OA 8-23-94

FILED
SID J. WHITE
AUG 12 1994
CLERK, SUPREME COURT
By ______________
Chief Deputy Clerk

IN THE

SUPREME COURT OF FLORIDA

Case No. 83,969

ADVISORY OPINION TO THE
ATTORNEY GENERAL
RE: TAX LIMITATION

REPLY BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., 1000 FRIENDS OF FLORIDA, INC., COMMON CAUSE, THE FLORIDA AUDUBON SOCIETY, and AMERICAN PLANNING ASSOCIATION, FLORIDA CHAPTER IN OPPOSITION TO INITIATIVE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CASES ii

ARGUMENT 1

I THE SINGLE-SUBJECT RULE IS NOT, AS THE TAX CAP COMMITTEE IMPLIES, A RESTRAINT ON THE PEOPLE'S RIGHT TO AMEND THEIR CONSTITUTION. 1

II THE TAX CAP COMMITTEE HAS MISSTATED THE NATURE OF THIS COURT'S REVIEW OF AN INITIATIVE AMENDMENT. 3

III DESPITE THE COMMITTEE'S CLAIM THAT THE PROPOSED AMENDMENT HAS THE SINGLE PURPOSE OF REQUIRING GREATER VOTER APPROVAL OF CERTAIN CONSTITUTIONAL AMENDMENTS, THE PROPOSED AMENDMENT PLAINLY VIOLATES THE SINGLE-SUBJECT RULE 5

IV THE PROPOSED AMENDMENT'S TITLE AND SUMMARY ARE BOTH PATENTLY MISLEADING. 10

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CASES

Cases:

Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners
19 Fla. L. Weekly S368 (Fla. July 7, 1994) 4, 12

Askew v. Firestone,
421 So. 2d 151 (Fla. 1982) 10, 11

Evans v. Firestone,
457 So. 2d 1351 (Fla. 1984) 2, 4, 5, 8, 10, 11

Fine v. Firestone,
448 So. 2d 984 (Fla. 1984) 1, 2, 4, 5, 6, 7, 8, 9

Florida League of Cities v. Smith,
607 So. 2d 397 (Fla. 1992) 4

Floridians Against Casino Takeover v. Let's Help Florida,
363 So. 2d 337 (Fla. 1978) 4, 6

In re Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination,
632 So. 2d 1018 (Fla. 1994). 1, 3, 5, 6, 8

In re: Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund
19 Fla. L. Weekly S276
(Fla. May 26, 1994) 1, 2, 8, 9, 11

Weber v. Smathers,
338 So. 2d 819 (Fla. 1976) 4

ARGUMENT

I

THE SINGLE-SUBJECT RULE IS NOT, AS THE TAX CAP COMMITTEE IMPLIES, A RESTRAINT ON THE PEOPLE'S RIGHT TO AMEND THEIR CONSTITUTION.

The power to propose amendments through the initiative process was obviously intended as a method by which individual citizens could join together in a "grass roots" movement to propose changes to the Florida Constitution. The framers of Article XI, Section 3, however, recognized that just as a grass roots movement could use the initiative process to address matters of public concern, so too could a well-financed, special interest group take advantage of the initiative process to seek amendments which are of particular benefit to them, but which the public would not generally support. To secure passage of such a special interest measure, the benefitted group could simply tack their special interest provision onto a more popular measure and include them both within the same initiative proposal. The special interest group would thus force the voter into a situation where he must vote for a special interest measure which he finds repugnant in order to secure passage of another measure which he supports. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984); *In re: Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund*, 19 Fla. L. Weekly S276, S277-78 (Fla. May 26, 1994); *In re Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1019-20 (Fla. 1994). When coupled with the financial resources to manipulate the mass media and to

take advantage of modern marketing techniques, the drafters of Article XI, Section 3 recognized that a special interest group could use such "logrolling" tactics to effectively "buy" an amendment to the Florida Constitution.[1]

To help avoid this danger, the framers of the Florida Constitution included the single-subject rule in Article XI, Section 3. The single-subject rule requires the drafter of an initiative amendment to direct and focus the electorate's attention on "a change regarding one specific subject of government." *Fine*, 448 So. 2d at 988. The single-subject rule was specifically created to avoid the inclusion of special interest amendments in the Florida Constitution. *Evans v. Firestone*, 457 So. 2d 1351, 1358 (Fla. 1984) (McDonald, J., concurring).

Thus, contrary to the Committee's implication, the single-subject rule is not a restraint on the people's right to amend their constitution. [*See* Tax Cap Brief at 5-6]. The single-subject rule serves not to limit the people, but to limit the drafters of an initiative amendment and thereby protect the people

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[1] Indeed, the fears of the authors of Article XI, Section 3 seem vindicated with regard to the package of four amendments proposed by the Tax Cap Committee. Far and away the largest contributor to the Committee is U.S. Sugar Corporation, which has contributed, in 1994 alone, over two million dollars to finance the Committee's efforts. [*See* Appendix]. It cannot be mere coincidence that these contributions come on the heels of an initiative proposal which would have imposed a tax on raw sugar for clean-up of pollution in the Everglades. *Save Our Everglades*, 19 Fla. L. Weekly at S276. Recognizing that this Court's recent invalidation of the proposal cannot prevent renewed efforts to impose such costs through future initiative amendments or other means, the immediate motivation for U.S. Sugar's support of the Committee's amendments is self-evident.

from unscrupulous efforts to seek special interest amendments to the Florida Constitution -- amendments that are intended to serve the specific ends of a special interest group, rather than the interests of the public as a whole. Ironically, it is the proposed amendment at issue in this case which actually seeks to impose more stringent limits on the people's right to amend their constitution. In the instant case, this Court has a prime opportunity not only to demonstrate the continued effectiveness of the single-subject rule in preventing such evils, but also to resoundingly confirm that the Florida Constitution is not for sale -- at any price.

II

THE TAX CAP COMMITTEE HAS MISSTATED THE NATURE OF THIS COURT'S REVIEW OF AN INITIATIVE AMENDMENT.

The Tax Cap Committee argues that in order to strike the proposed amendment from the ballot, its opponents must demonstrate that it "clearly and conclusively" violates the single-subject rule and Section 101.161. [Tax Cap Brief at 6]. While the proposed amendment's violations of these constitutional and statutory requirements easily exceed this standard, no such standard has <u>ever</u> been adopted by this Court for use in the advisory opinion process set forth in Article IV, Section 10 of the Florida Constitution.

The advisory opinion process of Article IV, Section 10 was made a part of the Florida Constitution in 1986. Prior to 1986, this Court's jurisdiction to review the legal sufficiency of initiative proposals was routinely invoked in an action in the

nature of mandamus to force the Secretary of State to remove an initiative from the ballot. *See Fine*, 448 So. 2d at 985; *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 338-39 (Fla. 1978); *Weber v. Smathers*, 338 So. 2d 819, 821 (Fla. 1976); *see also Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992). The "clearly and conclusively defective" burden of proof arose in that context, and it has never been imported by this Court into the advisory opinion process of Article IV, Section 10.[2]

Indeed, this Court has made abundantly clear that it will examine an initiative proposal's compliance with the single-subject rule and Section 101.161 in advisory opinion proceedings even if no party appears before the Court to support or challenge the amendment. *Advisory Opinion to the Attorney General Re: Stop Early Release of Prisoners*, 19 Fla. L. Weekly S368 (Fla. July 7, 1994). In *Stop Early Release*, absolutely no interested party, including the sponsor of the initiative proposal, filed a brief or sought to appear before the Court in the advisory opinion proceedings invoked by the Attorney General. *Id.* at S368. Nonetheless, the Court made clear that it was constitutionally required to determine, *sua sponte*, whether the proposed amendment complied with the single-subject rule and Section 101.161. *Id.*

Thus, the advisory opinion process places the onus not on any

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[2] Even in applying the "clearly and conclusively defective" burden in mandamus-type actions seeking the removal of a proposal from the ballot, this Court has required strict compliance with the single-subject rule and Section 101.161 due to the gravity of amending the Florida Constitution. *See Fine*, 448 So. 2d at 989.

particular party, but on the amendment itself. In all events, it is the initiative proposal and its ballot title and summary that this Court must scrutinize for strict compliance with the single-subject rule and Section 101.161. *See Fine*, 448 So. 2d at 989.

III

DESPITE THE COMMITTEE'S CLAIM THAT THE PROPOSED AMENDMENT HAS THE SINGLE PURPOSE OF REQUIRING GREATER VOTER APPROVAL OF CERTAIN CONSTITUTIONAL AMENDMENTS, THE PROPOSED AMENDMENT PLAINLY VIOLATES THE SINGLE-SUBJECT RULE.

Focusing on the general rubric that an initiative proposal must display a "logical and natural oneness of purpose," the Committee repeatedly argues that its proposed amendment satisfies the various component tests of the single-subject rule because the amendment "simply provides that constitutional amendments which seek to impose new State taxes or fees must be approved by a two-thirds vote." [Tax Cap Brief at 7; *see id.* at 6-8, 11, 13-14, 17]. As this Court has noted, however, "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single subject requirement." *Evans*, 457 So. 2d at 1353; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020; *Fine*, 448 So. 2d at 990. If such a facial unity of purpose were all that the single-subject rule required, even an amendment declaring that "The Legislature is hereby abolished" or that "The Florida Constitution is hereby repealed" would pass muster under Article XI, Section 3.

The Committee's reliance on "unity of purpose" is misplaced. The "unity of purpose" concept is used to test compliance with the

legislative single-subject requirement of Article III, Section 6. As this Court has held, however, the single-subject rule of Article XI, Section 3 is a far more stringent test. *Fine*, 448 So. 2d at 988-89. This Court has expressly receded from any indication in *Floridians*, the case cited on this point by the Committee [Tax Cap Brief at 12-13], that "unity of purpose" is the sole requirement of Article XI, Section 3. *Id.* at 988. Indeed, such "unity of purpose" could be found in all of the initiative proposals that this Court has previously held violative of the single-subject rule.

While "logical and natural oneness of purpose" may be useful as a general rubric, this Court has articulated several individual tests of compliance with the single-subject rule that are far more meaningful. Among these individual tests is whether the proposed amendment will result in multiple unannounced or unanticipated collateral effects. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1022 n.6, 1023 (Kogan, J., concurring); *Fine*, 448 So. 2d at 995 (McDonald, J., concurring). The Committee completely ignores one of the most egregious of the amendment's hidden collateral effects -- that an amendment could be defeated even if every voter who actually voted on the issue favored its passage. This results from the proposal's requirement that voter approval be measured by two-thirds of those "voters voting in the election," rather than those voters "voting on the question" (Article XI, Section 4(b)) or those voters "voting on the matter" (Article X, Section 12(d)). If a substantial number of voters in the election

did not vote on a specific amendment, the proposal's reference to "voters voting in an election" could actually result in a mathematically impossible number of votes being required for passage of an amendment. This possible effect remains hidden from the voter.

Unannounced collateral effects are also created by the ambiguous terms contained in the proposed amendment, which purports to subject to its two-thirds voting requirement any constitutional amendment imposing a "new State tax or fee." The amendment defines this phrase as "any tax or fee which would produce revenue subject to lump sum or other appropriation by the Legislature . . . which tax or fee is not in effect on November 7, 1994." The amendment is unclear as to precisely what kind of constitutional amendment would be subject to the initiative's two-thirds voting requirement -- amendments that require the imposition of new taxes, amendments that authorize the Legislature to impose new taxes, amendments that repeal or diminish existing constitutional tax exemptions or prohibitions, or amendments that increase existing constitutional tax caps. This ambiguity is magnified because the proposed amendment applies to constitutional amendments which impose state taxes and fees. Generally, the current constitution authorizes certain taxes which the Legislature may then choose to impose in its discretion.

The result of this ambiguity and its attendant unannounced collateral effects is *de facto* logrolling, "because the electorate cannot know what it is voting on." *Fine*, 448 So. 2d at 995

(McDonald, J., concurring). In its brief, the Committee spends several pages trying to further explain and limit what types of amendment would be subject to the initiative's two-thirds voting requirements. [Tax Cap Brief at 8-10, 12]. The voter, however, will not have the benefit of the Committee's interpretation of the amendment in the voting booth and is likely to interpret the amendment differently. For example, the average voter could quite reasonably assume that the initiative's two-thirds voting requirement would apply to a constitutional amendment authorizing the Legislature to impose an unrestricted state income tax or imposing a sales tax on all services. After all, such taxes are not currently being "imposed" upon Florida citizens. These taxes are therefore "not in effect" and are "new taxes." According to the Committee, however, such amendments would <u>not</u> be subject to the initiative's two-thirds voting requirement. [Tax Cap Brief at 9-10]. The ambiguity of the proposed amendment makes it impossible for the voter to accurately gauge the amendment's collateral effects, and it therefore violates the single-subject rule.

Another of the individual tests of compliance with the single-subject rule is whether the proposed amendment performs, alters, or substantially affects only a single function of government, as opposed to multiple, distinct functions. *Save Our Everglades*, 19 Fla. L. Weekly at S277; *Restricts Laws Related to Discrimination*, 632 So. 2d at 1020; *Evans*, 457 So. 2d at 1354; *Fine*, 448 So. 2d at 990. By its express terms, the proposed amendment affects two broad categories of distinct government functions -- (1) general

government operations financed through tax revenues; and (2) government services financed through fees imposed upon recipients of these services. This Court has already held that the two are "separate and distinct functional operations of our government." *Fine*, 448 So. 2d at 991.

The Committee attempts to distinguish *Fine* by arguing that the amendment at issue in that case "would have precluded the Legislature from increasing taxes and fees" and placed "absolute limits" on the State's gross revenues. [Tax Cap Brief at 12]. This is inaccurate. The amendment in *Fine* did not impose absolute limits on revenue growth, but allowed the Legislature to exceed specified limitations only with voter approval. *Id.* at 987.

The Committee further argues that the proposed amendment affects no existing function of government, but operates only prospectively, on future attempts to amend the constitution. [Tax Cap Brief at 7, 13]. Of course, virtually all proposed amendments operate prospectively only, but this characteristic does not prevent an amendment from intruding on current government functions. *See, e.g., Save Our Everglades*, 19 Fla. L. Weekly S276. In addition, the Committee's claim depends upon its argument that the amendment would not effect any tax which is currently authorized by the Florida Constitution. The actual language of the amendment, however, admits of no such clear limitation.

IV

THE PROPOSED AMENDMENT'S TITLE AND SUMMARY ARE BOTH PATENTLY MISLEADING.

To avoid misleading the voting public, the drafter must ensure that the summary and title provide the electorate with fair notice of the "true meaning" of an amendment. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982); *see Evans*, 457 So. 2d at 1355. The ballot summary of the proposed amendment states "[p]rohibits imposition of new State taxes or fees . . . by constitutional amendment."[3] The ballot title refers to "constitutionally-imposed" taxes or fees. The summary and title clearly indicate to the voter that some unidentified force has the ability to "impose" new taxes upon them through constitutional amendment. What the title and summary conceal, however, is that no one can use the constitution as a vehicle to impose taxes upon the citizens of Florida against their will. Only the people can amend their constitution. It is the people themselves who make the choice to impose or not to impose any "new State tax or fee" by constitutional amendment.

Thus, while the ballot title and summary indicate that the amendment serves to restrain some malevolent force's ability to impose new taxes on the people, its true effect is to restrain the people's ability to amend their own constitution.[4] Nowhere does the ballot title or summary reveal this effect to the voters.

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[3] All emphasis in quotations used in this brief is supplied unless otherwise noted.

[4] Indeed, the proposed amendment's requirement of a two-thirds vote of those "voters voting in the election" may make amendment impossible in some circumstances. *See supra* pgs. 6-7.

Rather, the Committee has used political rhetoric and emotional language to suggest that if the voter does not vote "yes" on the amendment, some unidentified force will "impose" a new tax or fee upon them. To provide fair notice of the "true meaning" of the proposed amendment, the ballot title and summary must tell the voters what the amendment would actually do -- namely, place greater restraints on the people's own ability to amend their constitution.[5] *See Evans*, 457 So. 2d at 1355; *Askew*, 421 So. 2d at 155-56. Because the ballot title and summary omit any mention of the amendment's true effect, they are patently misleading, and the amendment must, therefore, be stricken from the ballot.

The Committee goes on to defend the title it composed for the proposed amendment, arguing that the title is merely a "caption." [Tax Cap Brief at 20]. As such, the Committee contends that it could have "captioned" the proposed amendment with the simple phrase "Tax Limitation," and laments that its title is being attacked because the Committee chose to provide more detailed information. [*Id.* at 20-21]. Again, the Committee misses the point. The issue here is not how much or how little information was provided in the title, but whether the "caption" of <u>this</u> proposed amendment is actually misleading to the voting public. *Save Our Everglades*, 19 Fla. L. Weekly at S278; *Askew*, 421 So. 2d at 155.

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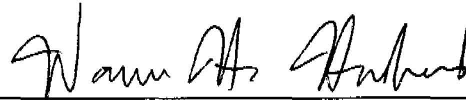
[5] Indeed, the Committee expressly recognizes that this is the amendment's true effect. [Tax Cap Brief at 14 ("this amendment will make it harder to amend the Florida Constitution")].

The very ambiguity of the title and summary cannot help but mislead the voter as to the "true meaning and effect" of the amendment. For example, the average voter could quite reasonably assume from the ballot title and summary that the initiative's two-thirds voting requirement would apply to a constitutional amendment authorizing the Legislature to impose "new taxes" such as an unrestricted state income tax or imposing a sales tax on all services. According to the Committee, however, such amendments would not be subject to the initiative's two-thirds voting requirement. [Tax Cap Brief at 9-10]. The title and summary inevitably promise the voter more than even the Committee itself believes that the amendment can deliver. *Stop Early Release*, 19 Fla. L. Weekly at S369.

CONCLUSION

For all the above reasons, this Court must strike the proposed amendment from the ballot.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to **ROBERT BUTTERWORTH**, Attorney General, The Capitol, Tallahassee, Florida, this 12th day of August, 1994.

Attorney

APPENDIX