IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 05-1564

ADVISORY OPINION TO THE ATTORNEY GENERAL

RE: EXTENDING EXISTING SALES TAX TO NON-TAXED SERVICES WHERE EXCLUSION FAILS TO SERVE PUBLIC PURPOSE

ANSWER 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 PROPOSED INITIATIVE

On Petition for a Written Opinion of the Justices
As to the Validity of an Initiative Petition

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SUMMARY OF THE ARGUMENT

In their initial brief, the proponents argue that the Court should show great deference to their initiative entitled "Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose" [hereinafter "Services Tax Amendment"]. In support of this assertion, they cite to a case that involved not an initiative petition, but an amendment proposed by the Florida Legislature. Greater deference is due a proposal of the Florida Legislature because of separation of powers concerns and because of the "filtering legislative process" typically undertaken before a legislative proposal gets to the ballot. While a citizen-proposed initiative will not be invalidated unless it is "clearly and conclusively defective," the Court also has enforced "strict compliance" with the single-subject rule, and it should do so in this case.

The two constitutional tests applied by the Court in an initiative validation proceeding—the single-subject rule and the ballot summary requirement—work together to ensure that both voter and judge can perceive the limits of the proposed change. Thus the tests should be applied to ensure that an initiative would not precipitate major changes without notice or warning to the people.

The Services Tax Amendment fails both tests for a multitude of reasons set forth in detail in our Initial Brief. Not the least of these flaws is the fact that it encompasses two of the three disparate subjects expressly recognized by this Court

when the proponents advanced a similar measure for the 2004 ballot. Other significant material defects also support removal of the petition from the ballot, including one defect not explained in our Initial Brief. That defect arises from the suggestion in the text that the initiative limits the Legislature's power to alter the sales tax rates that are existing on January 1, 2009. Because the Services Tax Amendment is clearly and conclusively defective, it should be invalidated and removed from further circulation.

ARGUMENT

I. The Standard of Review

Citing *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956), the proponents argue that the Court should show deference to their proposed Services Tax Amendment because of the Court's "great respect afforded to the initiative process." Initial Brief and Appendix of the Sponsor Floridians Against Inequities in Rates, at 9 [hereinafter Sponsor's Initial Brief].

Gray v. Golden does not require the degree of judicial deference for an initiative suggested by the proponents. There, the Court ruled on a constitutional amendment proposed by the Legislature. It did so 12 years prior to the existence of the initiative process as adopted in the 1968 Constitution, so this case cannot stand for the proposition ascribed to it by the proponents. Moreover, Justice Terrell justified the Court's restraint there with this reasoning:

> … The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval. …

Gray, 89 So. 2d at 790. No such claim can be made here.

The judicial deference exhibited in *Gray v. Golden* and similar cases under the 1885 and 1968 Constitutions can be attributed in part to the separation-of-powers doctrine. *See Armstrong v. Harris,* 773 So. 2d 7, 14 (Fla. 2000). By contrast, the Court's more recent jurisprudence shows that initiatives are subjected to searching scrutiny – as they should be – precisely because there is no "filtering legislative process" before an initiative goes on the ballot. *Fine v. Firestone,* 448 So. 2d 984, 988 (Fla. 1984).

It is true that in 1976, relying upon an earlier decision in which the Court had rejected an attempt to strike from the ballot a constitutional amendment proposed by the Legislature, the Court adopted the legal standard which requires a citizen-proposed initiative to be "clearly and conclusively defective" before it will be judicially invalidated. *Weber v. Smathers,* 338 So. 2d 819, 821 (Fla. 1976) (citing *Goldner v. Adams,* 167 So. 2d 575, 575 (Fla. 1964)).

This Court has applied that standard ever since. *E.g., Advisory Op. to the Att'y Gen. re: Fairness Initiative Requiring Legis. Determination that Sales Tax Exemptions and Exclusions Serve a Pub. Purpose,* 880 So. 2d 630 (Fla. 2004). At the same time, the Court has not abandoned its pronouncement that it will enforce "strict compliance" with the single-subject rule, *Fine,* 448 So. 2d at 989, and it should not do so now.

The Interested Parties respectfully submit that the two constitutional tests applied by this Court in a validation proceeding are more than complementary. The public is protected by both the single-subject requirement for an initiative to be "sufficiently complete within itself," *Fine,* 448 So. 2d at 990 (quoting *Weber,* 338 So. 2d at 822), and the necessity for the proponents to present a concise and readable ballot summary that gives "voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots." *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 620 (Fla. 1992). These tests are intended to work together as a healthy brake on the otherwise ungoverned initiative process. They are two sides of the same coin.

When these limiting principles are considered in conjunction with one another, it may be that some potential constitutional changes are not amenable to the initiative process. After all, not every conceivable change can be set forth in all its material respects in appropriate constitutional language and then be summarized adequately for the voter.[1]

This prospect should not be troubling. In *Adams v. Gunter,* 238 So. 2d 824, 831 (Fla. 1970) (addressing Article XI, section 3 as adopted in 1968), the Court

[1] In some cases the Court's single-subject analysis has reflected consideration of both the limitations on subject matter prescribed by Article XI, section 3 and the separate requirement for full and fair disclosure to the voters of a proposed change. *E.g., Advisory Op. to the Att'y Gen. re Tax Limitation,* 644 So. 2d 486, 493-94 (Fla. 1994) (addressing "Voter Approval of New Taxes" amendment).

observed that there is a means by which the people may bring about constitutional change without reliance on the Legislature or the initiative process, and that is by a constitutional convention pursuant to Article XI, section 4. The Court specifically identified this alternative as the preferred means for proposing more extensive changes which the Legislature declines to put on the ballot; the Court opined that the initiative process was only intended for a more contained measure that is "complete within itself." *Adams,* 238 So. 2d at 831.

Justice Kogan echoed the Court's analysis in *Adams v. Gunter* when he discussed the proper scope of an initiative in part by distinguishing between the initiative process and the broader constitutional convention process. *In re Advisory Op. to the Att'y Gen. – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1022-23 & n. 6 (Fla. 1994) (Kogan, J., concurring). To prevent logrolling, he also suggested that an initiative should be subjected to a severability analysis to determine if the measure contains "at least two complete and workable proposals" about which voters might disagree. *Advisory Op. to the Att'y Gen. – Limited Political Terms in Certain Elective Offices,* 592 So. 2d 225, 231 n. 5 (Fla. 1991) (Kogan, J., concurring and dissenting). If it did, he concluded the measure violated the single-subject requirement.

Justice Shaw alluded to the limited scope of permissible constitutional change under the initiative process in his concurring opinion in *Fine,* 448 So. 2d at

996-99. His formulation of the single-subject rule reflects the linkage between the single-subject requirement and the mandate that the ballot summary clearly inform the voters of the reach of the proposed change. Justice Shaw wrote:

> I see the one-subject limitation on initiative petitions as serving two purposes:
>
> 1. Ensuring that initiatives are sufficiently clear so that the reader, whether layman or judge, can understand what it purports to do and perceive its limits.
>
> 2. Ensuring that there is a logical and natural unity of purpose of the initiative so that a vote for or against the initiative is an unequivocal expression of approval or disapproval of the entire initiative.

Fine, 448 So. 2d at 998 (emphasis added*).*

While the language to be read by a judge is the text of the amendment, the language to be read by the voter is the ballot summary. Thus, the voter must be able to perceive the limits of the proposal based not upon the text but upon that ballot summary. If the reach of the proposal in the text cannot adequately be described in the ballot summary, the voter cannot cast "an unequivocal expression of approval or disapproval for the entire change." *Id.* Likewise, if the proposal in the text is such that a judge cannot perceive its limits, it would be impossible adequately to describe those limits to a voter in the ballot summary.

These very concerns motivated the Court when it applied the original text of Article XI, section 3 in *Adams v. Gunter.* There, even in the absence of an express single-subject requirement, the Court's reasoning reflected concerns about

logrolling. *Adams,* 238 So. 2d at 831 (quoting *McFadden v. Jordan,* 32 Cal. 2d 330, 196 P. 2d 787, 789 (Cal. 1948)). In his concurrence, Justice Thornal noted that the initiative would bring about major changes "without notice or warning in the proposal which is being acted upon." *Adams,* 238 So. 2d at 833 (Thornal, J., concurring). He also acknowledged that, in initiative cases, there would be "an idealistic pronouncement 'to let the people decide,'" *id.,* at 832, but he concluded that the Court should instead exercise its judicial powers "when the responsibility is clearly ours under the law." *Id*. This is such a case.

Despite the textual change to Article XI, section 3 in 1972, perhaps we have not traveled so far from this Court's teachings in *Adams v. Gunter*.

II. & III. THE SERVICES TAX AMENDMENT DOES NOT COMPLY WITH THE SINGLE-SUBJECT REQUIREMENT AND DOES NOT PROVIDE FULL AND FAIR NOTICE TO VOTERS.

The Sponsor's Initial Brief concludes that the Services Tax Amendment is fully compliant. It does so without any analysis to illuminate the underlying issues for the Court. Thus, the Interested Parties have little to "answer" and must instead simply point again to the defects analyzed in great detail in our initial brief. However, anticipating arguments likely to be advanced in the Sponsor's Answer Brief, the Interested Parties respectfully encourage the Court to dismiss any suggestion that the proponents somehow deserve more deference on this their third attempt, or that the flaws identified in our initial brief provide an insufficient basis to invalidate the Services Tax Amendment.

To the contrary, the Services Tax Amendment is marred by the same fault which this Court described in its ruling on proponents' last effort. *Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legis. Determination that Sales Tax Exemptions and Exclusions Serve a Pub. Purpose,* 880 So. 2d 630 (Fla. 2004). The Court held that their 2004 proposal "contained three disparate subjects [including]. . . the creation of a sales tax on services that currently does not exist; and [ ] limitations on the Legislature's ability to create or continue exemptions and exclusions from the sales tax." *Id.* at 634.

The cosmetic changes made to the Services Tax Amendment have not cured this fatal flaw. It still creates a sales tax on services that currently does not exist, and imposes new limitations on the Legislature's ability to create or continue exclusions from the sales tax. This alone requires the Court to strike the Services Tax Amendment from the ballot.

The additional, significant flaws described in our initial brief all are material defects that demonstrate further that the Services Tax Amendment is clearly and conclusively defective. These include:

- Substantially altering the powers of the Legislative, Executive and Judicial branches;
- Failing to tell the voters about the lack of a corresponding use tax;
- Failing to tell the voters about the change in the Governor's role in lawmaking;
- Failing to tell the voters which branches of government will write the tax law;
- Failing to tell the voters that some services already taxed may be taxed again; and
- Misleading the voters regarding the treatment of employee salaries and benefits.

The proponents made one argument in their initial brief which we did not address earlier, and which deserves an answer. They inadvertently point out another way in which the Services Tax Amendment violates the single-subject requirement when they assert that this initiative would not disturb the "discretion of the Legislature to reduce sales tax rates[.]" Sponsor's Initial Brief, at 13.

In fact, the Services Tax Amendment contains no such protection in the operative language which would create this constitutional tax. What the proposed constitutional text provides in subsection (a) is as follows: "Except for the payment of employee salaries and benefits, all services that are not exempted by the legislature [prior to July 1, 2008] shall be subject to the existing sales tax effective January 1, 2009." (emphasis added).

At most, this proposed constitutional text would lock-in the then-existing general sales tax rate on January 1, 2009, and thus limit the Legislature's discretion when considering future fiscal issues. If so, it also would lock-in the then-existing sales tax rates adopted by local governments under a variety of local option add-ons for the general sales tax. *See, e.g.*, §§ 212.054, 212.055, 212.0305 & 212.0306, Fla. Stat. (2005). If this portion of subsection (a) is intended to cement the then-existing sales tax rates into the Constitution, then the proponents have failed to propound a ballot summary which would give "the voter fair notice of the decision he must make." *Askew v. Firestone,* 421 So. 2d 151, 155 (Fla. 1982).

On the other hand, this proposed constitutional text is at least ambiguous concerning sales tax rates.[2] In that event, the Court almost certainly would be asked at a later date to engage in judicial construction of the measure to determine the scope of the Legislature's powers, and those of Florida's local governments, when it comes to sales tax rates. If so, then it is impossible to read this initiative and "perceive its limits." *Advisory Op. to the Att'y Gen. re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 522, 529 (Fla. 2004) (Bell, J., concurring)(quoting *Fine*, 448 So. 2d at 998 (Shaw, J., concurring)). In either event, the Services Tax Amendment must fail for this additional violation of the single-subject requirement of Article XI, section 3.

For these and other reasons, the Services Tax Amendment violates the single-subject requirement of Article XI, section 3 and must be invalidated.

[2] The operative words in subsection (a) also raise the issue of whether they are intended to affect the sales tax rate applied to goods, in addition to the rate applied to services. Further, the carefully chosen words in the proponents' initial brief raise the issue as to whether the Legislature and local governments would have the discretion to increase the sales tax rate under this measure.

CONCLUSION

For the reasons of law and policy set forth above and in their initial brief, the Interested Parties respectfully request that the Justices render a written opinion which determines that the Services Tax Amendment:

(a) Violates the single-subject requirement of Article XI, section 3;

(b) Contains a ballot summary which is clearly and conclusively defective under the standards set forth in Article XI, section 5, Fla. Const., and section 101.161(1), Florida Statutes; and

(c) Is therefore invalid and unsuitable for further circulation as a proposed constitutional amendment.

Respectfully submitted on this 12th day of October, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this answer brief was provided by United States mail, postage pre-paid, to: CHARLES J. CRIST, JR., Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399, and ROBERT L. NABORS, Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308, on this 12th day of October, 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.

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Attorney