

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 05-1833

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: EXTENDING EXISTING SALES TAX TO NON-TAXED SERVICES
WHERE EXCLUSION FAILS TO SERVE PUBLIC PURPOSE

BRIEF OF INTERESTED PARTIES
FLORIDA ASSOCIATION OF REALTORS, INC.; FLORIDA INSTITUTE
OF CERTIFIED PUBLIC ACCOUNTANTS; FLORIDA RETAIL
FEDERATION; FLORIDA CHAMBER OF COMMERCE, INC.; FLORIDA
ASSOCIATION OF BROADCASTERS; FLORIDA MANUFACTURERS
ASSOCIATION; NATIONAL FEDERATION OF INDEPENDENT
BUSINESSES, INC.; FLORIDA FARM BUREAU FEDERATION,
INC.; FLORIDA MINERALS AND CHEMISTRY COUNCIL, INC.;
FLORIDA FRUIT AND VEGETABLE ASSOCIATION, INC.;
FLORIDA CATTLEMEN'S ASSOCIATION, INC.; SUNSHINE STATE
MILK PRODUCERS, INC.; FLORIDA NURSERY GROWERS AND
LANDSCAPE ASSOCIATION; PRINTING ASSOCIATION OF
FLORIDA; AND FLORIDA BANKERS ASSOCIATION
IN OPPOSITION TO THE FINANCIAL IMPACT STATEMENT

On Petition for a Written Opinion of the Justices
As to the Validity of a Financial Impact Statement

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STATEMENT OF INTERESTED PARTIES

The Opponent Interested Parties as indicated on the cover of this Brief adopt and reaffirm as if published herein, the Statement of Interests as set forth in the Brief of Interested Parties in Opposition to the Proposed Initiative, Filed in Case No. SC 05-1564.

STATEMENT OF THE CASE

On August 24, 2005, the Secretary of State forwarded to the Attorney General and to the Financial Impact Estimating Conference (the “Conference”), a petition for a constitutional initiative: “Extending the existing sales tax to non-taxed services where exclusion fails to serve public purpose.” The Attorney General petitioned this Court for an advisory opinion on the initiative petition to determine whether the amendment should be placed on the ballot. (Case No. SC05-1564). That petition is currently pending resolution by this Court.

Pursuant to Section 100.371, Fla. Stat., the Conference gave the public was given an opportunity to express its opinions with regard to the financial impact of the initiative. The Conference forwarded the prepared financial impact statement and financial information statement to the Attorney General pursuant to Article XI, Section 5, Florida Constitution, and Section 100.371(6), Fla. Stat.

On October 11, 2005, the Attorney General petitioned this Court for an advisory opinion as to whether the Conference's financial impact statement complies with Section 100.371, Fla. Stat. This statement is now at issue.

SUMMARY OF THE ARGUMENT

This Court should adopt a standard of review for the financial impact statement similar to that of the ballot title and summary. The financial impact statement should be clear, unambiguous, accurate and informative. It should include where possible a numeric expression of the probable financial impacts in order to fully implement the constitutional mandate to inform the voters of the financial impacts.

In the instant case, the summary is not inaccurate but it fails to fully inform voters of the probable impacts. It fails to include the numeric expression even though the numbers are readily available.

The statement should be remanded for redrafting.

STANDARD FOR REVIEW

The Court has had the opportunity in four instances to opine on the fiscal impact statements associated with initiative petitions. *Advisory Opinion to the Attorney General Re: Authorizes Miami-Dade & Broward County Voters to approve Slot Machines in Pari-Mutuel Facilities*, 882 So. 2d 966 (Fla. 2004); *Advisory*

Opinion to the Attorney General Re: Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Pari-Mutuel Facilities, 880 So. 2d 689 (Fla. 2004); *Advisory Opinion to the Attorney General Re: Public Protection from Repeated Medical Malpractice*, 880 So. 2d 686 (Fla. 2004); *Advisory Opinion to the Atty. General Re: Repeal of High Speed Rail Amendment*, 880 So. 2d 628 (Fla. 2004).

In each instance the Court has imposed a strict constitutional requirement that the financial impact of any amendment must be expressed in a clear and unambiguous financial impact statement. The expression of impact in the statement must be limited to the increase or decrease in revenues or costs to state or local governments. Any range of potential impacts must relate to those impacts, not any ancillary impacts. *Repeal of High Speed Rail*, 880 So. 2d at 629; *Authorizes Slot Machines in Pari-mutuel Facilities*, 880 So. 2d at 690; *Public Protection from Repeated Medical Malpractice*, 880 So. 2d at 687.

The Court also should require that the statement include, whenever possible, a numerically expressed estimate of the probable financial impact so that the voters may cast an intelligent and informed ballot. The Court should adopt a standard analogous to that of the ballot title and summary requirements expressed by this Court in *Smith v. American Airlines, Inc.*, 606 So. 2d 618 (Fla. 1992). There, the

Court held that the title and summary be clear and unambiguous, give the voters sufficient notice of what they are asked to decide, and be both accurate informative, and provide meaningful information. *Smith v. American Airlines*, 606 So. 2d at 620-621, *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798 (Fla. 1998) at 803.

The Court should require no less of the financial impact statement. Utilizing the logic in *Smith v. American Airlines*, this Court should require the financial impact statement state in clear and unambiguous language, the probable financial impacts of the amendment if it were adopted by the electorate.

Section 100.371(6) instructs that “the financial impact estimating conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or cost to state or local governments resulting from the proposed initiative.” The statute provides for “a clear and unambiguous financial impact statement, no more than seventy five words in length . . . Nothing in this subsection prohibits the financial impact estimating conference from setting forth a range of potential impacts in the financial impact statement.”

Fair notification by the financial impact statement is required to allow the voter to make an intelligent choice. Failure to include in the financial impact

statement a numeric estimate of the range of costs or revenues when such information is available in the financial information statement, does not fairly inform the voter. It requires interested persons to seek out information through the Supervisor of Elections, Secretary of State or Office of Economic and Demographic Research web sites. The availability of public information is no substitute for accurate ballot information. *Smith v. American Airlines*, 606 So. 2d at 621.

The Court should require a clear, unbiased statement which gives the numeric financial impact of any initiative amendment. That is what is required by the constitution and implements the intent of the Legislature and the public.

ARGUMENT

THE FINANCIAL IMPACT STATEMENT MUST CONTAIN CLEAR NUMERIC EXPRESSION OF THE PROBABLE IMPACTS

The requirement that a fiscal impact analysis and statement be provided for voters is new. The Florida Legislature first proposed such a requirement by statute in 2002 which was later found unconstitutional. Ch. 2002-390, Laws of Florida (Fla. 2002); *Smith v. Coalition to Reduce Class Size*, 827 So. 2d 959 (Fla. 2002).

The constitutional requirement for financial impact statements was adopted at the 2002 general election and incorporated at Article VI, Section 5(b), Florida Constitution, which provides in pertinent part: “[t]he Legislature shall provide by

general law, prior to the holding of an 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.”

The 2004 Legislature adopted implementing legislation. Section 100.371(6), Fla. Stat., provides for the development and presentation to the voters of a financial impact statement by the Conference. This financial impact statement is closely analogous to the ballot summary required by Section 101.161, Fla. Stat.

The financial impact statement forwarded to this Court for review here provides:

“Although state and local governments potentially receive substantial revenue from non-tax services subject to legislative review, the probable impact of the amendment is dependent upon future action of the legislature and cannot be determined. If the Legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected. If the Legislature fails to exempt one or more services that are currently non-taxed, state and local government revenues will increase.”

(Page 1, Financial, Information Statement attached hereto as Appendix A.)

While not inaccurate, this financial impact statement does not numerically express the probable financial impacts as required. *Cf. Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). This omission precludes the voter from being able to cast a

ballot in an intelligent manner. *Cf. Advisory Opinion to the Attorney General Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994).

The financial information statement does describe in greater detail the projected increase or decrease in revenues or costs. Section 100.371(6)(d)3, Fla. Stat. The initiative financial information statement explains that \$19 billion in exclusions from the sales tax “will become taxable if not reenacted by the legislature”. (Appendix A, Page 5) This number is calculable and it is the best estimate of the outer range of “probable” impacts by the Conference.

As this Court noted when disapproving the predecessor to the petition at issue:

“[T]he proposed amendment operates in a way that could essentially create a tax on services if the Legislature fails to enact specific exclusions for all possible services. We conclude that the voter must be directly informed of such an important consequence, and that this summary fails to do so. Therefore we conclude that the ballot summary is deficient because it does not inform the voter that the amendment can operate in a way that would create such a tax by the passage of the amendment.”

Advisory Opinion to the Attorney General Re: Fairness Initiative, 880 So. 2d 630 (Fla. 2004) at 636.

Similarly, the financial impact statement in the instant case fails to inform the voters that new tax revenues, depending upon action or inaction of the Legislature, could range from \$0 in new revenues to \$19 billion in additional revenues. Such an

important consequence should be disclosed to the voter to meet the test announced in *Smith* that a ballot summary, or in this case, a financial impact statement, be both accurate and informative.

The proposed amendment in this case provides for legislative review of all services currently not subject to sales tax and provides the Legislature may exempt from future taxation, services determined to serve a public purpose. Unless exempted, all services will be subject to sales tax effective January 1, 2009. (Page 2, Appendix A). An informative estimate of the probable financial impact of the proposal is that it will generate additional tax revenues of \$19 billion unless the legislature acts to reduce the amount. The Conference admits the amendment could generate in excess of \$19 billion in new taxes. The Conference should not be permitted to omit this critical information based upon musings over what the legislature may or may not do.

In Advisory Opinion to the Attorney General Re: Authorized Miami-Dade and Broward Voters To Approve Slot Machines in Pari-Mutuel Facilities, 880 So. 2d 689 (Fla. 2004), this Court dealt with a financial impact statement regarding the authorization of slot machines at pari-mutuel facilities. The initiative amendment provided:

“in the next regular legislative session occurring after voter approval of this constitutional amendment, the legislature shall adopt legislation implementing this section...The legislature may tax slot machine revenues, and any such taxes must supplement public education funding statewide.” (Emphasis added).

On its face the slot machine amendment required future legislative action to implement the amendment. Yet the Conference was able to provide an estimate of tax revenues based upon assumptions about a tax rate, the number of machines that would be installed and the amount of gambling that would be conducted. (Financial Impact Information Statement, Miami-Dade and Broward Voters to Approve Slot Machines, attached hereto as Appendix B). Similar objective information can be provided in the case at bar. Clearly the peoples’ intent in the passage of a constitutional amendment and legislative action to implement that intent was to assure that the public would be given meaningful financial information.

In this case, the impact statement can be easily remedied by acknowledging the probable financial impact ranges from \$0 to \$19 billion in additional tax revenues.

CONCLUSION

WHEREFORE the Opponents pray that this Honorable Court will enter its order:

1. Establishing a standard of review for the Financial Impact Statement similar to that of the ballot title and summary;
2. Holding that the financial impact statement must be accurate and informative; a clear, unambiguous and unbiased expression of the probable financial impacts of the amendment; and including a numeric expression of the probable fiscal impact; and
3. Remanding the financial impact statement in this case to the financial impact estimating conference for redrafting and inclusion of the expression of the probable financial impacts in a numerically expressed fashion so that voters are fully informed.

Respectfully submitted on this 10th day of November, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief has been furnished, by United States Mail, postage pre-paid, to CHARLES J. CRIST, JR., Attorney General, The Capital, PL-01, Tallahassee, Florida, 32399, and ROBERT L. NABORS, Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308, on this 10th day of November, 2005.

CERTIFICATE OF COMPLIANCE

I FURTHER CERTIFY that this Brief is presented in 14-point Times New Roman and complies with the font requirements of Rule 9.210.

APPENDIX

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APPENDIX A

Initiative Financial Information Statement
Extending existing sales tax to non-taxed
services where exclusion fails to serve
public purpose

APPENDIX B

Initiative Financial Information Statement
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County Voters to Approve Slot Machines
in Parimutuel Facilities