

IN THE SUPREME COURT
STATE OF FLORIDA

IN RE:)
)
ADVISORY OPINION TO) CASE NO.: 86,600
THE ATTORNEY GENERAL -)
TAX LIMITATION)
_____)

INITIAL BRIEF OF FLORIDA TAXWATCH

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

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STATEMENT OF THE CASE AND FACTS

By letter dated October 9, 1995, Robert A. Butterworth, Attorney General, petitioned this Court for an advisory opinion concerning the initiative petition for the proposed Constitutional Amendment entitled "Tax Limitation: Should Two-Thirds Vote Be Required For New Constitutionally-Imposed State Taxes/Fees?" Attorney General Letter, October 9, 1995, A-1, Appendix. This Court has been asked to determine whether the initiative petition complies with the requirements of Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes. Pursuant to Article IV, Section 10, Florida Constitution, and Section 16.061, Florida Statutes, this Court entered an Order dated October 12, 1995, permitting interested persons to file briefs with this Court and scheduling oral argument for January 3, 1996. Florida Supreme Court Interlocutory Order, October 12, 1995, A-3, Appendix.

This is the second time this Court has reviewed this initiative petition. The first time the Court looked at this initiative petition it held that the "initiative improperly attempts to combine provisions concerning both taxes and user fees in a single initiative and, as a result, it violates the single-subject requirement." In re Advisory Opinion to the Attorney General re: Tax Limitation v. Smith, 644 So.2d 486, 491 (Fla. 1994). The Court went on to state that "we need not address the other issues raised by the opponents." Id. Thus, this Court did not determine whether this initiative petition

complies with Section 101.161, Florida Statutes. Subsequent to the Court's decision in Tax Limitation, the voters approved an amendment to Article XI, Section 3 excepting from the single-subject requirement those amendments limiting the power of government to raise revenue. Because the voters removed the single subject impediment and initiative petition signatures are valid for a period of four years, which has not yet expired, this initiative is once again before the Court.

Florida TaxWatch is a state-wide independent research institute and taxpayer watchdog organization entirely devoted to state taxing and spending issues in Florida. It was organized in 1979 and has become recognized widely as the watchdog of citizens' hard-earned tax dollars. Florida TaxWatch is well-known and respected for its empirically sound research products that recommend productivity enhancements and explain state-wide impact of economic and tax and spend policies and practices.

SUMMARY OF THE ARGUMENT

The Court should review this ballot initiative a second time because the people of Florida voted to remove the constitutional impediment that previously barred it from placement on the ballot. The Court has jurisdiction to conduct the requested review because its prior advisory opinion is non-binding, persuasive authority subject to further challenges. Principles of res judicata and collateral estoppel do not preclude the Court's review because the Court did not render a decision as to

whether the ballot initiative complied with Section 101.161, Florida Statutes. Additionally, Section 100.371, Florida Statutes, does not prohibit the Court from reviewing a ballot initiative a second time. Finally, denying the initiative petition a second review would not serve any positive purpose, such as an increase ballot integrity.

The ballot title is clear, informative, and uses the full 15 words allowed to provide a caption by which voters may refer to the proposed amendment. The ballot title is not per se misleading simply because it is framed in a question. In fact, the question presented in the title actually tracks voting and it conveys more information to voters than titles the Court has previously approved.

The ballot summary is clear and unambiguous and conveys the chief purpose of the proposed amendment to voters so that they may cast informed votes. The chief purpose of the proposed amendment is to require a favorable vote by a two-thirds majority of those voting in the election in order to pass constitutional amendments that would impose new State taxes or fees. The ballot summary clearly explains this chief purpose.

ARGUMENT

I. THE COURT HAS NOT PREVIOUSLY RULED ON WHETHER THIS INITIATIVE PETITION COMPLIES WITH SECTION 101.161, FLORIDA STATUTES.

In the Attorney General's letter to the Court petitioning it for a written opinion as to the validity of this initiative petition, he noted that this Court reviewed this petition in In re Advisory Opinion to the Attorney General re: Tax Limitation v. Smith, 644 So.2d 486, 495 (Fla. 1994) ("Tax Limitation"), and held that it violated the single-subject rule. In Tax Limitation the Court expressly did not reach the question whether the ballot title and summary met the requirements of Section 101.161, Florida Statutes, because its holding on the single-subject issue was dispositive.

The single-subject rule contained in Article XI, Section 3, Florida Constitution is no longer applicable to this proposed amendment because that provision was amended in the November 8, 1994 election to except from the single-subject requirement those proposed amendments "limiting the power of government to raise revenue." Article XI, Section 3, Florida Constitution. Accordingly, the Secretary of State resubmitted the initiative petition to the Attorney General's office because under Section 101.161(2), Florida Statutes, "the signatures obtained on the initiative petitions are valid for a period of four years," which has not yet expired, thereby making the initiative eligible for

placement on the ballot if it complies with Section 100.371, Florida Statutes. Attorney General letter, dated October 9, 1995 at 2, A-1, Appendix; Secretary of State Letter, September 11, 1995, A-2, Appendix.

In this request for an advisory opinion, the Attorney General queried, without discussion, whether Section 100.371, Florida Statutes or jurisdictional principles preclude this Court from again considering this initiative petition. A-1, Appendix.

A. Section 100.371, Florida Statutes, Does Not Prohibit This Court From Reviewing This Initiative Petition.

There is nothing in Section 100.371, Florida Statutes, that suggests that the people's right to amend their Constitution should be denied in the extraordinary circumstances in which we find this initiative petition. In fact, Section 100.371 provides that initiative petition signatures are valid for 4 years from the date they are given. Recognizing that initiative petition signatures are valid for 4 years, in Advisory Opinion to the Attorney General re Florida Locally Approved Gaming, 656 So.2d 1259, (Fla. 1995), the Court rendered its opinion on an initiative petition despite the lack of a sufficient number of signatures in favor of its placement on the ballot because "the verified signatures . . . collected were valid for four years pursuant to Section 100.371(2), Florida Statutes (1993), and

that, should it meet all other legal requirements, [the] proposed amendment could appear on the 1996 ballot." Id. at 1260-61.

Moreover, not allowing multiple review of initiatives, when circumstances warrant that review, would limit the constitutional amendment process without the required concomitant increase in ballot integrity. As this Court has stated, "[i]n considering any legislative act or administrative rule which concerns the initiative amending process, we must be careful that the legislative statute or implementing rule is necessary for ballot integrity since any restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process." State of Florida ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561, 566 (Fla. 1980) ("The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity."). A second review of this ballot initiative, when the Court's only express reason for keeping it off the ballot no longer is an impediment, will do no disservice to ballot integrity and not allowing the review will not increase ballot integrity.

B. *Res Judicata* And Collateral Estoppel Principles

Do Not Preclude the Court's Review of This

Ballot Initiative

Principles of *res judicata* and collateral estoppel also do not preclude the Court's review of the initiative petition because the Court has never determined whether the initiative violates Section 101.161, Florida Statutes. The initiative was denied ballot access for the sole reason that it violated the single-subject rule. See Tax Limitation, 644 So.2d at 495. That rule is no longer applicable to this initiative petition and should therefore no longer act as a barrier to Florida citizens' right to vote their preference on this initiative.

The Court is asked to now give an advisory opinion whether the initiative passes muster under Section 101.161, Florida Statutes. Section 101.161 requires that the ballot title and summary be an "an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure [and t]he ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." The Court expressly did not conduct this review the first time the initiative petition was before the Court because its review under the single-subject rule was dispositive.

Moreover, even had the Court given an advisory opinion on whether the initiative complies with Section 101.161, this Court could still exercise its jurisdiction to revisit its analysis. This Court did so in Florida League of Cities v. Smith, 607 So.2d 397 (Fla. 1992). In the initial review of the ballot summary and title at issue in League of Cities this Court rendered an advisory opinion that the initiative petition did not

violate the single-subject rule and did not contain a ballot summary that failed to adequately advise voters of the amendment's effect. Despite this holding, the Court again reviewed the ballot summary under Section 101.161 when an opponent to its placement on the ballot filed a writ of mandamus asserting that the proposed amendment would trigger the repealer to the homestead tax provisions, which was not mentioned in the ballot summary. This Court held that it had jurisdiction to again review the initiative petition. The Court cited the legislative history of its authority to review initiative petitions that "stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent and would only constitute persuasive authority as to any other adversarial challenge that might later be raised. This necessarily implies that other legal challenges would continue to be permissible under existing precedent" Id. at 399 (internal citations omitted). In this case, the Court is not being asked to revise its earlier analysis. It is being asked to continue its review, which it previously curtailed when the Court decided a then dispositive issue, now that the people have removed the initiative's constitutional barrier to ballot access.

The peoples' right to amend their Constitution is at stake and any reasons to deny this initiative petition review simply because it failed to pass constitutional muster under the former unamended Constitution seem spurious in comparison to this venerated right.

II. THE BALLOT TITLE CONVEYS THE MEANING OF THE PROPOSED
AMENDMENT IN COMPLIANCE WITH SECTION 101.161, FLORIDA
STATUTES.

Section 101.161(1) requires that each ballot initiative have a "caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." The title of the ballot initiative, "Tax Limitation: Should Two-thirds Vote Be Required For New Constitutionally-Imposed State Taxes/Fees?", clearly tells the voter the subject matter of the proposed amendment and is written in a way that people will speak of or refer to the amendment. The ballot title meets the requirements of Section 101.161, Florida Statutes.

The Attorney General suggested that the Court should determine whether the ballot title is misleading because it is framed as a question rather than a statement. A-1, Appendix. Questions are not per se misleading. Tax Limitation, 644 So.2d at 496. In Tax Limitation, the Court did caution that "for future proposals . . . the use of a question in the title or summary may place a proposal in jeopardy of being removed from the ballot because a question can convey a double meaning." Id. at 496 n.4. The Court's caution should not apply to this ballot initiative; however, because the Court stated that it applied to future proposals. This ballot initiative was reviewed in the same advisory opinion in which the Court cautioned future initiative petitioners to use care when framing the ballot title

in a question. Thus, the drafters of this initiative have not ignored the Court's caution.

Furthermore, the Court held that the ballot title that prompted the caution in Tax Limitation was not misleading. That title was: "Revenue Limits: May People's Amendments Limiting Government Revenue Be Allowed To Cover Multiple Subjects?" Id. at 496. The ballot title for this initiative petition is at least as clear as the ballot title the Court approved in Tax Limitation.

Moreover, the ballot title, albeit framed in a question, is more informative to voters, and therefore beneficial to the ballot process, than other ballot titles the Court has approved, such as: "Homestead Valuation Limitation", In re Advisory Opinion to the Attorney General-Homestead Valuation Limitation, 581 So.2d 586, 588 (Fla. 1991), and "Limited Political Terms in Certain Elective Offices", Advisory Opinion to the Attorney General-Limited Political Terms in Certain Elective Offices, 592 So.2d 225, 228 (Fla. 1991). Additionally, the ballot title tracks voting -- if a voter answers yes to the ballot title he or she would cast a yes vote; whereas a voter who answers no to the ballot title would cast a no vote. The title and the way it tracks voting could not be more logical. The title ballot goes beyond the statutory requirements without misleading the voters.

III. THE BALLOT SUMMARY CLEARLY AND UNAMBIGUOUSLY EXPLAINS THE CHIEF PURPOSE OF THE PROPOSED AMENDMENT IN COMPLIANCE WITH SECTION 101.161, FLORIDA STATUTES.

The Attorney General's letter also raises the question whether the ballot summary complies with Section 101.161, Florida Statutes, that requires that "[t]he substance of the amendment . . . be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." A-1, Appendix. This Court has interpreted this provision to mean that a ballot summary must be "clear and unambiguous," E.g., Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982), "accurate and informative," Advisory Opinion to the Attorney General re: Casino Authorization, Taxation and Regulation, 656 So.2d 466, 468 (Fla. 1995), and "fair and advise the voter sufficiently to allow him intelligently to cast his vote." Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So.2d 225, 228 (Fla. 1991); Advisory Opinion to the Attorney General re: Casino Authorization, Taxation and Regulation, 656 So.2d 466, 468 (Fla. 1995).

The Court has also tempered these requirements so that ballot summaries "need not explain every detail or ramification" of the proposed amendment. E.g., Smith v. American Airlines, Inc., 606 So.2d 618, 621 (Fla. 1992) ("We recognize that the seventy-five word limit on ballot summaries prevents the summary from revealing all the details or ramifications of the proposed

amendment. Accordingly, we have never required that the summary explain the complete details of a proposal at great and undue length, nor do we do so now."); Advisory Opinion to the Attorney General-Limited Political Terms In Certain Elected Offices, 592 So.2d 225, 228 (Fla. 1991) (the ballot summary "need not explain every detail or ramification of the proposed amendment"); Carrol v. Firestone, 497 So.2d 1204, 1206 (Fla. 1986).

The Court has also apprised opponents to ballot initiatives that it will not interfere with the public's right to have a ballot initiative appear on the ballot unless it is "clearly and conclusively defective." E.g., Fine v. Firestone, 448 So.2d 984, 987 (Fla. 1984); Askew v. Firestone, 421 So.2d 151, 154 (Fla. 1982) ("In order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly and conclusively defective."). The ballot summary at issue is not "clearly and conclusively defective."

The full text of the proposed amendment provides:

Article XI of the Florida Constitution is hereby amended by creating a new Section 7 reading as follows:

Notwithstanding Article X, Section 12(d) of this constitution, no new State tax or fee shall be imposed on or after November 8, 1994 by any amendment to this constitution unless the proposed amendment is approved by not fewer than two-thirds of the voters voting in the election in which such proposed amendment is considered. For purposes of this section, the phrase "new State tax or fee" shall mean any tax or fee which would produce revenue subject to lump sum or other appropriation by

the Legislature, either for the State general revenue fund or any trust fund, which tax or fee is not in effect on November 7, 1994 including without limitation such taxes and fees as are the subject of proposed constitutional amendments appearing on the ballot on November 8, 1994. This section shall apply to proposed constitutional amendments relating to State taxes or fees which appear on the November 8, 1994 ballot, or later ballots, and any such proposed amendment which fails to gain the two-thirds vote required hereby shall be null, void and without effect.

The ballot summary provides:

Prohibits imposition of new State taxes or fees on or after November 8, 1994 by constitutional amendment unless approved by two-thirds of the voters voting in the election. Defines "new State taxes or fees" as revenue subject to appropriation by State Legislature, which tax or fee is not in effect on November 7, 1994. Applies to proposed State tax and fee amendments on November 8, 1994 ballot and those on later ballots.

As the Court can see, the ballot summary clearly, accurately, unambiguously, and fairly explains the chief purpose of the proposed amendment to the voters so that they can make an informed decision at the polls. The ballot summary explains correctly that the proposed amendment requires that any new State taxes or fees that are imposed via a constitutional amendment must be passed by a two-thirds majority of those voting in the election. The summary defines "new State taxes or fees" as "revenue subject to appropriation by State Legislature" in conformity with the definition used in the proposed amendment. Finally, the summary explains that, if passed, the new amendment

will be applied to amendments on the November 8, 1994 and later ballots. To the credit of the proponents of this ballot summary, no political rhetoric or grandstanding is used - the summary is matter of fact and explains the chief purpose of the proposed amendment. Compare In re Advisory Opinion to the Attorney General-Save Our Everglades, 636 So.2d 1336 (Fla. 1994).

IV. ISSUES RAISED BY THE ATTORNEY GENERAL.

The Attorney General raised the following issues for the Court's consideration:

The title refers to "constitutionally imposed" state taxes or fees. The voter may be unsure as to whether the amendment affects only new taxes or fees that are imposed by the Florida Constitution or whether it also extends to taxes or fees imposed by the Legislature since a legislatively created tax is, in fact, imposed pursuant to the authority granted to the Legislature by the Constitution. While the text of the amendment indicates that it is modifying Article X, Section 12(d), Florida Constitution, by changing the definition of "vote of the electors" to require a two-thirds vote approving a constitutionally imposed state tax or fee, the summary does not inform the voter of such effect.

A-1, Appendix.

The Attorney General has raised two issues in this paragraph. The first issue is whether the proposed amendment will apply to legislatively created taxes or fees. The amendment and the ballot summary are clear. The amendment states: taxes and fees "imposed on or after November 8, 1994 by any amendment to [the Florida] Constitution" must pass by a two-thirds vote of those voting in the election. The ballot summary specifically

states that "imposition of new State taxes or fees on or after November 8, 1994 by constitutional amendment" are prohibited unless two-thirds of those voting in the election approve. The average voter will understand that if a new tax is going to be imposed via a constitutional amendment, it must be approved by two-thirds of those voting in the election. It is that simple. The proposed amendment does not apply to existing taxes or fees or legislatively, as opposed to constitutionally, imposed taxes or fees.

Additionally, when the ballot title and summary are read together, there is no basis for voter confusion about the distinction between taxes imposed by constitutional amendment and taxes imposed pursuant to existing constitutional authority. The Court is required to read the ballot title and summary together, Section 101.161, Florida Statutes, and has consistently done so. See e.g. Advisory Opinion to the Attorney General re Limited Casinos, 644 So.2d 71, 75 (Fla. 1994) ("This Court has always interpreted section 101.161(1) to mean that the ballot title and summary must be read together in determining if the ballot information properly informs the voter.").

The second issue the attorney General raised is that the ballot summary does not mention that the amendment modifies Article X, Section 12(d) of the Florida Constitution. A-1, Appendix. The absence of this information does not make the ballot summary misleading, unclear, inaccurate, or ambiguous. The addition of the information that the amendment modifies

Article X, Section 12(d) of the Florida Constitution, which is otherwise readily available in the beginning of the proposed amendment's text, does not give the voter any additional information other than where the Constitution is being amended. While this information might sometimes be critical to a voter's understanding of the amendment, in this case it adds little. The voter is already told that the chief purpose of the amendment is to require a two-third's vote to amend the Constitution in the limited cases in which new State taxes or fees are being imposed via the Constitutional amendment. The amendment does nothing else and knowing where it is to be placed in the Constitution is of little value to voters.

Moreover, if numbers are also counted as a word, the ballot summary already contains 73 words, none of which are expendable. The additional words could not have been added given the seventy-five word limit for ballot summaries. The word-limitation should be taken into account when the Court considers all challenges to this ballot summary. See, e.g., Smith v. American Airlines, Inc., 606 So.2d 618, 621 (Fla. 1992); Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elected Offices, 592 So.2d 225, 228 (Fla. 1991).

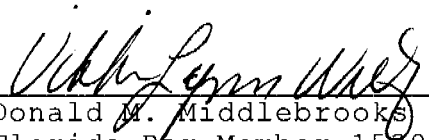
The Attorney General's final query is whether the November 8, 1994 application date of the amendment is also its effective date. A-1, Appendix. The Florida Constitution provides that an amendment's effective date may be specified in the amendment rather than being subject to the default effective date. Article

XI, Section 5(c), Florida Constitution. The proposed amendment could not be clearer that it is to apply to amendments passed on or after November 8, 1994. If the voters want to pass this amendment and have it apply to all affected amendments passed since November 8, 1994, they should be allowed to amend their Constitution accordingly.

CONCLUSION

For the reasons set forth above, Florida TaxWatch respectfully requests that the Court render an advisory opinion as to whether this initiative complies with Section 101.161, Florida Statutes. Florida TaxWatch submits that both the ballot title and summary comply with Section 101.161 and the voters should be given an opportunity to vote their preference on the proposed amendment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the Honorable A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301, and Julian Clarkson, Esq. and Susan Turner, Esq., Holland & Knight, 315 South Calhoun -- Suite 600, Tallahassee, Florida, 32302-0810, by United States mail, this 20 day of November, 1995.


Vikki Lynn Wulf

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- A-1 Attorney General Letter dated October 9, 1995.
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