendment. Or perhaps the Governor would come to this Court for an advisory opinion.

The outcome would not be as simple as telling retailers to start collecting a six percent tax on the sale of ostrich feed and to remit it to DOR each month. Someone must amend Chapter 212, Florida Statutes, and the Florida Administrative Code to render the tax law intelligible and predictable for tax administrators as well as for businesses and individuals who wish to order their affairs in compliance with the law.

For example, the purchase of goods by a wholesaler for resale to a retailer is not taxable today because the transaction falls outside the definition of a “retail

⁵Consider for a moment the circumstance where a majority of both the House and the Senate pass a bill to reenact an exemption, but the Governor vetoes the measure. The veto can be sustained by one-third of the members of the House or Senate, present and voting. *See* Art. III, §8, Fla. Const. Thus, it is not an exaggeration to say that the Exemption Repeal Amendment will, in some circumstances, alter the legislative process to the extent of empowering a minority of only one house to decide what is taxed.

sale” that is subject to tax. It is excluded from the scope of the sales tax on goods. If this exclusion were treated as an “exemption” under the Exemption Repeal Amendment, someone would need to amend the statutory definition of “retail sale.” That is the role of lawmaking and the reason that taxes are levied only “in pursuance of law.” Yet “[t]he ballot summary fails to inform the public that [one or more undesignated branches of government] 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).

Thus, the Exemption Repeal 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 tax to transactions currently exempt from tax by virtue of a definition or exclusion, or it is deficient because it does not disclose that the safeguard of Article VII, section 1(a) would be partially inapplicable as to Florida’s chief revenue source, the sales tax on goods.

If the Exemption Repeal Amendment is not deficient in one way, it is surely deficient in the other. Whichever it turns out to be, these “legal differences are significant and are not revealed to the voter.” *Treating People Differently*, 778 So. 2d at 897. The ballot summary is clearly and conclusively defective for failing fairly and accurately to explain that the Exemption Repeal Amendment turns the

existing constitutional means for imposing a tax on its head. *See also Advisory Op. to the Att’y Gen. re: Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 469 (Fla. 1995) [hereinafter *Casino Authorization*].

D. The Ballot Summary Fails to Give a Voter Adequate Notice of a Significant Change in the Governor’s Role in Making Laws Concerning the Sales Tax.

The ballot summary is silent as to the substantial effect that the Exemption Repeal 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. This recurring fact of government life is one of the constitutional checks and balances that every school child learns about. *Florida Ass’n of Realtors, Inc.*, 825 So. 2d at 536-37. This fact of life would change under the Exemption Repeal Amendment.

The proposed constitutional text provides that the Legislature shall “review all exemptions from the sales tax existing on or subsequent to the effective date of this amendment,” prior to July 1, 2008, and every 10 years thereafter, and that “exemptions not reenacted and continued shall lapse and end” the following January 1. [A. 1] Thus, if the Legislature fails to reenact a specific exemption prior to July 1, 2008, the sales tax would be imposed on a specific good by virtue of that inaction, and the Governor would have no power to veto those new taxes.

In that respect, the Exemption Repeal Amendment also repeals the gubernatorial veto that presently could be exercised over decisions to extend the sales tax to exempt transactions.

The ballot summary merely provides that “exemptions not reenacted and continued by the Legislature shall be eliminated” by operation of the Exemption Repeal Amendment. [A. 1] Thus, this initiative would perform the legislative act of extending the sales tax to transactions that are now exempt, and negate the Governor’s power to review and approve or veto such an extension. Therefore, this initiative would “insulate this legislative action from executive veto” *Florida Ass’n of Realtors, Inc.*, 825 So. 2d at 539.

Nowhere is this important change disclosed to the voter. In their zeal to eliminate various exemptions from the sales tax, the proponents of this initiative would alter the dynamics of the lawmaking process for the sales tax without fairly and adequately describing this dramatic change for the voter. This ballot summary is clearly and conclusively defective.

E. The Ballot Title Misleads the Voter By Failing to Describe the Initiative’s Chief Purpose and to Call it by the Name by Which it is “Commonly Referred To or Spoken Of.”

The Court must ask whether “the ballot title and summary ... fairly inform the voter of the chief purpose of the amendment,” *Advisory Op. to the Att’y Gen.*

re: Right to Treatment and Rehabilitation for Non-Violent Drug Offenses, 818 So. 2d 491, 497 (Fla. 2002), and “whether the language of the title and summary, as written, misleads the public,” *Advisory Op. to Att’y Gen. re: Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998). Adding further definition to this requirement, Section 101.161 mandates that a title “shall consist of a caption ... by which the measure is commonly referred to or spoken of.”

The chief purpose of the Exemption Repeal Amendment is to periodically review and automatically repeal sales tax exemptions, absent legislative action to reenact them. Yet the ballot title advertises to the voter that the measure is merely an “[i]nitiative requiring legislative determination that sales tax exemptions serve a public purpose.” [A. 1] The inadequacy of this title can be readily seen by comparing it to the proposed section title that would appear in the constitution — “Periodic legislative review of sales tax exemptions.—”. [A. 1]

Standing alone, this title defect may not rise to the level of being misleading, but it is fatal in combination with a ballot summary that fails to inform the voter, in plain, easy-to-understand language, that under this initiative sales tax exemptions will be repealed automatically every 10 years if the Legislature does not act to retain them each time. Nor does it explain that the tax will apply to transactions if

the Legislature acts and the Governor vetoes that action and is sustained by only one-third of the members of only one house.

Additionally, the ballot title fails to describe the Exemption Repeal Amendment in the manner by which it is “commonly referred to or spoken of” as required by Section 101.161. Again, contrast the title that would appear in the constitution with the title on the initiative form circulated to voters. [A. 1] Additionally, news articles regarding the Exemption Repeal Amendment -- indeed, the proponents’ own promotional materials -- demonstrate that it is commonly referred to or spoken of as a “review of exemptions.”⁶

For these reasons, the ballot title is clearly and conclusively defective and the measure should not be validated for a position on the ballot.

In summary, the cumulative weight of the defects in the ballot title and summary identified *supra*, pages 12 through 27, “combine to produce a summary that is fatal to the proposed amendment.” *Casino Authorization*, 656 So. 2d at 469. Accordingly, the Exemption Repeal Amendment should be invalidated due to its failure to fairly and adequately inform the voter of the decision they would be asked to make if it were to appear on the ballot.

⁶To review proponents' description of the amendments, we encourage the Justices to visit their website at <http://www.fairamendment.com/default.cfm>.

II. THE EXEMPTION REPEAL AMENDMENT ENGAGES IN LOGROLLING AND SUBSTANTIALLY ALTERS OR PERFORMS MULTIPLE FUNCTIONS OF 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 explained 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 opined 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. 1984) (Shaw, J., concurring in result only)).

No matter which formulation is applied, the Exemption Repeal Amendment embodies the evils which the single-subject requirement is intended to forbid. 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 constitutional mandate, *Fine*, 448 So. 2d at 989, this Court should invalidate the Exemption Repeal Amendment.

A. This Initiative Forces a Voter Who Wants to End the Sales Tax Exemptions on One or More Goods to Acquiesce in Ending the Exemptions on Other Goods.

This initiative is intended to result in the repeal of multiple exemptions from the sales tax on goods and, in order to do 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 on goods in exchange for achieving a periodic legislative review of

existing exemptions. It would force a voter to accept the extension of the sales tax to some goods which he or she may wish to remain free from tax in exchange for achieving an end to the sales tax exemption for other goods which he or she believes should be taxed. And it would force a voter to accept exemptions of certain goods in exchange for reviewing the exemptions on other goods.

When this Court invalidated the proponents' 2004 attempt to bring about myriad changes to the sales and use tax, it concluded 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 violate[d] 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 Exemption Repeal Amendment mandates both (1) "a scheme for the Legislature to review existing exemptions to the sales tax under

chapter 212” and (2) “limitations on the Legislature’s ability to create or continue exemptions ... from the sales tax.” *Sales Tax Initiative*, 880 So. 2d at 634.

The Exemption Repeal Amendment requires review of all existing sales tax exemptions and subsequent decennial reviews of the exemptions then in effect.⁷ The second subject from the 2004 initiative also evident in the Exemption Repeal Amendment is the imposition of “limitations on the Legislature’s ability to create or continue exemptions ... from the sales tax.” *Id.*, at 634. The amendment limits the Legislature’s authority to re-enact exemptions by requiring lawmakers to determine a public purpose for each good which will receive an exemption. It automatically repeals existing exemptions every 10 years.

Combining these limitations on legislative authority with adoption of “a scheme for the Legislature to review existing exemptions to the sales tax under chapter 212” constitutes impermissible logrolling in clear violation of the 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

⁷As discussed above, *supra* at 17-20, 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

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).

The second way in which the Exemption Repeal Amendment engages in logrolling is more subtle. At its most basic level, it would force voters who wish to end some exemptions to the sales tax – for such ballyhooed examples as skyboxes and ostrich feed – to accept automatic extension of the sales tax to other goods, should the Legislature fail to reenact some current exemptions, or should the Governor veto the Legislature’s decision not to create such a tax and be sustained. Thus, it is apparent this initiative was written by “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)).

In this respect, the Exemption Repeal Amendment is just like the initiative which 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*

the proponents has important policy implications, the Interested Parties believe that

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 different goods that are now exempt from taxation.

Finally, the Exemption Repeal Amendment engages in logrolling in that it would compel a voter to accept what appear to be new constitutional sales tax exemptions for food, prescription drugs, health services,⁸ and residential rent, electricity and heating fuel as a trade-off for review of all other exemptions. [A. 1]

this issue is pertinent only to the fairness and adequacy of the ballot summary.

⁸The inclusion of “health services” in this laundry list of favored exemptions which would received elevated constitutional protection creates other infirmities in this initiative as discussed above. *See supra* at 12-16.

This initiative 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).

The Exemption Repeal Amendment can be interpreted as a constitutional determination that these specified exemptions serve a public purpose and therefore should continue. If so, transactions involving these goods would enjoy special protection from the sales tax, absent further constitutional change. It is just this sort of horse-trading that forces a voter “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 they buy. Those who favor repeal of some current sales tax exemptions – say, skyboxes and ostrich feed – should not have to subject themselves to preferred treatment for transactions involving food, drugs, or anything else in order to achieve their goal. The voters “have the right to expect that any proposed amendment will be submitted to them in the manner prescribed by the present constitution.” *Slot*

Machines, 880 So. 2d at 528 (Bell, J., specially concurring) (quoting *Floridians Against Casino Takeover*, 363 So. 2d 337 at 343 (Alderman, J., dissenting)).

This Court is a bulwark against ill-conceived measures intended to force a voter to accept multiple propositions in an initiative. Historically, it has protected a 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 Exemption Repeal Amendment should be invalidated for impermissible logrolling.

B. This Initiative 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 "substantially altering or performing the functions of multiple branches of state government." *Sales Tax Initiative*, 880 So. 2d at 633. The Exemption Repeal Amendment would substantially 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 determine which branches will perform the tasks needed to give it effect and thus

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)).

**1. This Initiative Would Perform and Substantially
Alter the Functions of the Legislative Branch.**

The initiative would substantially alter or perform the function of the Legislature in several ways. Most importantly, by operation of law it would actually perform the legislative function by imposing a sales tax on goods which are now exempt from tax. Further, it would restrict the Legislature’s prerogatives under Article VII, section 1(a), to set tax policy and impose taxes by general law, thus making the taxation of certain transactions off-limits to the normal give-and-take of the legislative process. Finally, by setting in motion automatic taxation tied to pre-existing appropriations provisions in Chapter 212, the Exemption Repeal Amendment would perform the appropriations function otherwise reserved to the Legislature.

The proposed constitutional text provides that, after the decennial review of exemptions from the sales tax on goods, those “exemptions not reenacted and continued shall lapse and end[.]” [A. 1] Thus, the scope of the sales tax on goods in Chapter 212 would be automatically enlarged. In that way, the Exemption Repeal Amendment undeniably would perform the legislative function. Even the

proponents admit that. *See* Initial Brief and Appendix of the Sponsor, Floridians Against Inequities in Rates, at 13-14.

Importantly, the automatic imposition of the sales tax on goods which are currently exempt would turn the normal lawmaking process on its head. That is the proponents' avowed goal. Accordingly, it would circumvent the procedural safeguards prescribed in Article III. There would be no notice to the public of the specific goods to be taxed, in the multiple ways such notice is now required during legislative deliberations. Art. III, § 7, Fla. Const. Thus, the "filtering mechanism" of the legislative process would be thwarted. *Evans v. Firestone*, 457 So. 2d 1351, 1357 (Fla. 1984 (Overton, J., concurring)).

Moreover, the Exemption Repeal Amendment would restrict the Legislature's authority to set tax policy and impose taxes by general law. It would periodically force lawmakers to review of Florida's most complex revenue-raising measure, Chapter 212, Florida Statutes. Further, it would require them to determine that each specific exemption serves a public purpose before they could retain it. And it would make certain transactions – the purchase of food, prescription drugs and residential rent, electricity and heating fuel -- off-limits to the give-and-take of the legislative process when considering state fiscal matters.

Finally, the Exemption Repeal Amendment would perform the legislative appropriations function. Sales taxes automatically imposed by the Exemption Repeal Amendment would be directed under existing law into various depositories specified in Section 212.20, Florida Statutes. That statute directs that specified percentages of sales taxes be earmarked for distribution to counties and cities. Therefore, rather than allowing the Florida Legislature to appropriate these funds, the effect of the Exemption Repeal Amendment is to automatically appropriate a specified percentage of them to cities and counties.

In these ways, the Exemption Repeal Amendment would further alter the powers of the Legislative Branch.

2. The Exemption Repeal Amendment Would Substantially Alter the Functions of the Executive Branch

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. This sharing of power is one of the hallmarks of our representative democracy.

Under the Exemption Repeal Amendment, the sales tax would be extended to goods which are presently exempt from tax without legislative action. Therefore, the Governor would not have an opportunity to review and approve or

veto such a decision as authorized under Article III, section 8. This initiative would thus alter the constitutional system of checks and balances.

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.” *Advisory Op. to the Att’y Gen. re: Adequate Pub. Educ. 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.” *Save Our Everglades*, 636 So. 2d at 1340. Here, the negation of the Governor's veto power is a substantial alteration of a second branch of government, thus constituting a violation of the single-subject requirement.

3. The Exemption Repeal Amendment Would Substantially Alter the Functions of the Judicial Branch.

We described above the very real possibility that the Legislature may behave as the proponents wish and allow additional sales taxes to be imposed through its own inaction, after reviewing existing exemptions every 10 years. *See supra* at 35-37. It is possible the necessary laws and implementing rules would not be in place for some transactions which presently are not subject to tax due to carefully crafted definitions and exclusions. Thus, there would be no guidance for the Executive

Branch when imposing and collecting the tax. Absent legislative authorization, the Executive Branch can be expected to ask the Judiciary for direction.

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 Exemption Repeal 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 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 v. Ty-Tan, Inc.*, 48 So. 2d 158, 160 (Fla. 1950) (emphasis added). For the Exemption Repeal Amendment potentially to require such an exercise of legislative power by the Judicial Branch clearly violates the single-subject requirement. This initiative must be invalidated.

For all these reasons, the Exemption Repeal Amendment violates the single-subject requirement of Article XI, section 3 and must be invalidated.

CONCLUSION

For the foregoing reasons of law and policy, the Interested Parties respectfully request that the Justices render a written opinion which determines that the Exemption Repeal 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.

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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.

Attorney

APPENDIX

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