

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC04-947

ADVISORY OPINION TO THE  
ATTORNEY GENERAL

RE: FAIRNESS INITIATIVE REQUIRING  
LEGISLATIVE DETERMINATION  
THAT SALES TAX EXEMPTIONS AND  
EXCLUSIONS SERVE A PUBLIC  
PURPOSE

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**INITIAL BRIEF AND APPENDIX OF THE SPONSOR  
FLORIDIANS AGAINST INEQUITIES IN RATES**

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## STATEMENT OF THE CASE AND FACTS

Pursuant to the provisions of Article IV, section 10, Florida Constitution and section 16.061, Florida Statutes, the Florida Attorney General has requested an advisory opinion on the validity of the FAIR Amendment proposed through the initiative petition process of Article XI, section 3, Florida Constitution. See App. A.

### Jurisdiction

This Court has jurisdiction pursuant to the provisions of Article V, section 3(b)(10), Florida Constitution.

### The Petitioner

The Constitutional Amendment is proposed by FAIR, standing for "Floridians Against Inequities in Rates," a political action committee organized by three citizens with long experience in public service. Former Senate President John McKay and former Comptroller General Bob Milligan are the Co-Chairs of FAIR and former Senator Jack Latvala is the Treasurer. As reflected in its title, FAIR was organized to present to the people by petition a proposed constitutional amendment to direct the Legislature to perform an open review of exemptions and exclusions to the State sales tax and thus mandate a legislative decision of whether each advances a defined public purpose. Widespread support for the sales tax reform proposed by the FAIR Amendment is documented by the editorial support the initiative has received from major Florida newspapers. See App. B.

Ballot Title, Ballot Summary and Text of Amendment

The ballot title for the proposed amendment provides:

**FAIRNESS INITIATIVE REQUIRING  
LEGISLATIVE DETERMINATION THAT SALES  
TAX EXEMPTIONS AND EXCLUSIONS SERVE A  
PUBLIC PURPOSE**

The Ballot Summary for the proposed amendment provides:

The Legislature shall periodically review sales tax exemptions or excluded services and transactions except: food; prescription drugs; health services; and residential rent, electricity, and heating fuel; and shall continue or create only exemptions or exclusions serving a defined public purpose. Each law shall contain the single subject of a single exemption or exclusion and be approved by three-fifths vote of each legislative house. Exemptions and exclusions not reenacted or adopted by the Legislature are eliminated.

The text for the proposed amendment provides:

Article III of the Florida Constitution is hereby amended to add the following as Section 20:

Legislative review and enactment of exemptions and exclusions from the sales tax.--

(a) **FAIRNESS INITIATIVE.** Except for the current exemptions provided for: food; prescription drugs; health services; and residential rent, electricity, and heating fuel, which secure tax fairness, the legislature shall, prior to July 1, 2007, and prior to the first day of July for each tenth year thereafter, review all exemptions and services or transactions excluded from the sales tax existing on or created subsequent to the effective date of this amendment. The Legislature shall reenact only those exemptions or adopt and continue only those exclusions that advance or serve the public purpose of: encouraging economic development and competitiveness; supporting educational, governmental, literary, scientific, religious, or charitable

initiatives or institutions; or securing tax fairness. All exemptions or exclusions that are not reenacted or adopted and continued by the adoption of a law in conformity with the enactment requirements provided in this section shall be eliminated effective January 1 subsequent to the July 1 deadline established in this section for the review of all exemptions and exclusions. Each law creating or reenacting a sales tax exemption or creating or continuing an exclusion shall require approval by three-fifths vote of the membership of each house of the Legislature, shall contain a single-subject matter of a single exemption or a single exclusion and shall contain a factual determination that each exemption or exclusion advances or serves a public purpose as enumerated in this section.

(b) CONSTRUCTION. For the purpose of this section:

(1) The term sales tax shall mean the tax on sales, use and other transactions levied by the state or authorized to be levied by a local government in chapter 212, Florida Statutes, as of January 1, 2003, except that the term sales tax shall not include the convention development tax, the local option food and beverage tax or the rental car surcharge provided in sections 212.0305, 212.0306, or 212.0606, Florida Statutes, or the taxation of: the sales of tangible personal property purchased for resale or imported, produced, or manufactured in this state for export; sales of real property; sales of intangible personal property; payment of employee salaries and benefits; or transactions subject to the communications services tax imposed in chapter 202, Florida Statutes.

(2) The term exclusion and the phrase a service or transaction excluded from sales tax shall mean a sale or use of tangible personal property or the rendering of services for consideration that is not subject to the sales tax and not specifically exempted on the effective date of this amendment.

(3) To satisfy the enactment limitation of this section that each law shall contain only the single subject-matter of a single exclusion, each law adopting or continuing an exclusion from the sales tax shall include or reference the

sale or use or the rendering of a service by a business, industry or profession with at least the same first four digits in its NAICS code number as described by the North American Classification System code published by the United States Census Bureau, or its successor in function.

Certification By the Secretary of State:  
Attorney General's Request for Advisory Opinion

After the Secretary of State approved the format of the Petition, FAIR began collecting the signatures required by section 15.21, Florida Statutes (2004), beginning the process leading to the Secretary of State's certification.

The Attorney General received the certification from the Secretary of State on May 27, 2004 and, pursuant to Article IV, section 10 and Article V, section 3(b)(10), Florida Constitution, and section 16.061, Florida Statutes (2004), petitioned this court for an advisory opinion. See App. A. The advisory opinion is to ensure compliance of the amendment's text with Article XI, section 3, Florida Constitution, and compliance of the proposed ballot title and summary with section 101.161, Florida Statutes (2004). This brief supports the constitutionality of the Petition.



## SUMMARY OF ARGUMENT

This Court has recognized the sovereign right of the people to amend their Constitution and has been reluctant to interfere with that right. While the standard of review is de novo, the Court accords deference to the initiative process, including proposed amendments. It is only when the proposed amendment is clearly and conclusively defective that the Court will remove it from the ballot.

Point I - The Amendment Satisfies the Single Subject Rule. The amendment must comply with the single subject rule of Article XI, section 3, Florida Constitution.

The FAIR Amendment addresses the single subject of exemptions and exclusions to the State sales tax. The amendment has a logical and natural oneness of purpose of directing the Legislature to review the State sales tax to ensure openness and fairness in the adoption or continuation of any exclusions and exemptions in the State sales tax structure. The amendment does not impact the functions of multiple branches of government nor does it impact multiple provisions of the Florida Constitution. The constitutional appropriation power of the Legislature remains unfettered. The discretion of the Legislature to reduce sales tax rates or appropriate sales tax proceeds as a consequence of the mandated review remains intact. The amendment is straightforward and clear and does not affect any collateral powers of the Legislature.

Point II - The Ballot Title & Summary Meet Applicable Statutory Requirements. Section 101.161(1), Florida Statutes, requires the proposed amendment to have a short

ballot title and summary that inform the voter of the chief purpose of the amendment and that is not misleading.

This statutory requirement is plainly met. The proposition's title and summary contain no more words than are allowed and they inform the voter in clear and unambiguous language that the amendment mandates the Legislature to periodically review sales tax exemptions or excluded services and transactions except: food; prescription drugs; health services; and residential rent, electricity, and heating fuel; and create or continue only those exemptions or exclusions serving a defined public purpose. The voter is further informed that each law creating or reenacting a sales tax exemption shall contain a single subject of a single exemption or exclusion and be approved by three-fifths vote of each legislative house. Exemptions and exclusions not reenacted or adopted by the Legislature are eliminated.

A review of all Florida case law construing the initiative process demonstrates that the proposed Amendment complies with the principles announced by this Court in its review of initiative amendments. The FAIR Amendment satisfies the requirements of the Florida Constitution, the Florida Statutes and rulings of this Court. It should be placed on the ballot as a proposed constitutional amendment.

## ARGUMENT

### I. STANDARD OF REVIEW.

This Court's respect for the right of Floridians to amend their Constitution has led to a general reluctance to interfere with the initiative process. See Weber v. Smathers, 338 So. 2d 819, 821 (Fla. 1976); Advisory Op. to the Att'y Gen. Re: Tax Limitation, 644 So. 2d 486, 489 (Fla. 1994). Specifically, when reviewing a proposed constitutional amendment for the ballot, this Court has noted that each proposition is to be reviewed with "extreme care, caution and restraint." Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). "Such amendments are reviewed under a forgiving standard and will be submitted to the voters if at all possible." Advisory Op. to the Att'y Gen. Re: Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002). Still, as there is no factual inquiry, and as the analysis requires only the application of law, the standard of review is de novo. See Fine v. Firestone, 448 So. 2d 984, 987 (Fla. 1984). However, the Court's review is deferential due to the great respect afforded to the initiative process. See Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956).

A Petition for a proposed amendment will be upheld by this Court unless it is "clearly and conclusively defective." Weber, 338 So. at 822. The Court lacks the authority to pass on the merits and wisdom of the proposed amendment, see Tax Limitations, 644 So.2d at 489; nor may the Court be concerned with the draftsmanship quality, Weber, 338 So. 2d at 822; or even the constitutionality of the proposal, In re Advisory Op. to the Att'y Gen.--Restricts Laws Related to Discrimination, 632 So. 2d

1018, 1019 fn.1 (Fla. 1994). Rather, the Court's review is limited to determining whether the Petition violates the single subject requirement of Article XI, section 3, Florida Constitution, and whether the ballot title and summary violate the clarity requirement of section 101.161, Florida Statutes (2004). The proposed amendment at issue clearly satisfies both criteria, and it should be submitted to the people.

## **II. THE PROPOSED AMENDMENT COMPLIES WITH THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION.**

The limitation on the people's right to amend their Constitution is embodied in the single subject rule of Article XI, section 3, Florida Constitution. The only type of initiative amendment that is exempt from the single subject rule is the amendment which limits the government's power to raise revenue. *Id.* This rule requires the amendment to embrace only a single subject and matter. *Id.* Limiting proposed constitutional amendments to those that contain a single subject has been termed a "rule of restraint," *Fine v. Firestone*, 448 So. 2d at 988, requiring the subject encompassed by the amendment to be singular in function, not location. *Tax Limitations*, 644 So. 2d at 490.

There are three primary justifications for the single subject rule. The first justification is to prevent "logrolling." *Advisory Op. to the Att'y Gen. Re: Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). Logrolling occurs when a single initiative embraces several separate issues, some of which may be attractive to voters, and some of which may be disfavored. *Id.* The consequence of this practice is that

voters must offer their "approval" of disfavored provisions in order to secure passage of an issue they favor. Id. The second justification for the rule is that it is more likely to prevent any single constitutional amendment from substantially altering or performing the functions of multiple aspects of government. Advisory Op. to the Att'y Gen. Re: Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367, 369 (Fla. 2000). The third justification is that it is "designed to insulate Florida's organic law from precipitous and cataclysmic change." Save Our Everglades, 636 So. 2d at 1339.

The court utilizes a "oneness of purpose" standard in applying the single subject rule. Fine v. Firestone, 448 So. 2d at 990. This test is satisfied when the amendment concerns a single subject, Advisory Op. to the Att'y Gen. Re: Stop Early Release of Prisoners, 661 So. 2d 1204, 1206 (Fla. 1995); when the amendment does not substantially affect multiple provisions of the Constitution, Weber, 338 So. 2d at 822; and when the amendment does not substantially alter or perform the functions of multiple branches of government. See Advisory Op. to the Att'y Gen. Re: Funding For Criminal Justice, 639 So. 2d 972, 973 (Fla. 1994); Monorail, 769 So. 2d at 369-70.

The FAIR Amendment contains the single subject of exemptions and exclusions to the State sales tax. The amendment directs the Legislature to periodically review all services or transactions exempted from the State sales tax except those expressly excluded from such review, and to adopt or continue only those that advance or serve one of the public purposes established in the amendment. Each law creating or

reenacting a sales tax exemption or creating or continuing an exclusion is required to be approved by three-fifths vote of the membership of each legislative house, contain a single subject matter of a single exemption or exclusion and contain a factual determination of the public purpose advanced. The amendment has the logical and natural oneness of purpose of directing the Legislature to review the State sales tax to ensure openness and fairness in the adoption or continuation of exclusions and exemptions in the State sales tax structure. The amendment does not impact the functions of multiple branches of government nor does it impact multiple provisions of the Florida Constitution. The constitutional appropriation power of the Legislature remains unfettered. The discretion of the Legislature to reduce sales tax rates or appropriate sales tax proceeds as a consequence of the mandated review remains intact. The amendment is straightforward and clear and does not affect any collateral powers of the Legislature.

Subsection (b) of the amendment clarifies the legislative directive embodied within the amendment and clarifies any ambiguity that might otherwise exist.

Subsection (b)(1) defines the term "sales tax" by reference to the existing provisions of Chapter 212, Florida Statutes, with certain specified exceptions. Such reference to existing general law taxing provisions has constitutional precedent. See Art. XII, § 9(a)(2), Fla. Const. (incorporating portions of Article XII, section 19 of the 1885 Florida Constitution which defines "gross receipts tax" as levied pursuant to Chapter 203, Florida Statutes).

Subsection (b)(2) of the amendment provides a definition of the term "exclusion" and the phrase "a service or transaction excluded from the sales tax."

Finally, to provide guidance to the Legislature in complying with the single-subject requirement of the amendment, subsection (b)(3) of the amendment makes reference to classifications of businesses, industries and professions established by the North American Classification System code provided by the United States Census Bureau, or its successor in function. See App. C (providing business, industry or profession groupings by the first four digits of the applicable NAICS code numbers).

The FAIR Amendment complies with the single subject requirement of Article XI in a manner similar to Stop Early Release of Prisoners, which addressed the single subject of limiting sentence reduction methods, 661 So. 2d at 1206; and Monorail, which only addressed whether the government should provide a high speed transit system throughout Florida, 769 So. 2d at 369. The Fairness Initiative addresses the single subject of requiring sales tax exemptions to serve a public purpose and thus does not constitute logrolling. See also Advisory Op. to the Att'y Gen. Re: Ltd. Political Terms in Certain Elected Offices, 592 So. 2d 225, 227 (Fla. 1991) (addressing the subject of limiting the number of consecutive terms that certain elected officials may serve); Advisory Op. to the Att'y Gen. Re: Ltd. Casinos, 644 So. 2d 71, 73 (Fla. 1994) (addressing only the authorization of privately-owned casinos in Florida).

The FAIR Amendment also meets the single subject rule in that it does not substantially affect multiple provisions of the Constitution. Section 20 will be added to Article III and it will simply provide a mandate to the Legislature to review sales tax

exemptions and exclusions and to direct a process for their continuation or adoption to ensure fairness. There are no substantial incidental effects on other provisions of the Constitution. The addition of a single section to Article III, which does not adversely affect other constitutional provisions, conforms with the case law interpretation of the single subject requirement.

Finally, the Fairness Initiative does not substantially alter or perform the functions of multiple branches of government since it merely directs the legislative branch to periodically review the exemptions and exclusions to the State sales tax and provide restrictions on their adoption and continuation.

### **III. THE BALLOT TITLE AND SUMMARY PROVIDE FAIR NOTICE OF THE AMENDMENT'S CONTENT AND UNAMBIGUOUSLY DISCLOSE THE CHIEF PURPOSE OF THE AMENDMENT.**

Section 101.161(1), Florida Statutes (2004), provides that whenever a proposed constitutional amendment is submitted to the vote of the people, a summary of the amendment shall appear on the ballot, which shall not exceed seventy-five words and must set forth the chief purpose of the amendment. It also requires a title for the ballot of fifteen words or less that represents the name by which the amendment is commonly known. *Id.* The title and summary must be drafted "so the voter will have fair notice of the content of the proposed amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." Stop Early Release of Prisoners, 661 So. 2d at 1206. An informed vote does not equate to providing the



voter with every potential detail or ramification of the proposal. Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986). However, if a material fact is omitted so that the primary purpose of the amendment is unclear, ambiguous, or misleading, the proposal will be struck for failure to comply with section 101.161(1), Florida Statutes. See Advisory Op. to the Att'y Gen. Re: Term Limits Pledge, 718 So. 2d 798, 803 (Fla. 1998).

The ballot summary provides fair notice of the content and chief purpose of the amendment and is not misleading. An intelligent vote can be cast on the ballot question since the voter is informed in clear and unambiguous language that the amendment mandates the Legislature to: (1) periodically review sales tax exemptions or excluded services and transactions except those provided for: food; prescription drugs; health services; and residential rent, electricity, and heating fuel; and (2) create or continue only those exemptions or exclusions serving a defined public purpose. The voter is further informed that: (1) each law shall contain the single subject of a single exemption or exclusion and be approved by three-fifths vote of each legislative house; and (2) exemptions and exclusions not reenacted or adopted by the Legislature are eliminated.

This Court has removed proposals from the ballot for violating this statutory requirement when the summary failed to address the true scope of the amendment, Term Limits Pledge, 718 So. 2d at 804; when the proposal was deceptive, and "fly[ing] under false colors," Askew, 421 So. 2d at 156; when the proposal is misleading and appealing to voters' emotional vulnerabilities, Save Our Everglades, 636

So. 2d at 1341; and when the summary failed to define certain terms necessary for an informed vote, Advisory Op. to the Att'y Gen. Re: Amendment to Bar Gov't From Treating People Differently Based on Race in Public Educ., 778 So. 2d 888, 897 (Fla. 2000).

The current Petition does not violate any of these principles. The title of this Petition is "Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose." The title does not exceed fifteen words, and it provides a common reference for the proposed amendment.

The ballot summary also falls within the word limitation and explains the chief purpose of the amendment, accurately reflecting the text of the proposed amendment. There are no material omissions from the ballot summary which prevent a voter from casting an informed vote. In addition, there are no undefined words that would make the summary unclear or ambiguous. Every vital aspect of the amendment is adequately represented in the ballot summary. It satisfies the governing legal requirement of section 101.161(1), Florida Statutes (2004). The Attorney General does not challenge this point. See App. A.

The ballot title and summary inform the voter of the amendment's primary purpose, which is to direct the Legislature to review the State sales tax to ensure openness and fairness in the adoption of exclusions and exemptions in the State sales tax structure. To serve that end, the amendment provides for a periodic review of all tax exemptions except for those that fall within certain designated categories, which generally relate to basic needs for sustenance (e.g., food and health services). In order

for the Legislature to continue to authorize exemptions or exclusions from the sales tax, the Legislature must find that the exemption or exclusion serves a delineated purpose, which will ensure fairness in our tax system. As the title and summary inform the voter of the chief purpose and scope of the amendment, and are not misleading, the Court should approve the ballot title and summary.

## CONCLUSION

It is submitted that the Petition fully meets the requirements of Article XI, section 3, Constitution of Florida, and section 101.161, Florida Statutes, and qualifies for submission to the electorate when the requisite signatures are collected.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and accurate copy of the foregoing brief and appendix has been furnished by United States Certified Mail with adequate postage to the Office of the Attorney General, The Capitol, Tallahassee, FL 32399.

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## **CERTIFICATE OF FONT**

**I HEREBY CERTIFY** that this brief is presented in Times New Roman font, 14 point type, a font that is proportionately spaced as required by the Florida Rules of Appellate Procedure.

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