

IN THE SUPREME COURT  
STATE OF FLORIDA  
CASE No. SC01-2422

---

---

*IN RE: ADVISORY OPINION TO THE ATTORNEY GENERAL RE: PROTECT  
PEOPLE FROM THE HEALTH HAZARDS OF SECOND-HAND TOBACCO  
SMOKE BY PROHIBITING WORKPLACE SMOKING,*

---

---

BRIEF OF LORILLARD TOBACCO COMPANY  
R.J. REYNOLDS TOBACCO COMPANY  
ASSOCIATED BUILDERS & CONTRACTORS OF FLORIDA, INC.  
CIGAR ASSOCIATION OF AMERICA, INC.  
FLORIDA HOTEL & MOTEL ASSOCIATION, INC.  
FLORIDA UNITED BUSINESSES ASSOCIATION, INC.  
FLORIDA TOBACCO & CANDY ASSOCIATION  
FLORIDA PETROLEUM MARKETERS AND CONVENIENCE STORE  
ASSOCIATION  
FLORIDA RETAIL FEDERATION

---

---

Elliot H. Scherker, Esq. Florida Bar No. 202304 Elliot B. Kula, Esq. Florida Bar No. 003794 Greenberg Traurig, P.A. 1221 Brickell Avenue Miami, Florida 33131 Telephone: (305) 579-0500	Barry Richard, Esq. Florida Bar No. 105599 Greenberg Traurig, P.A. 101 East College Avenue Tallahassee, Florida 32302 Telephone: (850) 222-6891
--	--

*Counsel for Lorillard Tobacco Company*

## TABLE OF CONTENTS

### **Page**

<u>TABLE OF CITATIONS</u>	ii
<u>SUMMARY OF ARGUMENT</u>	1
<u>ARGUMENT</u>	2
<u>CONCLUSION</u>	12
<u>CERTIFICATE OF SERVICE</u>	14
<u>CERTIFICATE OF COMPLIANCE</u>	15

## TABLE OF CITATIONS

<b>Cases</b>	<u>Page</u>
<i>Advisory Opinion to Attorney General — Fee on Everglades Sugar Production</i> , 681 So. 2d 1124 (Fla. 1996)	10, 17
<i>Advisory Opinion to Attorney General re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education</i> , 778 So. 2d 888 (Fla. 2000)	3
<i>Advisory Opinion to Attorney General re: Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guide Way or Magnetic Levitation Sys.</i> , 769 So. 2d 367 (Fla. 2000)	11
<i>Advisory Opinion to Attorney General re: Funding for Criminal Justice</i> , 639 So. 2d 972 (Fla. 1994)	..... 6, 11
<i>Advisory Opinion to Attorney General re: Limited Casinos</i> , 644 So. 2d 71 (Fla. 1994)	3
<i>Advisory Opinion to the Attorney General — Save Our Everglades</i> , 636 So. 2d 1336 (Fla. 1994)	4, 11, 12, 13, 15, 16, 17
<i>Advisory Opinion to the Attorney General re: Florida Locally Approved Gaming</i> , 656 So. 2d 1259 (Fla. 1995)	6
<i>Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers</i> , 705 So. 2d 563 (Fla. 1998)	..... 4
<i>Advisory Opinion to the Attorney General re: Term Limits Pledge</i> , 718 So. 2d 798 (Fla. 1998)	3
<i>Askew v. Firestone</i> , 421 So. 2d 151 (Fla. 1982)	..... 4
<i>Evans v. Firestone</i> , 457 So. 2d 1351 (Fla. 1984)	..... 6
<i>Ramos v. Philip Morris Cos., Inc.</i> , 743 So. 2d 24 (Fla. 3d DCA 1999)	..... 5
Right of Citizens to Choose Healthcare Providers, 705 So. 2d at 563 (Fla. 1998)	..



## **SUMMARY OF ARGUMENT**

Florida law requires that the ballot title and summary for a proposed constitutional amendment state the chief purpose and legal effects of the amendment in clear and unambiguous language, and no more. The inclusion in a title or summary of factual assumptions or politically biased rhetoric is inherently misleading and legally impermissible. The ballot title and summary for the proposed amendment includes both factual assumptions and political rhetoric and the sanctity of the ballot requires that the provision be stricken.

## ARGUMENT

### THE BALLOT TITLE AND SUMMARY ARE FATALLY DEFECTIVE BECAUSE THEY ARE MISLEADING AND POLITICALLY BIASED.

This case raises once again a legal principle of overarching significance that transcends the subject of the particular initiative under review. The purpose of Section 101.161(1), Florida Statutes (2000), is to ensure that Florida voters will be able to cast an intelligent and informed ballot on a proposed constitutional amendment. To achieve that purpose, the statute provides — and this Court has demanded — that the ballot title and summary set forth in clear and unambiguous language, untainted by biased political rhetoric, the chief purpose and legal effects of the proposed amendment.

The initiative petition under review egregiously violates Section 101.161. The ballot title and summary before the Court essentially *adjudicate a factual question* and include language that has, as its sole purpose, not *informing* the voter, but *influencing* the voter to support the proposition. The ballot title for the proposed amendment is “Protect People From the Health Hazards of Second-Hand Tobacco Smoke By Prohibiting Workplace Smoking.” The ballot summary begins with the same implicit factual assumptions: “To protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor work

places.” This is forbidden political rhetoric and subjective electioneering — which may be appropriate *outside* the voting booth, but is inappropriate in a ballot title or ballot summary.

Section 101.161, Florida Statutes (2000), states, in pertinent part:

Whenever a constitutional amendment ... is submitted to the vote of the people, the substance of such amendment ... shall be printed in clear and unambiguous language on the ballot .... [T]he substance of the amendment ... shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

§ 101.161(1), Fla. Stat. (2000). The ballot title and summary are read together to determine whether the ballot information properly informs the voter within the meaning of the statute. *Advisory Opinion to Attorney General re: Limited Casinos*, 644 So. 2d 71, 75 (Fla. 1994).

Section 101.161 serves a critical purpose in the initiative process:

This statute requires that the title and summary be accurate and informative. The ballot title and summary must “state in clear and unambiguous language the chief purpose of the measure,” and “assure that the electorate is advised of the true meaning, and ramifications, of an amendment.”

The purpose of the statute is “to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.”

*Advisory Opinion to the Attorney General re: Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citations omitted); *accord, e.g., Advisory Opinion to Attorney*



*General re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 892 (Fla. 2000); *Advisory Opinion to the Attorney General — Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994); *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982). This Court’s responsibility “is to determine whether the language of the title and summary, as written, misleads the public.” *Advisory Opinion to the Attorney General re: Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998).

The ballot title for the proposed amendment is “Protect People From the Health Hazards of Second-Hand Tobacco Smoke by Prohibiting Workplace Smoking.” The ballot summary for the proposed amendment begins with the following declaration: “*To protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor work places.*” (emphasis added). The title and summary suffer from two fatal flaws. First, they rest upon an implicit factual assumption, and second, they include a blatant political message.

Any factual assumption included in a title or summary, whether direct or implicit, is inherently misleading. There is no forum provided by Florida law or procedure for the adjudication of factual issues prior to the placement of an initiative proposal on the ballot. Nevertheless, a title or summary such as those in the case at bar present what purports to be settled facts. Indeed, this “factual” statement is the first

and most prominent message in what the voter will read just before casting his or her ballot.

It makes no difference how accepted a factual assertion may be, either in the courtroom or in the public mind. This Court has no means by which to evaluate effectively the degree of accuracy of factual assumptions in the review of ballot titles and summaries. There is no practical yardstick by which the Court can draw a line that permits factual assumptions in some cases and not in others. It is an all or nothing proposition. If the Court were to allow factual assumptions to remain in a ballot title or summary in *any* case, it would be opening a Pandora's box.

In this case, both the title and summary present to the voters two purportedly settled facts: (1) that second hand tobacco smoke is a health hazard to persons entering enclosed indoor work places; and (2) that the provisions of the amendment will "protect" persons from such health hazard. On what legal principle shall the proponents of a constitutional amendment be given the exclusive right to present such factual pronouncements to the voter? If such statements are to be permitted by the proponents, would not the most basic rules of fair play and

ballot neutrality require that opponents be given the right to make their own factual statements on the ballot?.

1

The inclusion of political rhetoric is equally troublesome. It is the equivalent of allowing one side in a political debate to include a slogan in every voting booth. This Court has condemned attempts to “mislead the public with ‘political rhetoric.’” *Advisory Opinion to the Attorney General re: Florida Locally Approved Gaming*, 656 So. 2d 1259, 1262 (Fla. 1995). Neither the title nor the summary may “incorporate any misleading or emotional language which could present the amendment ‘under false colors.’” *Advisory Opinion to Attorney General re: Funding for Criminal Justice*, 639 So. 2d 972, 974 (Fla. 1994) (citation omitted). As this Court expressly has held:

[T]he 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*.

*Save Our Everglades*, 636 So. 2d at 1342 (quoting *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984)) (emphasis added).

In *Funding for Criminal Justice*, the Court rejected a challenge to the ballot title of “Funding for Criminal Justice,” because the title “substantively advise[d] the voter

as to the text of the amendment and the chief purpose of the measure,” without using “misleading or emotional language” or flying “under false colors.” 639 So. 2d at 974. In stark contrast, the ballot title in the case at bar does *not* merely accomplish this limited task, but instead begins with an emotional appeal that states the *political motivation* of the proposed amendment rather than its *legal purpose and effect*.

This Court’s decision in *Save Our Everglades, supra*, compels the Court to strike this initiative from the ballot. The proponents sought to amend the constitution to create a trust to restore the everglades, funded by a fee on raw sugar. 636 So. 2d at 1337. The ballot title, however, was “Save Our Everglades,” and the first sentence of the ballot summary stated that the amendment would create a trust “to restore the everglades for future generations.” *Id.* at 1338. This Court struck the proposed amendment from the ballot, holding that both the ballot title and the summary were misleading. *Id.* at 1341-42. Addressing the title, the Court held:

The title of the present initiative — “SAVE OUR EVERGLADES” — is misleading. It implies that the everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be “saved” via the proposed amendment. Yet, nothing in the text of the proposed amendment hints at this peril .... Further the text of the amendment clearly states that the purpose of the amendment is to “restore” the everglades to its original condition, not to “save” it from peril. A voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment. “A proposed amendment cannot fly under false colors; this one does.”

*Id.* at 1341 (citation omitted).

<sup>1</sup> The Court further held that “the summary more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment.” *Id.* at 1342.

So too, here, the ballot title implies — indeed, it flat-out *says* — that second-hand tobacco smoke is a “health hazard.” And the ballot *summary* here goes far beyond the relatively mild statement in *Save Our Everglades* that the trust was being created “to restore the everglades for future generations.” 636 So. 2d at 1338. The ballot summary *repeats* the vice of the ballot title, commencing with the statement that “[t]o protect people from the health hazards of second-hand tobacco smoke, this amendment prohibits tobacco smoking in enclosed indoor work places.” If the ballot summary in *Save Our Everglades* was forbidden “political rhetoric,” as opposed to “an accurate and informative synopsis of the meaning and effect of the proposed amendment,” 636 So. 2d at 1342, the adjudicatory language of the title and summary in this initiative surely suffers from the same defect.

---

<sup>1</sup> In a transparent attempt to give the appearance of heeding the lessons of *Save Our Everglades*, the proponents of the current amendment have included the offending language in the body of the amendment as well as the title and summary. Surely the Court did not intend to suggest that the underlying principle stated in the case could be so easily circumvented.

Indeed, approving this sort of “factfinding” and political sloganeering in a ballot title and summary would eviscerate the carefully erected protections with which this Court has surrounded the initiative process. Proponents of a particular initiative would be emboldened to cloak *any* political agenda in the raiment of ballot titles or summaries, moving the political contest directly into the voting booth. For example:

- an initiative to end public funding for the arts could be titled “Protect People Against Wasted Tax Dollars”;
- an initiative to ban fluoridation could be titled “Protect People Against Hazardous Substances in Water”; and
- an initiative to repeal consumer protection statutes could be titled “Protect People From the Burdens of Unreasonable Governmental Regulations.

In each instance, the ballot summary, as here, could repeat — and reinforce the political message of the title.

2

The true irony is that this Court, after striking the ballot initiative in *Save Our Everglades*, pointed the way to those, such as the present proponents, who would seek to promote a particular agenda through an initiative petition. In the subsequent decision in *Advisory Opinion to Attorney General — Fee on Everglades Sugar Production*, 681 So. 2d 1124 (Fla. 1996), the court considered a modified initiative petition that again sought to create a trust fund for cleaning up the Everglades. The ballot title, however, was “Fee on Everglades Sugar Production.” *Id.* at 1127. The ballot summary stated that the amendment would provide for the levy of a fee of one cent per pound on raw sugar grown in the Everglades, with the funds “to be used, consistent with statutory law, for purposes of conservation and protection of natural resources and abatement of water pollution in the Everglades.” *Id.* Gone were the

---

<sup>2</sup> As this Court often has stated, its function under Section 101.161, Florida Statutes (2000), bars any review of the “merits or wisdom of the proposal.” *Right of Citizens to Choose Healthcare Providers*, 705 So. 2d at 563, 565 (Fla. 1998). Thus, while the examples in the text are admittedly outlandish, the Court would not be empowered to address the correctness of the reported “factfinding,” no matter how absurd that factfinding might appear. That this is so only highlights the critical importance of this Court’s “gatekeeper” role in these circumstances and the need for strict enforcement of the prohibition against the use of inflammatory political rhetoric in a ballot title or summary.

factual assumption that the Everglades was at risk and the emotional appeal to save it. In their second effort, the opponents complied with the Court’s often repeated message and limited the ballot title and summary to an objective statement of the proposals legal purpose and effect. This time, the Court held that the amendment complied with the requirements of Section 101.161:

The title and summary promise only the establishment of a trust to receive and disburse monies. The voters reading the title and summary will learn the chief purpose of the initiative and be able to make an informed decision about whether to approve or reject the amendment. Accordingly, we find that the initiative entitled “Everglades Trust Fund” complies with the .... ballot title and summary requirements and should retain its place on the ballot.

*Id.* at 1130.

Following the *Save Our Everglades* decision, this Court has upheld similarly neutral ballot titles and summaries. *E.g., Advisory Opinion to Attorney General re: Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guide Way or Magnetic Levitation Sys.*, 769 So. 2d 367, 371 (Fla. 2000) (ballot title of “Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guide Way or Magnetic Levitation System,” and ballot summary stating that amendment’s purpose was “[t]o reduce traffic and increase travel alternatives”); *Funding for Criminal Justice*, 639 So. 2d at 973 (ballot title of “Funding for Criminal Justice” and summary stating that amendment would create trust fund “dedicated to criminal justice



purposes”).

The proponents of the present initiative could readily have complied with this Court’s clear message. Using a ballot title of “Prohibiting Work Place Smoking” — much like the title in “Funding Criminal Justice” — would convey the chief purpose of the proposed amendment. The ballot summary could properly read as follows (deletion indicated by strikethrough):

~~To protect people from the health hazards of second-hand tobacco smoke.~~ [T]his amendment prohibits tobacco smoking in enclosed indoor work places ....

With these deletions, the ballot title and summary would accomplish their statutory purpose, to “state in clear and unambiguous language the chief purpose of the measure,” *Fee on Everglades Sugar Production*, 681 So. 2d at 1127 (citation omitted) — without running afoul of this Court’s prohibition on inflammatory political rhetoric and “subjective evaluation[s] of special impact.” *Save Our Everglades*, 636 So. 2d at 1342 (citation omitted). Because the proponents of this initiative — in the obvious hope of increasing their chances of success by bringing their political views into the voting booth — chose to flout this Court’s clearly-drawn limitations on ballot titles and summaries, the proposed amendment must be stricken from the ballot. The sanctity of the ballot requires no less.

**CONCLUSION**

Based on the foregoing, [insert names of parties] request this Court to strike the “Workplaces Without Tobacco Smoke” initiative from the ballot.

<p>Elliot H. Scherker, Esq. Florida Bar No. 202304 Elliot B. Kula, Esq. Florida Bar No. 003794 Greenberg Traurig, P.A. 1221 Brickell Avenue Miami, Florida 33131 Telephone: (305) 579-0500 Facsimile: (305) 579-0723</p>	<p>Barry Richard, Esq. Florida Bar No. 105599 Greenberg Traurig, P.A. 101 East College Avenue Tallahassee, Florida 32302 Telephone: (850) 222-6891 Facsimile: (850) 681-0207  By: _____ Barry Richard</p>
<p><i>Counsel for Lorillard Tobacco Company</i></p>	

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing brief was served by U.S. Mal upon the attached service list this 28<sup>th</sup> day of November \_\_\_\_, 2001 to:

**American Cancer Society,  
Office of the Attorney General Florida Division, Inc.**  
Louis F. Hubener, III T. Elaine Holmes  
400 S. Monroe St. 3709 West Jetton Ave.  
Tallahassee, FL 32399-6536 Tampa, FL 33629-5146

**American Lung Association American College of Physicians--  
Of Florida, Inc. American Society of Internal Medicine,  
Marshall Collins Deason, Jr. Florida Chapter, Inc. and  
3750 Gunn Highway, Suite 2C Florida Public Health Association, Inc.**  
Tampa, FL 33624-4905 Christopher Lawson Nuland  
Law Offices of Christopher L. Nuland

**Center for Florida's Children 1000 Riverside Ave., Ste. 200  
And National Center for Jacksonville, FL 32204-4103  
Tobacco-Free Kids**

Michelle Anchors **American Heart Association, Inc.**  
Anchors, Foster, McInnis & Keefe **Florida/Puerto Rico Affiliate**  
909 Mar Walt Dr., Ste. 1014 Teresa D. Shelton  
Ft. Walton Beach, FL 32546-6757 4830 Windmill Palm Terr. N.E.  
St. Petersburg, FL 33703-6307

**Florida Restaurant Association**  
Warren H. Husband  
Metz, Husband, & Hauser  
P.O. Box 10909  
Tallahassee, FL 32302

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

---

<sup>1</sup> In actuality, the predicate for the pronouncement in the ballot title and summary is far from authoritatively settled. *See Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24, 32 (Fla. 3d DCA 1999) (noting, following settlement of action by airline flight attendants based on exposure to second-hand smoke, “the trial court’s pronouncement that the class had a *less than 50/50 chance of success*” and that “[t]he likelihood of success was *very low* in this litigation”) (original emphasis), *review dismissed*, 743 So. 2d 14 (Fla. 1999).