OA 8-23-94.

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

IN THE SUPREME COURT
STATE OF FLORIDA

IN RE:

ADVISORY OPINION TO THE ATTORNEY GENERAL -- TAX LIMITATION

CASE NO.: 83,969

REPLY BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

SUGGESTING THAT THE PROPOSED AMENDMENT COMPLIES WITH FLORIDA CONSTITUTION, ARTICLE XI, SECTION 3, AND THAT THE TITLE AND BALLOT SUMMARY COMPLY WITH FLORIDA STATUTES SECTION 101.161

Gary R. Rutledge
Florida Bar No. 222674
Kenneth A. Hoffman
Florida Bar No. 307718
Harold F. X. Purnell
Florida Bar No. 148654
Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.A.
215 South Monroe Street, Suite 420
Post Office Box 551
Tallahassee, Florida 32302-0551
(904) 681-6788
ATTORNEYS FOR THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

TABLE OF CONTENTS

Page

Issue No. 1

The Initiative Petition Seeking to Create Article XI, Section of the Florida Constitution Fully Complies With Article XI, Section 3 of the Florida Constitution 1

Issue No. 2

The Proposed Ballot Title and Summary For The Tax Limitation Initiative Fully Comport With The Requirements of F. S. 101.161 9

Conclusion 12

Certificate of Service 13

TABLE OF AUTHORITIES

Florida Constitution Page

Article I, Section 1 6

Article III, Section 11(a)21 6

Article VII 2

Article VII, Section 1(a) 4

Article VII, Section 2 5

Article VIII, Section 5(b) 5

Article XI, Section 3 . . . . 2, 3, 9

Article XI, Subsection 7 3

Cases

Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982) 10

Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices, 592 So.2d 225 (Fla. 1991) 3

Carroll v. Firestone, 497 So.2d 1204, 1206 (Fla. 1986) 8

Evans v. Firestone, 457 So.2d 1351, 1355 (Fla. 1984) 11

Fine v. Firestone, 448 So.2d 984 (Fla. 1984) 1, 2, 3

Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (1978) 7, 12

Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954) 10

In Re Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund, 19 Fla. L. Weekly 2, 5, 10

Weber v. Smathers, 338 So.2d 819 (Fla. 1976) 7

Florida Statutes

Section 101.161 . . . . 10, 12

ISSUE NO. 1

THE INITIATIVE PETITION SEEKING TO CREATE ARTICLE XI, SECTION 7 OF THE FLORIDA CONSTITUTION FULLY COMPLIES WITH ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.

The brief of David Citron ("Citron") asserts that the tax limitation initiative runs afoul of the single-subject requirement of Article XI, Section 3 of the Florida Constitution by virtue of the fact that it covers taxes and fees. Citron relies on this Court's decision in *Fine v. Firestone*, 448 So.2d 984 (Fla. 1984), to support its position that taxes and fees constitute two separate and distinct subjects.[1] The brief of Citron also posits that the tax limitation provision is flawed in that it allegedly fails to disclose the difference between voters voting in an election and voters voting on an issue.[2]

In the combined 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 (hereinafter referred to collectively as the "League"), it is similarly asserted that the proposed initiative deals with at least two distinct subjects, taxes and fees, and that the amendment is unclear as to whether it applies to constitutional amendments that authorize new taxes or to amendments that actually "impose" new taxes.[3] The brief of the

---

[1]Citron brief, at 3.

[2]*Id.*, at 7-8.

[3]League brief, at 14, 16.

League further asserts that the proposed amendment may have substantial impact on diverse governmental functions[4] and similarly raises the issue of the requisite vote in an election versus vote on the issue.[5]

In *Fine v. Firestone*, 448 So.2d 984 (Fla. 1984), this Court passed upon a proposed initiative entitled "Citizens Choice on Government Revenue." The initiative would have amended the taxation article of the Florida Constitution, Article VII, with an extensive revenue limitation provision. This Court found that the proposed initiative violated the single-subject requirement of Article XI, Section 3 of the Florida Constitution since it restricted all types of taxation utilized for general governmental operations, restricted the operation and expansion of all user fee services provided by governmental entities and had a substantial effect on the constitutional scheme for funding capital improvements with revenue bonds. The Court summarized its conclusions by stating:

> We conclude that the Citizens' Choice proposal contains at least three subjects. It limits the way in which governmental entities can tax; it limits what government can provide in services which are paid for by

---

[4]In this regard, at page 2 of its brief, the League states that a key component of the single subject test is "whether the amendment performs, alters, or substantially affects multiple, distinct functions of government ...." This is an incorrect statement of the test. As recently stated by this Court in *In Re Advisory Opinion to the Attorney General -- Save Our Everglades Trust Fund*, 19 Fla. L. Weekly S277, "a proposal may *affect* several branches of government and still pass muster, (however) no single proposal can substantially *alter* or *perform* the functions of multiple branches ...."

[5]League brief, at 17-20.

> the users of such services; and it changes how governments can finance the construction of capital improvements with revenue bonds that are paid for from revenue generated by the improvements. (*Supra* at 992.)

The proposed initiative at issue is *not* an amendment to the provisions of the Florida Constitution governing *taxation, nor does it attempt to amend existing authority to tax or to spend*, as did the Citizens' Choice amendment construed in *Fine v. Firestone, supra.* Instead, the proposed initiative seeks to create a new subsection 7 in Article XI of the Florida Constitution which would provide that any proposed constitutional amendment which imposes a new state tax or fee must be approved by not fewer than two-thirds of the voters.

In this regard, the proposed initiative is more closely akin to the term limitation initiative construed by this Court in *Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices*, 592 So.2d 225 (Fla. 1991). In this case, the initiative provided a term limitation for certain holders of state and federal elected offices. In the *Limited Political Terms* decision, this Court expressly found that such amendment constituted a single subject "limiting the number of consecutive terms that certain elected public officials may serve," *supra* at 227, and did nothing more than "add term limits as a further disqualification on holding office." (*Supra* at 228.)

Similarly, the proposed initiative at issue in this matter does nothing more than add a two-thirds vote requirement to adoption of any new constitutional amendment imposing a new state tax or fee. Its subject is singular and is limited solely to the

voting requirement for adopting such a new constitutional amendment.

The brief of the League asserts confusion as to whether the proposed initiative applies to amendments to the Constitution which "impose" new state taxes or fees or merely to amendments which "authorize" new state taxes or fees, leaving to the Legislature the decision to actually impose and provide for enforcement of the same. However, contrary to such assertion, the proposed initiative clearly applies to any new state tax or fee "*imposed* on or after November 8, 1994 by any amendment to this Constitution." (Emphasis supplied.) Such provision is clear and captures only the situation where imposition as opposed to authorization of a new state tax or fee is directed by the proposed amendment to the Florida Constitution. Thus, the League's contention that the single-subject requirement is violated when applied to new amendments authorizing but not imposing a new tax or fee is baseless.

Currently, the Florida Constitution, in Article VII, Section 1(a), reserves all forms of taxation to the state except as provided by general law. The only exceptions to this state preemption are ad valorem taxes upon real estate or tangible personal property, which are imposed by local governments. Consequently, unless otherwise restricted by the Florida Constitution, no new constitutional amendment is required to authorize the Legislature to impose taxes. While certain

constitutional limitations exist as to this authorization,[6] such taxes are in fact authorized. Consequently, future amendments which change existing limitations on authorization but which do not actually mandate the imposition of a new tax or fee would not be affected by the proposed initiative.

In situations, however, where a constitutional amendment would mandate the imposition of a new state tax or fee, leaving to the Legislature only the ministerial duty of providing the procedure for its collection and enforcement, the proposed initiative would apply.[7]

The issue of whether the proposed amendment is a result of an initiative or other process for proposing a constitutional amendment is immaterial. Where a proposed amendment would "impose" a new state tax or fee, the two-thirds majority requirement under the proposed initiative would apply, irrespective of the method utilized to propose the amendment. This is quite simply because the proposed initiative relates to a single subject, the voter approval requirement for an amendment imposing a new state tax or fee.

It is also asserted in the brief of the League that the two-thirds vote requirement of the proposed initiative would violate

---

[6]*See* Article VII, Section 5(b) of the Florida Constitution concerning income or inheritance taxes, and Article VII, Section 2 which contains the maximum intangible tax rate.

[7]*See, e.g.*, the type of mandatory imposition required in the initiative construed in *In Re Advisory Opinion to the Attorney General--Save Our Everglades Trust Fund*, 19 F.L.W. S276 (Fla. 1994).

the fundamental principle that political power is vested in the people as set forth in Article I, Section 1 of the Florida Constitution. However, a constitutional amendment that actually imposes a new state tax or fee is of a unique character which limits legislative power and is deserving of special consideration. Such a requirement is very much akin to the constitutional requirement which allows the Legislature to prohibit special laws or general laws of local application on any subject when prohibited by general law passed by three-fifths vote of the membership of each house. *See* Article III, Section 11(a)21.

It is also asserted that the two-thirds voting requirement is uncertain in that the language of the proposed initiative requires approval "by not fewer than two-thirds of the voters voting in the election in which such proposed amendment is considered." This, it is asserted, requires a two-thirds vote of the total number of people voting in the election on which the proposed amendment appeared rather than two-thirds of the voters voting on the actual amendment issue itself. However, such construction as asserted in both the Citron brief and brief of the League fail to reflect the initial phraseology of the amendment which provides, "Notwithstanding Article X, Section 12(d) of this Constitution..." The proposed initiative reflects an amendment or exception to the Article X, Section 12(d) requirement which defines vote of the electors to mean "the majority of those voting on the matter in an election."

The proposed initiative creates an exception to the otherwise applicable requirement of Article X, Section 12(d) that the vote be a majority of those voting "on the matter in an election" and substitutes a requirement that it be two-thirds of the voters voting "in the election in which such proposed amendment is considered." No assertion is made that such computation is not ascertainable, nor that the appropriate constitutional provision which is affected by the proposed initiative, Article X, Section 12(d), is not specifically referenced. Thus, no violation of the single-subject requirement has been shown.

The remaining arguments of the League similarly lack merit. For example, the League asserts that "a proposed amendment that asks voters to approve the amendment's effects on more than one object is invalid."[8] The precedent of this Court belies that statement. In *Weber v. Smathers*, 338 So.2d 819 (Fla. 1976), this Court approved the "Ethics in Government" proposal which, *inter alia*, imposed financial reporting requirements on all: (1) elected constitutional officers; (2) candidates for public office; (3) elected public officers; and (4) candidates for public office.[9] Similarly in the *Limited Political Terms* decision, this Court upheld the validity of an eight consecutive year term limit proposal impacting six different classifications of elected office.

---

[8]League brief, at 11-12.

[9]*Weber* was disapproved on other grounds *sub nom* in *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So.2d 337 (1978).

The League also attempts to distract the Court's attention from the single subject addressed in the proposal -- an increased voting requirement for proposed constitutionally imposed *new* state taxes and fees -- by referring to proposals which would amend *existing* state taxes and fees.[10] In a similar vein, the League's gratuitous discussion of the impact the proposed amendment may have on state funding sources and speculation on the number of affirmative votes which might be necessary to gain approval of a new state tax or fee in some future election[11] are irrelevant to the issues before the Court. *See, e.g., Carroll v. Firestone*, 497 So.2d 1204, 1206 (Fla. 1986) (wisdom of a proposed amendment is not a matter for the Court's review).

---

[10]League brief, at 14-15.

[11]*Id.*, at 18-20.

ISSUE NO. 2

THE PROPOSED BALLOT TITLE AND SUMMARY FOR THE TAX LIMITATION INITIATIVE FULLY COMPORT WITH THE REQUIREMENTS OF F.S. 101.161.

The brief of the League asserts that the title to the proposed initiative is incapable of communicating to voters the legal effects of the proposed amendment because it is phrased as a question. The League also argues that the ballot title more closely resembles political rhetoric and suggests that new taxes are currently being proposed or that they are imminent without identifying any. It is further asserted that the title and summary are ambiguous as to whether the amendment would apply to attempts to eliminate or alter exemptions, prohibitions or tax caps contained in the current Constitution and fail to disclose the impact that the proposed amendment will have on diverse governmental functions and services.

Essentially, the brief of the League reiterates its single-subject arguments under the title and summary section of its brief. However, for the reasons set forth under Issue No. 1 of this brief, the proposed initiative does not violate the single-subject requirements of Article XI, Section 3 of the Florida Constitution and the title and summary accurately address the sole subject of the initiative, the vote of the electors required for a constitutional amendment which imposes a new state tax or fee.

The fact that the ballot title is phrased as a question and not as a definitive statement is immaterial since the ballot title very succinctly sets forth the chief purpose and precise matter

that is being placed before the voters. Neither Florida Statute 101.161 nor any other requirement of law mandate that the title be phrased as "a definitive statement." Instead, as noted in *Hill v. Milander*, 72 So.2d 796, 798 (Fla. 1954), which involved a ballot question, the ballot title must only "be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." The same requirement applies to all ballots including proposed constitutional amendments. *Askew v. Firestone, supra* at 155.

The brief of the League collapses under the strain of attempting to parallel the title and summary of the proposed initiative with the title and summary found invalid by this Court in *In Re Advisory Opinion to the Attorney General--Save Our Everglades Trust Fund*, 19 F.L.W. s. 276 (Fla. 1994). To the contrary, the title and summary of the proposed initiative at issue in this matter are devoid of the political rhetoric that invalidated the Save Our Everglades initiative. There this Court found that the very title "Save Our Everglades" implied the Everglades is lost or in danger of being lost and needs to be "saved" by the proposed amendment. Further, this Court noted that the summary was misleading in that it reflected that the sugar cane industry "which polluted the Everglades" is "to help to pay to clean up the pollution." By using the phrase "to help to pay," this Court concluded that the summary gave the impression that entities other than the sugar cane industry would be sharing the expense of cleanup when in fact, nothing in the text of the proposed amendment indicated such would be the case. This Court

concluded by citing with approval the passage from *Evans v. Firestone*, 457 So.2d 1351, 1355 (Fla. 1984) that:

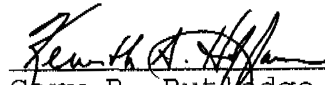
> The ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment and no more. The political motivation behind a given change must be propounded outside the voting booth.

Measured by this standard, the title and summary of the proposed initiative in a manner devoid of political rhetoric clearly and accurately convey the legal effect of the amendment and no more.

CONCLUSION

This Court has held that the single subject rule is to be broadly construed. In order to find a violation of the single subject rule, the record must show that the proposal is clearly and conclusively defective. *Floridians Against Casino Takeover*, 363 So.2d at 339-340. The application of these principles to the proposed amendment supports a determination by this Court that the proposed amendment complies with Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes (1993).

Respectfully submitted,



Gary R. Rutledge
Florida Bar No. 222674
Kenneth A. Hoffman
Florida Bar No. 307718
Harold F. X. Purnell
Florida Bar No. 148654
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
215 South Monroe Street, Suite 420
Post Office Box 551
Tallahassee, Florida 32302-0551
(904) 681-6788
ATTORNEYS FOR THE NATIONAL
FEDERATION OF INDEPENDENT
BUSINESS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399; Cass D. Vickers, Esq., Messer, Vickers, et al., P. O. Box 1876, Tallahassee, Florida 32302; Alan C. Sundberg, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P. O. Drawer 190, Tallahassee, Florida 32302; Jon Mills, Esq., P. O. Box 1099, Gainesville, Florida 32602; and David Citron, Box 25588, Ft. Lauderdale, Florida 33320-5588; this 12th day of August, 1994.

Attorney

h\reply.brf