

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-1564

ADVISORY OPINION TO THE
ATTORNEY GENERAL

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

**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 amendment extending existing sales tax to non-taxed services where exclusion fails to serve public purpose proposed through the initiative petition process of Article XI, section 3, Florida Constitution. See App. A.

Jurisdiction

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

The Petitioner

The proposed constitutional amendment in the Initiative Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose is proposed by Floridians Against Inequities in Rates ("FAIR"), a political action committee organized by three citizens with long experience in public service. Former Senate President John McKay, former Comptroller General Bob Milligan and former Attorney General Bob Butterworth are the joint chairs of FAIR. As reflected in its title, FAIR was organized to present to the people by petition three proposed constitutional amendments directing the Legislature to perform an open review of exemptions and exclusions to the sales tax, mandating a legislative decision on whether each exemption or exclusion advances a public purpose and directing the manner by which sales tax exemptions are granted.

Ballot Title, Ballot Summary and Text of Amendment

The ballot title for the proposed amendment provides:

Extending existing sales tax to non-taxed services where exclusion fails to serve public purpose

The ballot summary for the proposed amendment provides:

Except for the payment of employee salaries and benefits, all non-taxed services provided for compensation shall be reviewed by the Legislature to determine whether the exclusion of each service from taxation serves a public purpose. Upon completion of such review, services currently not taxed and which are not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009.

The text for the proposed amendment provides:

Article III of the Florida Constitution is hereby amended to add the following as Section 22:

Extension of sales tax to non-taxed services.--

(a) The legislature shall, prior to July 1, 2008, review each service rendered for compensation that is not taxed under the existing sales tax authorized in Chapter 212, Florida Statutes, and shall exempt from future taxation only those services whose exemption is determined to advance or serve a public purpose. Except for the payment of employee salaries and benefits, all services that are not exempted by the legislature shall be subject to the existing sales tax effective January 1, 2009.

(b) To accomplish the public purpose review of each service that is mandated in this section, a single service shall be that rendered 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 Industry Classification System code published by the United States Census Bureau, or its successor in function.

The constitutional amendment proposed in the Initiative Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to Serve Public Purpose is one of three amendments crafted to present to the people three proposed constitutional amendments directing the Legislature to perform an open review of exemptions and exclusions to the sales tax, mandating a legislative decision on whether each exemption or exclusion advances a public purpose and directing the manner by which sales tax exemptions are granted. Such proposed amendments are presented to the public as separate amendments

to comply with the reasoning provided by the Court concerning a constitutional amendment previously prepared by FAIR in Advisory Opinion to the Attorney General re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630 (Fla. 2004) (attached hereto as Appendix B).

In that decision, the Court held that the amendment then proposed by FAIR violated the single-subject rule by containing the following three disparate subjects as follows:

Although FAIR argues that the proposed amendment deals with the single-subject of sales tax, in reality, the initiative before the Court for review contains three disparate subjects: (1) a scheme for the Legislature to review existing exemptions to the sales tax under chapter 212; (2) the creation of a sales tax on services that currently does not exist; and (3) limitations on the Legislature's ability to create or continue exemptions and exclusions from the sales tax.

Fairness Initiative, 880 So. 2d at 634. See also App. B.

The Court in Fairness Initiative additionally held that the ballot summary for the amendment reviewed was deficient because it did not inform the voter that the amendment can operate in a way that it will create a tax on services if adopted:

Nevertheless, as noted above, the 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 a 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

880 So. 2d at 636.

The constitutional amendment currently before the Court in the initiative *Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to Serve Public Purpose* has independent constitutional viability and advances the objectives of FAIR even if the other two amendments proposed by FAIR are rejected by the electors. See App. C (ballot title, ballot summary and ballot text of the proposed amendment in the Initiative *Directing Manner By Which Sales Tax Exemptions are Granted by the Legislature*). See App. D (ballot title, ballot summary and ballot text of the proposed amendment in the Initiative *Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose*).

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 August 24, 2005, and, pursuant to Article IV, section 10 and Article V, section 3(b)(10), Florida Constitution, and section 16.061, Florida Statutes (2004), petitioned the 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). The Court issued an interlocutory order on September 2, 2005, containing a briefing schedule. This brief supports the constitutionality of the Petition.

SUMMARY OF ARGUMENT

The 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 constitutional amendment proposed by FAIR addresses the single subject of services excluded from the sales tax. The proposed amendment has a logical and natural oneness of purpose of directing the Legislature to review each service rendered for compensation that is not taxed under the existing sales tax and to exempt from future taxation only those services whose exemption is determined by the Legislature to advance or serve a public purpose. 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 (2004), 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.

The proposed amendment cures the deficiency found in the summary reviewed by the Court in Advisory Op. to the Att'y Gen. re: Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Pub. Purpose, 880 So. 2d 630 (Fla. 2004), see also Appendix B, by directing and clearly informing a voter that failure of the Legislature to enact a specific exemption for a service not currently taxed would create a tax on such service on January 1, 2009.

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 review all non-taxed services and exempt from future taxation only those services whose exemption is determined to advance or serve a public purpose.

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

ARGUMENT

I. STANDARD OF REVIEW.

The 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); League of Women Voters v. Smith (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, the 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). "[S]uch 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 the Court unless it is "clearly and conclusively defective." Weber, 338 So. 2d at 822. The Court lacks the authority to pass on the merits and wisdom of the proposed amendment, see League of Women Voters, 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 n.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 amendments that are exempt from the single subject rule are those amendments limiting 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 984, 988 (Fla. 1984), requiring the subject encompassed by the amendment to be singular in function, not location. League of Women Voters v. Smith (Advisory Op. to the Att'y Gen. re Tax Limitation), 644 So. 2d 486, 490 (Fla. 1994).

There are three primary justifications for the single subject rule. The first justification is to prevent "logrolling." In re Advisory Op. to the Att'y Gen.--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 to secure passage of an issue they favor. Id. (quoting Adams v. Gunter, 238 So. 2d 824, 831 (Fla. 1970)). 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, 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 v. Smathers, 338 So. 2d 819, 822 (Fla. 1976); and when the amendment does not "substantially alter or perform the functions of multiple branches of government." Monorail, 769 So. 2d at 369-70. See also Advisory Op. to the Att'y Gen. re Funding For Criminal Justice, 639 So. 2d 972, 973 (Fla. 1994). The Court has determined that the creation of a sales tax on services that currently does not

exist is a disparate subject. Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630, 634 (Fla. 2004).

The proposed amendment has the logical and oneness of purpose of directing the Legislature to review all non-taxed services and exempt from future taxation under the existing sales tax only those services whose exemption is determined to advance or serve a public purpose. All services that are not exempted by the Legislature are subject to the sales tax authorized in Chapter 212, Florida Statutes, effective January 1, 2009.

While exemptions to the sales tax are codified in law, most services are not currently taxed.¹ The proposed amendment is intended to gather for legislative review each service rendered for compensation that is not taxed under the existing sales tax authorized in Chapter 212, Florida Statutes.²

Except for the payment of employee salaries and benefits which is expressly excluded from the mandated legislative review, the Legislature is directed to review, prior to July 1, 2008, each non-taxed service and to exclude from taxation under the existing

¹See Fairness Initiative, 880 So. 2d at 634 n. 3.

²Such 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).

sales tax only those services whose exemption is determined to advance or serve a public purpose. The legislative determination of public purpose is unfettered and unrestricted in the proposal. The defined criteria that limited legislative discretion in determining public purpose in the proposed amendment reviewed by the Court in Advisory Op. to the Attorney General re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630 (Fla. 2004), has been eliminated in the proposed amendment before the Court.³ See also App. B.

Non-taxed services that are not exempted by the Legislature shall be subject to the sales tax on January 1, 2009.

The constitutional amendment has the logical and oneness of purpose of directing the Legislature to review those services not currently subject to the sales tax to ensure fairness in the continuation of the exclusion of such services from the 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

³The prior proposal reviewed in Fairness Initiative had restricted the term "public purpose" to "encouraging economic development and competitiveness; supporting educational, governmental, literary, scientific, religious, or charitable initiatives or institutions; or securing tax fairness." 880 So. 2d at 631.

the mandated review remains intact. The amendment is straightforward and clear and does not affect any collateral powers of the Legislature.

In reviewing the prior proposal in Fairness Initiative, the Court recognized that, in complying with the "disparate" subject that is now embodied in the proposed amendment,

[t]he Legislature would ostensibly have to anticipate and identify what services and transactions are currently excluded from the sales tax. If the Legislature failed to anticipate or identify a particular transaction or service and specifically exclude it from being taxed, the result would appear to be a tax on such service created by the Legislature's inaction. Hence, we must agree with the assertion that, by its operation, the proposed amendment would create a sales tax on services that currently does not exist.

880 So. 2d at 634-35.

To accomplish the public purpose review by the Legislature of each service that is mandated in the proposal, subsection (b) of the proposed amendment directs that a single service shall be that rendered by a business, industry or profession with at least the same first four digits in its North American Industry Classification System ("NAICS") code published by the United States Census Bureau, or its successor in function. See App. E (providing business, industry or professional grouping by the first four digits of the applicable NAICS code numbers).

The proposed amendment complies with the single subject requirement of Article XI, section 3, Florida Constitution, 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 369-71. The proposed amendment 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 proposed amendment also meets the single subject rule in that it does not substantially affect multiple provisions of the Constitution. Section 22 will be added to Article III and it will simply provide a mandate to the Legislature to review non-taxed services to determine whether the exclusion of each service from taxation serves a public purpose. 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 proposed amendment does not substantially alter or perform the functions of multiple branches of government since it merely directs the legislative branch

to review all non-taxed services and exempt from future taxation only those whose exemption is determined to advance or serve a public purpose.

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." Advisory Op. to the Att'y Gen. re Stop Early Release of Prisoners, 661 So. 2d 1204, 1206 (Fla. 1995). 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) (citing Miami Dolphins v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981)). 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 for the proposed amendment provides fair notice of the content and chief purpose of the amendment and is not misleading. The Court in

Advisory Op. to the Attorney General re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Public Purpose, 880 So. 2d 630 (Fla. 2004), see also Appendix B, found the summary reviewed in the prior proposal to be deficient for the "disparate" subject that directed the Legislature to review those services excluded from sales taxation with the following observation:

Nevertheless, as noted above, the 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 a 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.

880 So. 2d at 636.

The proposed amendment before the Court directly and clearly addresses these deficiencies noted by the Court in the summary of the prior proposal reviewed in Fairness Initiative.

First, the ballot title of the petition form which will appear on the ballot question identifies the services to which the sales tax is to be extended if the Legislature fails to determine that their exclusion fails to provide a public service as "non-taxed services."

Second, the ballot summary on the petition form which will appear on the ballot clearly describes the services to be reviewed by the Legislature to determine whether their

exclusion from taxation serves a public purpose as "non-taxed services." The ballot summary then concludes as follows:

Upon completion of such review, services currently not taxed and which are not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009.

Third, the ballot summary clearly states that payment of employee salaries and benefits are excluded from the legislative review directed by the proposed amendment.

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 review each service rendered for compensation that is not taxed under the existing sales tax and to exempt from future taxation only those services whose exemption is determined by the Legislature to serve a public purpose.

The 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 v. Firestone, 421 So. 2d 151, 156 (Fla. 1982); when the proposal is misleading and appealing to voters' emotional vulnerabilities, In re Advisory Op. to the Att'y Gen.--Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994); 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 Pub. Educ., 778 So. 2d 888, 897 (Fla. 2000).

The proposed amendment does not violate any of these principles. The title of the amendment is "Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve 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. 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 review each service rendered for compensation that is not taxed under the existing sales tax and to exempt from future taxation only those services whose exemption is determined by the Legislature to serve a public purpose. 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

There is no reason for the Court to place a hand of restraint on the proposed amendment. The citizens of Florida retain the inherent political power to direct the Legislature to review those services rendered for compensation that are not subject to the existing sales tax to ensure that their exclusion serves a public purpose. Any cataclysmic change by the approval by the people of the proposed amendment would not be to the Florida Constitution but would be to focus legislative labor on this essential element of sales tax reform. The direction to the Legislature by the people in the proposed amendment if adopted is precisely the exercise of political power that is reserved to the people in Article XI, section 3, Florida Constitution.

It is submitted that the Petition fully meets the requirements of Article XI, section 3, Florida Constitution, 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 Mail with adequate postage to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, this 12th day of September, 2005.

Robert L. Nabors

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.

Robert L. Nabors

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