

**IN THE SUPREME COURT OF FLORIDA**

Case No. SC04-1172

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Upon Request from the Attorney General  
for an Advisory Opinion as to the  
Validity of a Financial Impact Statement

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**ADVISORY OPINION TO  
THE ATTORNEY GENERAL**

RE: REPEAL OF HIGH SPEED RAIL AMENDMENT

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**BRIEF OF FLORIDA TRANSPORTATION ASSOCIATION, INC.  
AND C. C. ADOC@ DOCKERY**

IN OPPOSITION TO THE FINANCIAL IMPACT STATEMENT

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## STATEMENT OF THE CASE AND STANDARD OF REVIEW

The intent of this brief is to address the duties and responsibilities of the Court in reference to the financial impact statement on the initiative to Repeal the High Speed Rail Amendment. In addition, this brief will reveal that the impact statement does not accurately reflect the probable impact of the amendment. It is unclear, ambiguous, misleading, and confusing. In drafting the language to be included on the ballot the Financial Impact Estimating Conference disregarded extensive testimony and evidence reflecting the probable positive net financial impact of high speed rail on the State of Florida. Furthermore, the impact statement fails to comply with the Florida Constitution and Florida Statutes and therefore should be remanded.

On July 20, 2004<sup>1</sup>, Attorney General Charles Crist forwarded the following proposed financial impact statement to this Court for an Advisory Opinion: Passage of this amendment could result in state cost savings ranging from \$42 billion to \$51 billion over the next 30 years, based on the statewide system currently defined in law. This estimate assumes the repeal of associated laws and could be reduced by federal or private sector funding. The estimated 30 year impact equates to average cost savings of between \$4,700 and \$5,700 per Florida household, or \$157 to \$190 per year.

Article XI, section 5, Florida Constitution, provides, in relevant part, as follows:

(b) The legislature shall provide by general law, prior to the holding of an

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<sup>1</sup> The timing of the Court's review of this issue is critical. Recent statutory changes have placed significant time constraints on this Court, newly amended ' 100.371(6)(d)(2), **removes** this Court's ability to review the impact statement; AIf, by 5:00 p.m. on the 75<sup>th</sup> day before the election, the Supreme Court has not issued an advisory opinion on the initial financial impact statement prepared by the Financial Impact Estimating Conference for an initiative amendment that otherwise meets the legal requirements for ballot placement, the financial impact statement shall be deemed approved for placement on the ballot.@ The 75<sup>th</sup> day before the election is August 19, 2004.

election pursuant to this section, for the provision of a statement to the public regarding the probable financial impact of any amendment proposed by initiative pursuant to section 3. Art. XI, Sec. 5 (b), Fla. Const. (Emphasis added.)

- Section 100.371(6)(b), Florida Statutes, provides, in relevant part, as follows:
3. Principals of the Financial Impact Estimating Conference shall reach a consensus or majority concurrence on a clear and unambiguous financial impact statement, \* \* \*. Nothing in this subsection prohibits the Financial Impact Estimating Conference from setting forth a range of potential impacts in the financial impact statement. Any financial impact statement that a court finds not to be in accordance with this section shall be remanded \* \* \*. Sec. 100.371 (6)(b)(3), Fla. Stat. (2004).

This Court has reviewed financial impact statements under the above prescriptions, and has determined that the statutory phrase **A**range of potential impacts<sup>@</sup> in Section 100.371(6)(b), F.S., must relate to the phrase **A**probable financial impact<sup>@</sup> set forth at Article XI, Section 5, of the Constitution. In re Advisory Opinion to Att’y Gen.-Authorizes Miami-Dade & Broward County Voters To Approve Slot Machines In Parimutuel Facilities, Case No. SC04-1057 (July 15, 2004); In re Advisory Opinion to Att’y Gen.-Public Protection From Repeated Medical Malpractice, Case No. SC04-1053 (July 15, 2004).

Reviewing initiative ballot titles and summaries, this Court has on numerous occasions construed the statutory phrase **A**clear and unambiguous<sup>@</sup> to disallow language which confuses or misleads the voters. See generally, Askew v. Firestone, 421 So. 2d 151 (Fla. 1982); Smith v. American Airlines, 606 So. 2d 618 (Fla. 1992); In re Advisory Opinion to Att’y. Gen.-Amendment to Bar Government From Treating People Differently Based on Race in Public Education, 778 So. 2d 888 (Fla. 2000).

## SUMMARY OF ARGUMENT

Because the proposed financial impact statement relies upon a number of assumptions which are *independent of the amendment*, and which are *not probable*, and because the statement is *misleading and emotional* in content, it fails to comply with statutory and constitutional requirements, and should be remanded for redrafting.

### ARGUMENT

#### I. THE PROPOSED FINANCIAL IMPACT STATEMENT IS UNCLEAR, AMBIGUOUS, MISLEADING, CONFUSING AND INACCURATE

As was the case with the Additional Homestead Exemption initiative petition which was stricken from the ballot,<sup>2</sup> by the Court on July 15, 2004, whether the amendment would ultimately result in household cost savings depends upon a variety of factors *independent of the amendment*.

**The statewide system currently defined in the law.**

The economic projections of the proposed financial impact statement are specifically based on *The statewide system currently defined in the law.* This initial premise is not tied to the effect of the amendment itself. The full text of the proposed amendment states: **Article X, Section 19, Florida Constitution, is hereby repealed in its entirety.**

Article X, section 19, of the Florida Constitution does not mandate a route for the system, other than to require that it link the **five largest urban areas of the**

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<sup>2</sup> Because the initiative in that case would affect only the assessed value of property and not a second independent factor, namely, the taxing authority's power to raise the millage rate, this Court held that the summary which states that the amendment **provides property tax relief** to all Florida homeowners was misleading. In re Advisory Opinion to Att'y. Gen.-Additional Homestead Tax Exemption, Case No. SC04-942 (July 15, 2004). The error is compounded in the high speed rail financial impact statement by a plethora of independent factors.

State as determined by the Legislature.<sup>3</sup>

**The repeal of associated laws.**

The financial impact statement predicates its numbers on *the repeal of associated laws*. The statement provides that: *This estimate assumes the repeal of associated laws and could be reduced by federal or private sector funding.*

Thus, the Financial Impact Statement compounds one level of speculation on top of another to reach a fatally flawed conclusion that should not be allowed on the ballot. As a matter of law, the repeal of a constitutional mandate to construct a system of high speed ground transportation does not result in the repeal of existing statutes authorizing a statewide high speed rail system. Nor does it preempt the authority of the Legislature to adopt subsequent high speed rail legislation or make appropriations for it. This is pointed out by counsel for the sponsor of this amendment, at page 9 of the Initial Brief of the Sponsor:

"Thus, the only effect of repealing the above-referenced provision is that the State will no longer be constitutionally mandated to implement a high speed rail system. Further, repeal of the High Speed Rail Amendment does not remove the power and authority of the Legislature, Governor or Cabinet to, at some time in the future, implement a high speed rail system. The Florida Constitution is not a grant of power to the Legislature, but rather provides limitations on the Legislature's powers. Chiles v. Phelps, et. al., 714 So. 2d 453 (Fla. 1998); State of Florida ex rel. Collier Land Investment Corp., 188 So. 2d 781 (Fla. 1966). Thus, repeal of Article X, Section 19, Florida

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<sup>3</sup> The Summary of Initiative Financial Information Statement, prepared by the Financial Impact Estimating Conference, states that The Conference agrees that if federal or private sector funding can be obtained, the cost to the state to build the system would be reduced. Also, the description of the service area as defined in the law could be revised by the Legislature to comprise a smaller area, *further reducing the cost of the system.* Initiative Financial Information Statement, page 1. See also, page 4 of the Statement, which states: *It is conceivable that, if not repealed, the Legislature could redefine the total system as feasibility estimates are established. At this time it is not possible to predict changes to the system currently defined in law.*



Constitution, in no way limits the Legislature's power and authority to implement a high speed rail system in the future. The Proposed Amendment simply removes the Mandate to do so from the Florida Constitution. @Initial Brief of Sponsor, Page 9, June 18, 2004.

The assumption made by the Financial Impact Estimating Conference, that associated laws would be repealed, is neither a direct consequence of passage of the amendment, nor an assured result.

### **A federal or private sector funding@**

The financial impact statement further conditions its numbers on the *complete absence of federal or private sector funding*. This third critical variable is also *independent of the amendment itself*. The presence of both federal and private sector funding make the promised savings to the voters invalid. Because this caveat is sandwiched between two clear forecasts of savings it confuses the voter.

## **II. THE FINANCIAL IMPACT STATEMENT DOES NOT STATE THE PROBABLE IMPACTS**

Article XI, Section 5, Florida Constitution, requires that financial impact statements advise the public regarding the **probable financial impact** of any amendment proposed by initiative. Section 100.371, Florida Statutes, derives its basis from this constitutional provision.

The Authority has already received \$5.15 million, half of its funding, from Congress. Members of Florida's Congressional delegation in the United States Senate and United States House of Representatives have requested an additional \$33 million be included in the 2005 budget. It is misleading to provide to the Florida voter an estimate of **probable** financial impact that assumes no federal funding, when a pattern of such funding for high speed rail is already established as fact.

The impact statement fails to address the High Speed Rail Authority funding

plan in which the private sector commits, by contract, to assume all construction overrun costs and holds the state harmless from shortfalls in operating revenues, and to return to the state all revenues in excess of costs, estimated to be \$2.65 billion.<sup>4</sup> This turns the statement of potential costs and savings on its head. It is misleading to provide the Florida voter with an estimate of **probable** financial impact based on the assumption of no private sector funding, when it is clear that such private funding is an integral part of the existing process.

The conclusion is inescapable that the proposed financial impact statement makes several key assumptions that are not probable and relies on conditions precedent that are entirely independent of the amendment itself.<sup>5</sup> This renders the statement unclear, ambiguous, and misleading to the voters.

### **III. THE PROPOSED FINANCIAL IMPACT STATEMENT IS A POLITICAL STATEMENT AIMED AT SWAYING THE VOTERS**

The Financial Impact Statement is little more than a polemic, based on either incomplete or unsound economic reasoning. The asserted savings of \$4,700 to \$5,700 per Florida household over the next 30 years<sup>6</sup> assumes that the construction

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<sup>4</sup> The Financial Impact Estimating Conference in its Initiative Financial Statement Summary states: "Some level of private sector funding might eventually be committed to the system, as evidenced by current negotiations relating to Phase 1. Such a commitment could reduce the net savings to the state, but the extent of such funding can not be determined at this time. Initiative Financial Information Statement, at pages 6 and 7.

<sup>5</sup> Dr. Tim Lynch, Director, Center for Economic Analysis, Florida State University has projected that the long term economic benefits from the system will exceed the costs by a factor of approximately 2 to 1. Dr. Lynch has concluded that repeal of the amendment represents a loss of 41,267 jobs, a loss of \$11.7 Billion in wages and salaries, a loss of \$34.1 Billion in economic activity and a loss of \$5.7 Billion in other benefits.

<sup>6</sup> It is indicative of the politically charged nature of this impact statement that a review of other impact statements proposed for inclusion on the 2004 ballot reveals

of a high speed rail system more than 1,200 miles long and linking most of Florida major metropolitan areas will have no benefits at all to offset these costs.

It is obvious that, whether or not such a system is built, transportation improvements will continue to be constructed at public expense to meet the demands of Florida's rapidly growing population. If a high speed rail system is not available to carry passengers, the demand for travel between Florida's major cities will not disappear. The alternative result of future scenarios in which the state continues to develop without a high speed rail system cannot be clearly shown to produce a net *savings* of \$4,700 to \$5,700 per household, or any other specific figure. The reality is that public funds not spent on a rail system will otherwise be required for more lanes of highways, more airport runways and terminals and similar improvements. Assuming, *arguendo* that the result of approval of the amendment under consideration by the voters is the elimination of high speed rail as a future transportation mode in Florida, the only assured economic result is a *shift* in expenditures, not necessarily a reduction.

The ballot should not be used as a vehicle for political statement or emotional language. As recently as July 15, 2004, this Court admonished that ballot statements must be clear and neutral in content:

The use of the phrase "provides property tax relief" clearly constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment. See In re Advisory Op. to the Att'y Gen.-Save Our Everglades, 636 So. 2d 1336, 1341-42 (Fla. 1994) (finding "emotional language" of ballot title and summary to be misleading as it resembled "political rhetoric" more than "accurate and informative synopsis"...)...

Therefore, an accurate, objective, and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.

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**no other** reference to financial impact per "household".

Advisory Opinion to Atty. Gen. Re Additional Homestead Tax Exemption, SC04-942, at 17 (July 15, 2004).

Were the financial impact statement permitted to be deployed as a political tool to sway the voter's emotions, it would undermine the integrity of the process and violate Article XI, section 5, of the Florida Constitution. Justice Lewis distills the issue in his concurring opinion to a recent Advisory Opinion of this Court: My concern is that these constructions will render financial impact statements a vehicle for any manner of content and language, including politicized statements designed as an attempt to sway the voters of this state, as long as those statements are clear and unambiguous. I submit that this process cannot be divorced from its constitutional base of authority and if the statute does so, as the dissents posit, the entire legislative scheme is of very questionable constitutional validity. In re Advisory Opinion to Atty Gen.-Public Protection From Repeated Medical Malpractice ,Case No. SC04-1053, at 4 (July 15, 2004).

The recommended language for the financial impact statement accompanying the ballot proposal in this case impermissibly tugs at the heart strings of voters by promising misleading and improbable cost savings ~~per~~ <sup>per</sup> household, <sup>@</sup> rather than on a statewide basis. This is the same kind of electioneering rejected by the Court in the Advisory Opinion on the Additional Homestead Tax Exemption initiative.

### **CONCLUSION**

It is respectfully submitted that the proposed financial impact statement for the Repeal of the High Speed Rail Amendment is unconstitutional, violates Florida statute, is fatally flawed, and should be remanded to the Financial Impact Estimating Conference for redrafting.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 27<sup>th</sup> day July, 2004, to the following:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), Fla. R. App. P.

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