IN THE SUPREME COURT OF FLORIDA

ERIC M. HERSH, individually as a registered voter and taxpayer, and as the Mayor of the City of Weston, Florida,

Petitioner,

v.

KURT S. BROWNING, as Secretary of State, State of Florida,

Respondent.
_____/

CASE NO. SC07-1268

PETITION FOR WRIT OF MANDAMUS

Petitioner, Eric M. Hersh ("Mayor Hersh"), in his capacity as a registered voter in the State of Florida, as the owner of real property in the State of Florida that is subject to ad valorem taxation, and as the Mayor of the City of Weston, Florida, petitions the Supreme Court, pursuant to Article V, Section 3(b)(8), Florida Constitution, and Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100, to issue a writ of mandamus to Respondent, Kurt Browning, as Secretary of State, directing the Respondent to: (a) remove from the January 29, 2008 special election ballot the Constitutional amendments proposed in SJR 4B by the Florida Legislature (the "Proposed Constitutional Amendments"); and (b) expunge Sections 1 through 12

of HB 1B[1] (the "Statutory Restrictions on Local Millage Rates") that purport to limit the authority of local governments to set a millage rate of up to ten mills (1% of property value) as currently allowed by Article VII, Section 9, Florida Constitution, prior to the adoption of the Proposed Constitutional Amendments.

OVERVIEW

This petition ("Petition") concerns the property tax reform legislation recently enacted by the Florida Legislature. The legislation suffers from three serious constitutional infirmities.

First, the Proposed Constitutional Amendments contain a highly misleading ballot statement that fails to inform the voter of the most important aspect, effect and purpose of the Proposed Constitutional Amendments – the phasing out and ultimate elimination of the Save-Our-Homes protection adopted by the voters of Florida in 1992 (which limits increases in the taxable value of homesteaded properties to the lower of 3% or the change in the Consumer Price Index). The ballot statement also falsely suggests that, under the Proposed Constitutional Amendments, there would be a minimum homestead exemption of $50,000 for "everyone" when, in fact, those

[1] Alternatively, the Court could expunge the first 28 words of Section 34 of HB 1B, which would prevent Sections 1 through 12 from becoming effective unless and until the Proposed Constitutional Amendments are adopted. The remaining portions of HB 1B (Sections 13 through 32) do not take effect unless and until the Proposed Constitutional Amendments are adopted.

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property owners who refuse to relinquish their Save-Our-Homes protection would continue to have only a $25,000 homestead exemption.

Second, a referendum for the Proposed Constitutional Amendments has been improperly scheduled for vote during a special election in January 2008, even though the Florida Constitution requires the referendum to be held at a general election because the proposal includes more than a "single amendment or revision" to the Constitution. The Legislature itself repeatedly refers to the ballot measure as "constitutional amendments" (not "amendment" or "revision").

Third, although the Proposed Constitutional Amendments would, if approved, give the Legislature the power to limit the authority of local governments to increase ad valorem taxes, the legislation purports to exercise that power immediately in 2007, before the Constitutional amendments take effect (even if approved). The Statutory Restrictions on Local Millage Rates therefore interfere with and directly violate the right and ability of local governments to levy ad valorem property taxes up to ten mills under Article VII, Section 9 of the Florida Constitution.

Mayor Hersh recognizes the great importance of property tax reform, and understands the Legislature's zeal to enact changes as quickly as possible. However, on an issue as important as this, voters are entitled to a clear, accurate and non-misleading ballot statement to assist them in making this critical decision. In addition, the Legislature should not be permitted to ignore local governments'

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Constitutional right and authority to levy property taxes up to ten mills by exercising its not-yet-existent authority to limit increases in local government millage rates.

I. BASIS FOR JURISDICTION

The Petition is brought pursuant to Article V, Section 3(b)(8), of the Florida Constitution and Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100. Pursuant to this authority, this Court has original jurisdiction to issue writs of mandamus to state officers. The Secretary of State is a constitutional state officer. *See* Art. IV, § 4, Fla. Const. The issuance of a writ of mandamus by the Supreme Court (in the exercise of its original jurisdiction) to the Secretary of State is appropriate to: (a) remove from the ballot proposed amendments to the State Constitution that include misleading ballot statements; and (b) expunge unconstitutional provisions from legislative enactments. *See Chiles v. Milligan*, 682 So. 2d 74 (Fla. 1996); *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992); *Thompson v. Graham*, 481 So. 2d 1212 (Fla. 1986); *see also Div. of Bond Fin. v. Smathers*, 337 So. 2d 805 (Fla. 1976); *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971).

Mayor Hersh appreciates that this Court's jurisdiction to consider an original petition for writ of mandamus is discretionary, and that, under ordinary circumstances, such a petition is more appropriately initiated in a lower court. However, due to both the importance of the issues at stake and the need for a

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prompt, final resolution, acceptance of jurisdiction in this case is both proper and consistent with prior precedent. *See Chiles*, 682 So. 2d at 75-76; *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980).

A. The Importance of the Property Tax Issue Supports the Exercise of Original Jurisdiction by This Court.

This Court should accept original jurisdiction over the Petition because of the "great public interest in the determination of the question involved." *Light v. Meginniss*, 22 So. 2d 455, 455 (Fla. 1945). Acknowledging the "great public interest" and importance of this issue, the Florida Legislature recently convened in a special legislative session devoted solely to the issue of property taxes, at which it enacted the challenged legislation.

Furthermore, when discussing the legislation, the Governor referred to it as "landmark legislation," "the largest tax cut in Florida's History," and "the people's tax cut." Press Release from Governor's Office located on the Governor's official website at http://www.flgov.com/tax_cut (last visited July 4, 2007). Clearly, two of the three branches of the State government have already recognized the "great public interest" involved here, as should this Court.

B. The Adverse Impacts on Governmental Operations and Strict Time Constraints Support the Exercise of Original Jurisdiction by This Court.

The potential effect on the government (both state and local) of the Proposed Constitutional Amendments and Statutory Restrictions on Local Millage Rates

render the exercise of original jurisdiction appropriate here. Historically, this Court has exercised its original jurisdiction where "the functions of government will be adversely affected unless an immediate determination is made by this Court." *Dickinson*, 251 So. 2d at 271; *see also Div. of Bond Fin.*, 337 So. 2d at 807 (accepting original jurisdiction "[b]ecause a proceeding in circuit court followed by appellate litigation might entail harmful delay.") Furthermore, where the issue challenged creates a "lingering uncertainty [that] hampers the state's ability, . . . the Court will exercise its discretion to consider [such a] case." *Brown*, 382 So. 2d at 662.

This case undoubtedly requires immediate resolution. The Legislature has scheduled an election on the Proposed Constitutional Amendments for January 29, 2008. This is in violation of Article XI, Section 5(a), Florida Constitution. As a result, the failure to quickly consider the Legislature's acts will perpetuate this violation and may, given the misleading ballot statement, result in an invalid amendment of Florida's Constitution because the electors were not provided the information and explanation required by the Constitution. *See e.g. Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982).

The Legislature has already unconstitutionally deprived local governments of their right to raise needed revenue as a result of the Statutory Restrictions on Local Millage Rates under the purported authority of the Proposed Constitutional

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Amendments, even though almost six months remain before the measures are scheduled for election. As a result, the Legislature is impermissibly usurping the powers of local governments protected by the Florida Constitution. *See* Art. VII, §9, Fla. Const.

The Legislature's usurpation of power will continue to occur up to and through the special election unless this Court intervenes and prevents the Legislature from disregarding the Constitution. Moreover, the timing is critical: local governments are currently in the midst of setting their fiscal year 2008 millage rates within the strict time constraints set by statute. *See* Chapter 200, Fla. Stat.

As a result, the time-sensitive nature and lingering uncertainty involved here beg for this Court to accept original jurisdiction over this matter. *See Republican State Exec. Comm. v. Graham*, 388 So. 2d 556, 559 (Fla. 1980) ("The time constraint imposed by the date of the general election is sufficiently critical that we find a mandamus proceeding in this Court to be an appropriate remedy.").

C. No Issues of Fact Will Need to be Determined.

The Petition presents issues of law, not fact. It involves a strictly legal interpretation of Florida's Constitution and laws and their effect on recently enacted legislation and ballot language proposed by the Legislature. It does not involve fact-finding functions and will not require an evidentiary hearing. This

case does not raise "substantial issues of fact," which militates in favor of this Court's exercise of its original jurisdiction. *See generally Republican State Exec. Comm, supra.,* 388 So. 2d at 559; *Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 562-63 (Fla. 1980); *see also Fine v. Firestone*, 448 So. 2d 984, 985 (Fla. 1984); *c.f. Int'l Assoc. of Firefighters, Local 2019 v. Bd. of County Comm'rs, Broward County*, 254 So. 2d 195, 195 (Fla. 1971) (transferring case to circuit court because it involved substantial issues of fact).

II. THE FACTS ON WHICH THE PETITIONER RELIES

A. History of Local Government Property Taxes.

1. Historically, local governments levied ad valorem taxes with no millage limitation, except for public schools, for which counties were required to assess and collect a tax of between 3 and 10 mills. *See* Art. XII, § 8, Fla. Const. (1885).

2. In 1934, the Florida Constitution was amended to add Article X, Section 7, to provide a $5,000 exemption from ad valorem taxes for homesteaded properties. The 1968 Florida Constitution preserved the $5,000 homestead exemption, and enacted a new provision regarding the levy of ad valorem taxes by local governments in Article VII, Section 9:

> (a) Counties, school districts, and **municipalities shall,** and special districts may, **be authorized by law to levy ad valorem taxes** and may be authorized by general law to levy other taxes, for their respective purposes, except

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ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

(b) **Ad valorem taxes**, exclusive of taxes levied for the payment of bonds and taxes levied for period not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, **shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property**: for all county purposes, ten mills; **for all municipal purposes, ten mills**; for all school purposes, ten mills; for water management purposes for the northwest portion of the state lying west of the line between ranges two and three east, 0.05 mill; for water management purposes for the remaining portions of the state, 1.0 mill; and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

Art. VII, § 9, Fla. Const. (emphasis added).

3. Unlike most other provisions of the Florida Constitution regarding municipal powers, through the use of the term "shall," Section 9(a) requires that the Legislature authorize counties and municipalities to levy ad valorem taxes up to the ten mill cap set forth in Section 9(b). This Court has interpreted Section 9 to be "both a grant and a limitation on the authority of local governmental entities to tax." *Advisory Opinion to the Attorney General re: Tax Limitation* (*"Tax Limitation Decision"*), 644 So. 2d 486, 492 (Fla. 1994). Thus, municipalities and counties are

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each permitted under the Constitution to levy ad valorem taxes, but are capped at ten mills (1% of property value).

4. On March 11, 1980, a special election was held in Florida in which the homestead exemption was increased to $25,000 for school district ad valorem taxes. On October 7, 1980, the voters again amended the Constitution, increasing the homestead exemption as applied to other local government ad valorem taxes, to $15,000 in 1980, to $20,000 in 1981, and to $25,000 in 1982. Thus, by 1982, the Florida Constitution provided that all local ad valorem taxes were subject to a $25,000 homestead exemption. *See* Art. VII, § 6, Fla. Const.

5. At the November 3, 1992 general election, Florida voters approved "Save-Our-Homes," which caps increases in the taxable value of homesteaded property to the lower of 3% or the change in the Consumer Price Index. *See* Art. VII, § 4, Fla. Const.

B. <u>Summary of Property Tax Reform Legislation</u>.

6. During the 2007 legislative session, numerous proposals for property tax reform were discussed, but no consensus was reached. A special session of the Legislature was called beginning on June 12, 2007. On June 14, 2007, the third day of the session, three pieces of legislation (SJR 4B, HB 5B and HB 1B) were enacted by both houses of the Legislature, which were signed by the Governor on June 21, 2007.

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1. SJR 4B: Constitutional Amendments Related to Property Taxes, Including Creation of "Super Exemptions" in Place of Save-Our-Homes.

7. SJR 4B proposed amendments to Sections 3, 4, 6 and 9 of Article VII and the creation of Section 27 of Article XII of the Florida Constitution.

8. If adopted by the electors, taxpayers who purchase their homesteads after the effective date will no longer be eligible for the Save-Our-Homes cap on increases in assessed value and for the $25,000 homestead exemption, but instead will be given a "super exemption" equal to 75% of the first $200,000 of value, and 15% of the next $300,000 (increasing as statewide personal income increases), with a minimum exemption of $50,000 ($100,000 for low income seniors).

9. Current owners of homesteaded properties would be able, at any time, to make an irrevocable election to take the "super exemption" and abandon their Save-Our-Homes protection and $25,000 homestead exemption forever.

10. If current owners of homesteaded properties choose to keep their Save-Our-Homes protection, their homestead exemption would remain at $25,000 notwithstanding the Proposed Constitutional Amendments.

11. The Proposed Constitutional Amendments would also provide for at least $25,000 exemptions for tangible personal property, exemptions for affordable housing properties, and exemptions for fishing and commercial water dependent activity properties.

12. The Proposed Constitutional Amendments would also amend Article VII, Section 9 to require that the Legislature, by general law, limit the authority of local governments to increase ad valorem taxes.

13. Finally, the Proposed Constitutional Amendments would amend Article XII by creating Section 27 to establish a transition plan.

14. The Proposed Constitutional Amendments would be effective as of January 1, 2008 (if approved at the January 29, 2008 special election), or on January 1, 2009 (if approved in the November 2008 general election).

2. HB 5B: Setting Special Election on January 29, 2008 for Proposed Constitutional Amendments.

15. HB 5B sets a special election pursuant to Article XI, Section 5 for January 29, 2008, for consideration by the voters of the Proposed Constitutional Amendments. As required by Article XI, Section 5, HB 5B was enacted by a vote of at least three-fourths of the membership of each house.

3. HB 1B: Amending Various Florida Statutes, Including Roll Back of Local Government Millage Rates.

16. HB 1B, portions of which are effective immediately, makes substantial changes to local government ad valorem taxing procedures.

17. Most significantly, it legislatively restricts the constitutional authority of local governments (other than school districts) to levy ad valorem taxes, prior to the

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approval of the Proposed Constitutional Amendments that would give the Legislature the authority to do so.

18. For 2007-2008, local governments, by majority vote, may only levy taxes up to the "rolled back" rate (which is the millage rate necessary to produce the same amount of ad valorem tax revenue as generated in the prior year) minus 0-9%, depending upon the compound annual growth in that local government's ad valorem tax levy from 2001-2006. Thus, local governments that have seen the largest growth in ad valorem tax revenues (for whatever reason) have the largest reductions. In addition, this legislation establishes far lower maximum rates for local governments that currently have, and historically have had, lower millage rates, and a higher maximum rate for local governments that currently have, and historically have had, higher millage rates.

19. For the 2007-2008 fiscal year, local governments may exceed this cap through a 2/3rd vote (up to the rolled back rate) or unanimous vote (up to the 2006-2007 millage rate).

20. However, a local government may not exceed its 2006-2007 millage rate (even if the proposed new rate is under the constitutionally authorized ten mills) without voter approval in a referendum.

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21. In subsequent years, local governments, by majority vote, may only levy taxes up to the "rolled back" rate adjusted for growth in per capita Florida personal income.

22. Once again, local governments may exceed this cap through a 2/3rd vote (up to 110% of the prior year's "rolled back" rate adjusted for personal income growth) or unanimous vote/referendum (for any higher rate, up to the Constitutional ten mill cap).

23. HB 1B provides that local governments that violate its provisions will have a portion of their tax levy placed in escrow, and would be required to post a new hearing notice, conduct a new hearing and remedy the violation. If the violation is not remedied, the local government would forfeit its share of the local government half-cent sales tax revenue.

24. HB 1B makes numerous procedural changes, allows the Department of Revenue to adopt emergency rules and extend certain deadlines and repeals the 2006 law requiring the Department of Revenue to perform a tax study.

25. HB 1B also codifies the "super exemption," subject to the approval of the Proposed Constitutional Amendments, and enacts various provisions regarding affordable housing and community land trusts.

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C. The Parties.

26. Eric M. Hersh is an individual who resides in Weston, Florida. He is a property owner, taxpayer and registered elector and voter in Florida. He is also the Mayor of the City of Weston, Florida, a municipality organized and existing under the laws of the State of Florida, situated in Broward County, Florida. As a taxpayer and voter, Mayor Hersh has standing to challenge the misleading ballot language contained in HJR 4B and the unconstitutional holding of the referendum on the Proposed Constitutional Amendments at a special election. As the Mayor of a municipality, Mayor Hersh is required to vote on the setting of a millage rate for ad valorem taxes for all properties within the municipal borders, and thus his ability to perform his duties is affected by the unconstitutional infringement contained in HB 1B on the ability of local governments (including Weston) to levy ad valorem taxes up to 10 mills. Mayor Hersh has standing to pursue this Petition. *See Dep't of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972); *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) ("If citizens are given adequate pre-election notice, . . . those who object to the regularity of the ballot title and summary can challenge the amendment in court").

27. Respondent, Secretary of State Kurt S. Browning, as head of the Department of State, is responsible for the operation of the Division of Elections. *See* § 20.10, Fla. Stat. Secretary Browning has the ministerial duty of furnishing to

the Supervisor of Elections of each county the designated number, ballot title, and substance of each proposed constitutional amendment that is to appear on the ballot. *See* §§ 100.371(1), 101.161(2), Fla. Stat. Finally, expunction of unconstitutional provisions in a legislative bill is a proper remedy in a petition for writ of mandamus against the Secretary of State. *See generally Chiles*, 682 So. 2d at 76-77; *Div. of Bond Fin.*, 337 So. 2d at 807-08.

III. THE NATURE OF THE RELIEF SOUGHT

The Petitioner requests that this Court issue a writ of mandamus to Kurt S. Browning, as Secretary of State, directing him to remove the Proposed Constitutional Amendments from the January 29, 2008 ballot, and further directing the Secretary of State to expunge from the official record Sections 1 through 12 of HB 1B, which purport to restrict the ability of local government to set a millage rate consistent with Article VII Section 9, Florida Constitution, or alternatively, to expunge the first 28 words of Section 34 of HB 1B (which would prevent Sections 1 through 12 from becoming effective unless and until the Proposed Constitutional Amendments are adopted, identical to the effective dates of Sections 13 through 32).

IV. ARGUMENT

A. The Ballot Statement for the Proposed Constitutional Amendments is Misleading.

The ballot language is unconstitutionally misleading and fails to convey key aspects of the Proposed Constitutional Amendments. Florida law provides that ballot

language must not be misleading. *See, e.g., Askew,* 421 So. 2d at 155 ("The requirement for Proposed Constitutional Amendments is the same as for all ballots, i.e., that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote . . . ."); *see also Armstrong*, 773 So. 2d at 14 ("This Court has reviewed legislatively proposed amendments throughout this century, and we have evaluated amendments' validity on various grounds, including ballot accuracy"); *Sancho v. Smith*, 830 So. 2d 856, 861 (Fla. 2002) ("It is now settled that the accuracy requirement applies to amendments proposed by any authorized method, including those that are proposed by joint resolution of the Florida Legislature under article XI, section 1").

The text of the ballot statement to be addressed by this Court read, in full:

> CONSTITUTIONAL AMENDMENT
> ARTICLE VII, SECTIONS 3, 4, 6, AND 9;
> ARTICLE XII. SECTION 27
>
> AD VALOREM PROPERTY TAXATION: ASSESSMENTS, EXEMPTIONS, LIMITATIONS, AND HOMESTEADS. – Proposing amendments to the State Constitution to increase the homestead exemption from $25,000 to 75 percent of the just value of the property up to $200,000 and 15 percent of the just value of the property above $200,000 up to $500,000, to subject the $500,000 threshold to annual adjustments based on the percentage change in per capita personal income, to authorize an increase in the $500,000 threshold amount by a two-thirds vote of the Legislature, and **to specify minimum homestead exemption amounts of $50,000 for everyone** except low-income seniors and $100,000 for low income seniors; to provide

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> for transitional assessments of homestead property under the increased homestead exemption that include preserving application of Save-Our-Homes provisions until an irrevocable election is made; **to revise Save-Our-Homes provisions to conform to provisions providing for the increased homestead exemption and transitional assessments of homestead property**; to require the Legislature to limit the authority of counties, municipalities, and special districts to increase ad valorem taxes; to authorize an exemption from ad valorem taxes of no less than $25,000 of assessed value of tangible personal property; to provide for assessing rent-restricted affordable housing property and waterfront property used for commercial fishing, commercial water-dependent activities, and public access at less than just value; and to schedule the amendments to take effect upon approval by the voters and operate retroactively to January 1, 2008, if approved in a special election held on January 29, 2008, or shall take effect January 1, 2009, if approved in the general election held in November of 2008.

See SJR 4B, at pp. 12-13 (emphasis added). This summary, however, does not comply with the requirements of the law. It is "[i]mplicit in [Article XI, section 5, Florida Constitution] that the proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong*, 773 So. 2d at 12 (emphasis in original). In addition, Section 101.161(1), Florida Statutes, requires that all ballot summaries provide an "explanatory statement" of the "substance" of the proposed amendment in "clear and unambiguous language." *See* § 101.161(1) and (2), Fla. Stat. These requirements operate "as a kind of 'truth in packaging' law for the ballot." *Armstrong*, 773 So. 2d at 13.

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The role of the Court here is to "preview[] the ballot summary to determine if the chief purpose of the amendment is explained with sufficient clarity." *In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020-21 (Fla. 1994). In reviewing the summary, this Court is to be "cautious of approving the validity of a ballot summary that is not clearly understandable." *Id.* at 1021 (citing *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618 (Fla. 1992)).

Traditionally, the Court has afforded deference to the Legislature when it is proposing the ballot measure. *See Armstrong*, 773 So. 2d at 14. However, such deference is not without limits. *Id.* This Court has stated that "the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Id.* As a result, the Legislature is required to put forth a ballot summary that is "fair and advise[s] the voter sufficiently to enable him intelligently to cast his ballot." *Id.* at 15.

1. The Ballot Statement Fails to Advise the Voter that the Proposed Constitutional Amendments Phase Out and Ultimately Eliminate Save-Our-Homes.

One of the primary purposes and effects of the Proposed Constitutional Amendments is the phase-out and ultimate repeal of the "Save-Our-Homes" protections contained in Art. VII, s. 4 on the Florida Constitution. If adopted, there

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will be no "Save-Our-Home" protection for anyone who purchases a home after January 1, 2008 or anyone who irrevocably elects to receive the "super exemption." Eventually, Save-Our-Homes will be no more than a relic of history.

The Save-Our-Homes amendment "was designed to ensure that citizens on fixed incomes will not lose their homes on the tax block due to the rising value of Florida property," *Smith v. Welton*, 729 So. 2d 371, 372 (Fla. 1999). Indeed, Save-Our-Homes has been described as "one of the most valuable rights available to Florida residents." Richard Franklin and Roi Baugher III, *Protecting and Preserving the Save-Our-Homes Cap*, 77-Oct Fla. B. J. 34 (2003).

The elimination of Save-Our-Homes receives only the following brief, confusing and cryptic mention in the ballot statement:

> to provide for transitional assessments of homestead property under the increased homestead exemption that include preserving application of Save-Our-Homes provisions until an irrevocable election is made; to revise Save-Our-Homes provisions providing for the increased homestead exemption and transitional assessments of homestead property

The referenced language certainly does not make it clear to the voter that the Proposed Constitutional Amendments provide for a phase-out and ultimate repeal (misleadingly packaged as a mere "revision") of Save-Our-Homes. Voters are certainly not effectively advised that, by removing the current constitutional limitations on increases in the assessed values of their homes (both present and

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future), "citizens on fixed incomes" will again be at risk of losing "their homes on the tax block due to the rising value of Florida property," and that the Proposed Constitutional Amendments propose the repeal of "one of the most valuable rights available to Florida residents."

This language in the ballot statement is improper and violates the basic tenet of ballot fairness, which mandates that the voters "'be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.'" *Askew*, 421 So. 2d at 155 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)); *see also Armstrong*, 773 So. 2d at 18.[2] Put another way, "the ballot must give the voter fair notice of the decision he must make." *Id.* The Legislature has not complied with these basic requirements here and the public is not receiving the "fair notice" to which they are constitutionally entitled.

2. The Ballot Statement Falsely Suggests that the Proposed Constitutional Amendments Provide for a Minimum Homestead Exemption of $50,000 "For Everyone".

The ballot statement for the Proposed Constitutional Amendments expressly states that, except for certain low-income seniors, the "minimum homestead

[2] While the Secretary of State may argue that advertising may remedy this defect, this is not enough to bypass the minimum legal requirements for this ballot summary. *See Askew*, 421 So. 2d at 156. "The burden of informing the public should not fall only on the press and opponents of the measure – the ballot title and summary must do this." *Id.* (emphasis added).

exemption" will be "$50,000 for everyone." *See* SJR 4B at pp. 12-13 (emphasis added). This statement is factually untrue and highly misleading. In fact, if adopted, the Proposed Constitutional Amendments will not provide a minimum $50,000 homestead exemption to "everyone." Rather, those property owners who elect to remain in the Save-Our-Homes system (as is their right under the Proposed Constitutional Amendments) will receive no increase in their homestead exemption – they will maintain their current $25,000 homestead exemption. Nowhere in the ballot statement is this ever disclosed. As a result, it is likely that voters who intend to maintain their Save-Our-Homes protection will mistakenly be led to believe that, if the Proposed Constitutional Amendments pass, they will be able to maintain the 3% (or CPI) cap on assessment increases under Save-Our-Homes, and also benefit from the increased minimum homestead exemption for everyone of $50,000. Thus, they may vote for the Proposed Constitutional Amendments under false pretenses.

This misleading language is especially significant due to the reluctance that many homeowners may have to give up the great benefits of the Save-Our-Homes statutory cap. Citizens who want to keep the Save-Our-Homes provisions may see little reason to vote in favor of the Proposed Constitutional Amendments, but for the statement in the ballot summary that there would be "minimum homestead exemption amounts of $50,000 for everyone." If a homeowner can keep the

benefits of Save-Our-Homes and increase the homestead exemption to $50,000, a vote in favor of the proposal may be more likely. If, on the other hand, the ballot statement clearly stated that those who elect to keep Save-Our-Homes would receive no increased homestead exemption from the proposal, these citizens would be more inclined to vote against it.

The ballot statement here is unclear, ambiguous and "fl[ies] under false colors" -- misleading the public along the way. *Armstrong,* 773 So. 2d at 16-17; *see also Askew*, 421 So. 2d at 156. The Legislature's failure to comply with the minimum constitutional standards mandates that the ballot summary be stricken. This Court has not hesitated to remove from the ballot Proposed Constitutional Amendments that contain misleading, unclear or ambiguous ballot titles or summaries, and it should not hesitate to do so here. *See Askew,* 421 So. 2d at 156; *Armstrong,* 773 So. 2d at 17-18 (striking a proposed amendment because the ballot summary "hid the ball" from voters as to its true effect).

B. The Proposed Constitutional Amendments Have Been Improperly Scheduled for a Special Election.

The Proposed Constitutional Amendments cannot be presented at the January 29, 2008 special election. HB 5B calls a special election pursuant to Article XI, Section 5 of the Constitution, which states:

> A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the

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> joint resolution or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature **and limited to a single amendment or revision,** it is submitted at an earlier special election held more than ninety days after such filing.

Art. XI, § 5(a), Fla. Const. (emphasis added). The referenced language is a clear limitation on the scope of proposed Constitutional amendments that may be considered at a special election.

The Legislature itself has determined that the measure being placed on the January 29, 2008 special election ballot constitutes multiple amendments. SJR 4B specifically refers to "the following amendments to Sections 3, 4, 6, and 9 of Article VII and the creation of Section 27 of Article XII . . . ." SJR 4B, pg. 1, line 22 (emphasis added). The Legislature further uses the plural "amendments" throughout the joint resolution. *Id.* at pg. 1, line 2 (in the title); pg. 11, line 29; pg. 12, line 23 (in the ballot statement); pg. 13, line 17 (also in ballot summary). Similarly, the plural "amendments" is used throughout HB 5B and HB 1B. *See* HB 5B at pg. 1, line 6; pg. 1, line 24; pg. 2, line 34; and HB 1B at pg. 61, line 1687; pg. 63, line 1747; pg. 69, line 1913. This repeated use by the Legislature of the plural "amendments" (as opposed to the singular "amendment" or "revision") establishes that the Legislature knew and determined that this measure contained

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multiple Constitutional amendments. Further, the actual text of SJR 4B (which makes amendments and revisions to four sections in Article VII and creates an entirely new Section in Article XII) shows that the issue being submitted to the electorate is not a single amendment or revision, but rather constitutes several Constitutional amendments.

The Legislature clearly recognized that scheduling the Proposed Constitutional Amendments for special elections was legally questionable. Even though HB 5B calling for the special election on January 29, 2008 was enacted at the same time as SJR 4B, SJR 4B (at pg. 12, lines 10-16) provided alternate effective dates, depending upon whether the election was held at the special election on January 29, 2008 or at a general election:

> if submitted to the electors of this state for approval or rejection at a special election authorized by law to be held on January 29, 2008, [the Proposed Constitutional Amendments] shall take effect upon approval by the electors and shall operate retroactively to January 1, 2008, or, if submitted to the electors of this state for approval or rejection at the next general election, [the Proposed Constitutional Amendments] shall take effect January 1 of the year following such general election.

This issue should be placed on the ballot in the November 2008 general election, and should be removed from the January 2008 special election ballot.

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C. HB 1B Represents an Unconstitutional Infringement on the Ability of Local Governments to Levy up to Ten Mills.

The ability of local governments to levy ad valorem taxes up to the ten mill cap is rooted in Article VII, Section 9 of the Florida Constitution. In 1994, the Florida Supreme Court referred to this provision as "a cornerstone of home-rule power" and stated that it "is both a grant and a limitation on the authority of local governmental entities to tax." *Tax Limitation Decision*, 644 So. 2d at 492. The ability to tax up to ten mills is "an important part of the home-rule powers granted to local governments by our present constitution." *Id.* In short, municipalities have the Constitutional power to tax up to ten mills. *See generally Bd. of County Comm'rs of Marion County v. McKeever*, 436 So. 2d 299, 302-303 (Fla. 5th DCA 1983) (referring to the "prerogative under the state constitution to levy a millage of up to ten mills").

The 1994 *Tax Limitation Decision* by this Court is closely on point. There, the Court was asked for an advisory opinion as to the validity of four initiative petitions to amend the Florida Constitution. *See Tax Limitation Decision*, 644 So. 2d at 498. One of the amendments proposed to create a new section of the Florida Constitution that would prohibit any "new tax," including any increase in an existing tax rate. *Id.* at 491-92. The proposed amendment, however, did not mention, amend or delete Article VII, Section 9 (which gives local governments the right to levy ad valorem taxes up to ten mills). *Id.* at 493. Under Florida law,

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an initiative cannot substantially effect existing provisions of the Florida Constitution without identifying such provisions. *See Fine*, 448 So. 2d at 989. Thus, this Court ruled:

> While some local governmental entities are currently close to the ten-mill cap, other governmental entities have considerable leeway left in their taxing authority under this provision. There is no question that this proposed initiative amendment eliminates the ten-mill authorization without voter approval. Nothing has been said in this proposal concerning this substantial change in article VII, section 9, of the present constitution. It is, as previously stated, an important part of the home-rule powers granted to local government by our present constitution.

Tax Limitation Decision, 644 So. 2d at 493 (emphasis added). Thus, this Court disallowed the initiative, holding that "[t]he 'Voter Approval of New Taxes' initiative substantially affects article VII, section 9, without identifying it." *Id.*

HB 1B would similarly limit the authorization of local governments to levy up to ten mills. It therefore directly conflicts with Article VII, Section 9 of the Florida Constitution as it currently reads, rendering it invalid. *See, e.g. Gammon v. Cobb*, 335 So. 2d 261 (Fla. 1976) (legislative enactments that purport to limit constitutionally created rights are invalid).

The only way that the Legislature could limit local ad valorem taxation to a rate below ten mills would be for the voters to approve an amendment to the Constitution in a referendum (such as one of the amendments proposed in SJR

4B). However, unless and until the Constitution is amended, the Legislature simply lacks the power to limit local governments from levying ad valorem taxes up to the ten mill cap.

The provisions in HB 1B that allow local governments by a 2/3 or unanimous vote or referendum to exceed the maximum rate do not ameliorate the need for a constitutional amendment. A majority of a local elected body has a constitutional right to levy ad valorem taxes up to ten mills, and that authority cannot be taken away by the Legislature. These same types of "opt outs" were contained in the New Tax initiative petition considered by this Court in the 1994 *Tax Limitation Decision*. There, the proposed constitutional amendment would have prohibited any new tax or increase of any existing tax, except if approved by voters or adopted by a super majority vote (three fourths) of the governing body. *See Tax Limitation Decision*, 644 So. 2d at 491-92. Notwithstanding the "opt out" provision, this Court found that the proposed initiative would have eliminated the ten mill authorization and thus necessitated the identification of Article VII, Section 9 in the proposal.

Moreover, for 2007-2008, a local government may only "opt out," even by a unanimous vote, up to that entity's 2006-2007 millage rate, without a referendum. Thus, Mayor Hersh is unable, even if all of the other members of the Weston City Commission voted with him, to levy an ad valorem tax millage rate above 1.5235

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(Weston's 2006-2007 millage rate), which is far below the ten mill cap provided for in the Florida Constitution.

There can be no doubt that the Statutory Restrictions on Local Millage Rates constitute legislative prohibitions on the constitutional authority of local governments to levy up to ten mills. Although the only penalty expressly imposed upon local governments that violate the legislation is the forfeiture of sales tax revenue, the legislation is far more than mere legislative "encouragement" to lower taxes through use of the "power of the purse." The legislation describes the setting of a higher ad valorem rate as a "violation" throughout the enactment. A local government (even one that chooses to set its millage rate above the maximum rate and willingly relinquish its claim to the sales tax revenue) is forced to publish a notice (in boldface type and capital letters, no less) that its millage rate "HAS BEEN DETERMINED BY THE DEPARTMENT OF REVENUE TO BE IN VIOLATION OF THE LAW...." In addition, such a local government that consciously chooses to set a millage rate and to forfeit its sales tax revenue would also have a portion of its ad valorem levy placed in escrow for months until an administrative procedure can be completed. In short, the Legislature has not merely discouraged the setting of millage rates consistent with the Constitution, it has prohibited it.

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Moreover, the imposition by the Legislature of a penalty for the exercise of a constitutional right (in this case the forfeiture of the half-cent sales tax revenue), is also impermissible. The law is well-settled that the Legislature may not do indirectly that which it cannot do directly. *Maloney v. Kirk*, 212 So. 2d 609, 613 (Fla. 1968); *Town of Enterprise v. State*, 29 Fla. 128, 108 So. 740 (Fla. 1892). *See also County of Volusia v. State*, 417 So. 2d 968 (Fla. 1982); *State v. Halifax Hosp. Dist.*, 159 So. 2d 231 (Fla. 1963); *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012 (Fla. 2000); *Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978); *Jones v. Tanzler*, 238 So. 2d 91, 93 (Fla. 1970) ("It is elementary that the officials cannot do indirectly what they are prevented from doing directly.") The Legislature cannot utilize this type of indirect method to force local governments to "voluntarily" abandon their Constitutional authorization to levy taxes up to ten mills. As a result, the Secretary of State should be ordered to expunge all of the unconstitutional portions of HB 1B. *See generally Chiles*, 682 So. 2d at 76-77; *Div. of Bond Fin.*, 337 So. 2d at 807-08.

WHEREFORE, Petitioner Mayor Hersh prays that the Court:

A. Accept jurisdiction to review this Petition.

B. Issue a Writ of Mandamus to Secretary of State Kurt S. Browning mandating: (1) the removal of the Proposed Constitutional Amendments from the January, 2008 ballot; and (2) the expunction from the official record of Sections 1

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through 12 of HB 1B, (or alternatively the first 28 words of Section 34 of HB 1B, which would prevent Sections 1 through 12 from becoming effective unless and until the Proposed Constitutional Amendments are adopted).

C. Such further and other relief as the Court deems appropriate.

Respectfully submitted,

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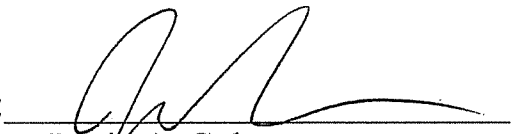
By: 

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with Times New Roman 14-point.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by telecopy and U.S. Mail this 9th day of July, 2007 to: Kurt S. Browning, Secretary of State, Florida Department of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, FL 32399-0250; and to Bill McCollum, Attorney General, Office of the Attorney General, State of Florida, The Capitol PL-01, Tallahassee, FL 32399-1050.

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