

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

ADVISORY OPINION TO THE
ATTORNEY GENERAL

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

**SUPPLEMENTAL BRIEF OF THE SPONSOR
FLORIDIANS AGAINST INEQUITIES IN RATES**

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STATEMENT OF THE CASE AND FACTS

For the purposes of this Supplemental Brief, the Court is directed to the Statement of the Case and Facts in the Initial Brief of the Sponsor of the proposed constitutional amendment filed by Floridians Against Inequities in Rates ("FAIR").

Upon the filing of briefs by all parties, the Court, by order dated February 3, 2006, removed this case from the oral argument calendar set for Monday, February 6, 2006, to allow any party to respond to the Motion for Leave to file Supplemental Briefs on Changed Circumstances and Notice of Supplemental Authority filed February 2, 2006, by the Interested Parties in Opposition. Pursuant to the February 3, 2006, order of the Court, FAIR filed a Response And Motion To Strike The Interested Parties' Motion For Leave To File Supplemental Briefs On Changed Circumstances. The Interested Parties in Opposition filed a Response to FAIR's Motion to Strike. The Court, by order dated March 9, 2006, dismissed FAIR's Motion to Strike, granted the Interested Parties in Opposition's Motion to File Supplemental Briefs on Changed Circumstances and set a briefing schedule for the filing of supplemental briefs and answer briefs by all parties. This Supplemental Brief is filed in response to the March 9, 2006 order.

For reference and citation: (1) the ballot title, ballot summary and ballot text of the proposed amendment of the initiative Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose is attached as Appendix A; (2) the request from the Attorney General for an advisory opinion of the Court filed pursuant to Article IV, section 10 and Article V, section 3(b)(10), Florida Constitution, and section

16.061, Florida Statutes (2004), is attached as Appendix B; and (3) the opinion of the Court concerning a constitutional amendment previously proposed by FAIR 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), is attached as Appendix C.

SUMMARY OF THE ARGUMENT

The jurisdiction of the Court to render an advisory opinion under Article V, section 3(b)(10), Florida Constitution, is limited by the scope of the request of the Attorney General submitted under general law direction pursuant to Article IV, section 10, Florida Constitution. Such special proceedings in this case are limited to addressing whether the proposed amendment and ballot title and summary comply with Article XI, section 3, Florida Constitution, and section 101.161, Florida Statutes.

Any changed circumstances resulting from the language of the proposed amendment and delay in its placement on the ballot does not expand the limited jurisdiction of the Court or its authority to consider collateral matters. Any changed circumstances resulting from a delay in ballot placement can be considered by the Court in these special proceedings only to the extent such changed circumstances bear on a single subject matter and ballot title and summary analysis.

Having met the constitutional and threshold requirements for an advisory opinion on the technical requirements of its initiative, judicial fairness and the economical

expenditure of judicial labor dictates that FAIR, as the sponsor, receive an advisory opinion on the proposed amendment before the Court.

INTRODUCTION

The contention of the Interested Parties in Opposition in their Motion for Leave to File Supplemental Briefs on Changed Circumstances is that the language in the proposed amendment and the delay in its placement on the ballot may be changed circumstances bearing on the single subject matter and the ballot title and summary analysis under the issues pending before the Court. There is no assertion or contention by the Interested Parties in Opposition in their Motion or Response before the Court that FAIR is not entitled to an advisory opinion of the Court on the request from the Attorney General under the constitutional and statutory scheme established to review technical requirements for amendments proposed by citizen initiative.

See, for example, the allegation in paragraph 8 of the Interested Parties' Motion For Leave to File Supplemental Briefs on Changed Circumstances:

The inclusion in the proposed amendment of specific dates for completion of the amendment-driven legislative review, while allowing for placement only on a general election ballot that falls later than the amendment-specified date for legislative action, are changed factual circumstances that raise additional issues of adequate notice to the voters through the ballot summary.

Also see the last sentence in paragraph (a) to such Motion:

Such issues would specifically be directed to the validity of the proposed amendment with respect to the requirement that the ballot summary provide fair and adequate notice to the

voters, and that the proposed amendment be limited to a single subject[.]

Finally, see the following allegation in paragraph 2 of the Response to Motion to Strike the Interested Parties Motion for Leave to File Supplemental Briefs on Changed Circumstances:

In FAIR's Motion to Strike, it appears that FAIR infers from Interested Parties' Motion for Leave that Interested Parties do not believe that FAIR is entitled to an advisory opinion in this matter. To the contrary, Interested Parties' Motion for Leave requests only an opportunity for the parties to this matter to brief the "changed circumstances" under which Interested Parties filed their Motion for Leave.

The above characterizations by the Interested Parties in Opposition of the impact of the issues before the Court in their Motion for Leave to File Supplement Briefs and Response to Motion to Strike are correct and are consistent with the limited jurisdiction of the Court in these special proceedings in responding to a request by the Attorney General for an advisory opinion on the issues directed by general law in section 16.061, Florida Statutes. Such characterizations are also consistent with the prior position of the Court that fairness dictates that ballot sponsors are able to obtain an opinion in regard to the technical requirements of an initiative prior to incurring the expense of signature gathering for ballot placement.

ARGUMENT

I. THE JURISDICTION OF THE COURT TO RENDER AN ADVISORY OPINION UNDER ARTICLE V, SECTION 3(10), FLORIDA CONSTITUTION, IS LIMITED BY THE SCOPE OF THE REQUEST BY THE ATTORNEY GENERAL SUBMITTED UNDER ARTICLE IV,

SECTION 10, FLORIDA CONSTITUTION, AS DIRECTED BY GENERAL LAW.

The jurisdiction of the Court in rendering an advisory opinion in these special proceedings is framed by the general law implementing Article V, section 3(b)(10), Florida Constitution. The jurisdiction of the Court in these special proceedings is limited to "addressing issues as provided by general law" when requested by the Attorney General pursuant to the provisions of Article IV, section 10, Florida Constitution. Article IV, section 10, provides that the Attorney General shall "as directed by general law," request an advisory opinion as to the validity of any initiative petition circulated pursuant to the provisions of Article XI, section 3, Florida Constitution. This jurisdictional grant to the Court to render advisory opinions when requested by the Attorney General is mandatory.

Section 16.061, Florida Statutes, is the general law directing the Attorney General in the filing of a petition and defining the scope of the limited jurisdiction of the Court in rendering an advisory opinion under these constitutional mandates.¹ Such general law directs that the scope of the advisory opinion requested by the Attorney General is "regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161."

¹ Under the constitutional and general law statutory scheme, section 15.21(3), Florida Statutes (2005), requires that the Secretary of State submit to the Attorney General petition initiatives that have been signed by "10 percent of the number of electors statewide and in at least one-fourth of the congressional districts required by s. 3 Art. XI

Section 16.061, Florida Statutes, also provides that the petition from the Attorney General for an advisory opinion "may enumerate any specific factual issues that the Attorney General believes would require a judicial determination." However, the petition before the Court on the proposed amendment enumerates no specific factual issue other than the issues of single subject matter and the compliance of the ballot title and summary with section 101.161, Florida Statutes. See App. B. No supplemental advisory opinion or request has been filed by the Attorney General in these proceedings.

Article XI, section 3, Florida Constitution, requires compliance with the single subject requirement in providing that a proposed amendment "embrace but one subject and matter directly connected therewith." Section 101.161, Florida Statutes, requires compliance with certain word limitations in the ballot title and summary and further requires in subsection (1) that the "substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot[.]"

The scope of the advisory opinion in this cause is framed by the general law implementing these constitutional mandates. The petition filed with the Court by the Attorney General in this cause appropriately does not reach the issue of whether the proposed amendment by initiative will in fact appear on the general election ballot.

As recognized in numerous decisions, the Court does not have the jurisdiction or authority in these limited proceedings to rule on the merits, wisdom or constitutionality of

of the State Constitution." Such certificate triggers the request for the Attorney General for an advisory opinion under section 16.061, Florida Statutes.

a proposed initiative or on the timing of its placement on a general election ballot. Such issues are collateral to the limited jurisdiction of the Court in the special proceedings authorized in Article V, section 3(b)(10), Florida Constitution, to render an advisory opinion in response to a petition by the Attorney General pursuant to Article IV, section 10, Florida Constitution. There is no factual record before the Court other than the briefs filed in response to the petition from the Attorney General that frames the issues pending before the Court in this cause.

In 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 (Fla. 2000), the Court described its role in reviewing initiatives as follows:

As the Court noted in Advisory Opinion to the Attorney General re Tax Limitation, 644 So. 2d 486, 489 (Fla. 1994) (Tax Limitation I), "This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments" Moreover, other constitutional challenges are not justiciable in this type of proceeding.

778 So. 2d at 891.

In Advisory Op. to the Att'y Gen. re Ltd. Political Terms in Certain Elected Offices, 592 So. 2d 225 (Fla. 1991), the Court stated the following as to collateral constitutional challenges:

[O]pponents of the proposed amendment have raised various constitutional challenges. However, based on the following provisions, we find that those issues are not justiciable in the

instant proceeding. The Florida Constitution provides that "the attorney general shall, as directed by general law," request this Court's opinion "as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." Art. IV, § 10, Fla. Const. General Law provides that the attorney general shall seek an advisory opinion "regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161." § 16.061(1), Fla. Stat. (1989). Thus, we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989).

592 So. 2d at 227.

II. WHETHER THE PROPOSED AMENDMENT IN ITS CURRENT FORM CAN BE PLACED ON THE 2008 GENERAL ELECTION BALLOT IS A COLLATERAL ISSUE UNRELATED TO THE LIMITATIONS IN ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION, ON AMENDMENTS BY CITIZEN INITIATIVE.

FAIR was organized to present to the people by petition an opportunity to directly implement an essential element of fundamental tax reform by directing the Legislature to perform an open review of exceptions and exemptions to the State 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.²

The initial FAIR initiative was found by the Court to contain three disparate subjects:

² FAIR is 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

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.

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, 634 (Fla. 2004). The proposed amendment in this cause is one of three separate amendments designed to comply with the direction of the Court contained in the above quote from the prior Fairness Initiative opinion. See App. A.

In Advisory Op. to the Att'y Gen. re: Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995), which is cited in the Interested Parties' Notice of Supplemental Authority, the Attorney General presented to the Court as an issue for resolution in his request for an advisory opinion the fact that the sponsor had failed to gather enough signatures for the ensuing November 1994 ballot. As a consequence, the deadline established in the proposed amendment for the Legislature to enact general law procedures for the licensing, regulation and taxation of gaming would have lapsed prior to its placement on the ensuing general election ballot. The Court held that the proposed amendment required the Legislature to act within a reasonable period of time after its

adoption notwithstanding the specific time specified in the proposed amendment for legislative action.

Whether FAIR continues to gather signatures under the constitutional initiative process to place the proposed amendment on the general election ballot in 2008 is not a case or a controversy before this Court and is not an issue raised by the petition of the Attorney General initiating these proceedings nor contemplated in the implementing provision of section 16.061, Florida Statutes. The collateral issue of whether the proposed amendment as written can be placed on the 2008 general election ballot can be reviewed in appropriate judicial proceedings. Nothing in an advisory opinion by the Court to the petition of the Attorney General in this cause would constitute judicial estoppel to the consideration of such collateral ballot issue in a subsequent action.

III. FUNDAMENTAL FAIRNESS REQUIRES THE RENDERING OF AN ADVISORY OPINION ON THE FAIR INITIATIVE AS REQUESTED BY THE ATTORNEY GENERAL IN THIS CASE.

The effort and expense of FAIR to obtain the requisite citizen signatures required to meet the threshold of public interest necessary to receive an advisory opinion from the Court has been incurred twice. Under fundamental fairness, FAIR is entitled to the advisory opinion requested by the Attorney General on the technical compliance of the proposed amendment in this cause prior to continuing in its efforts to incur the expense of collecting further signatures. See the commentary to 1986 House Joint Resolution No. 71, Chapter 86-326, Laws of Florida, proposing the addition of section 10 to Article IV and the amendment to section 3(b)(10) to Article V of the Florida Constitution:

This amendment was prompted by two 1984 decisions of the Supreme Court which struck initiatives from the ballot after those initiatives had secured the requisite signatures for ballot placement. Fine v. Firestone, 448 So. 2d 984 (Fla. 1984); Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984). It was felt that fairness dictated that ballot sponsors be able to obtain an opinion with regard to the technical requirements prior to going to the great effort and expense of collecting all of the necessary signatures for ballot placement.

Commentary in West's F.S.A. Const. Art. 4 § 10.

This is the second effort by FAIR to place before the voters the opportunity to direct the Legislature to undertake fundamental sales tax reform. See App. C. In each effort, FAIR incurred the expense and expended the effort to secure a sufficient number of signatures to receive an advisory opinion on the technical compliance of each specific sales tax reform initiative. As discussed previously, the proposed amendments before this Court were drafted in direct response to the prior opinion of the Court in reviewing the initial FAIR initiative.

In response to any argument of mootness, FAIR urges the Court to consider its reasoning in Plante v. Smathers, 372 So. 2d 933 (Fla. 1979), when an argument of mootness was rejected by the Court because of the constitutional significance of the question presented:

The issue before us is whether this constitutional provision requires full and public financial disclosure as a condition precedent to a candidate qualifying for an elective constitutional office when the candidate qualifies after July 1 of the election year. This case, as it relates to the 1978 election, has become moot; however, we elect to retain jurisdiction and to resolve the constitutional issue because it is

a matter of great importance and of general public interest and will probably recur in the next general election.

372 So. 2d at 935; see also Sadowski v. Shevin, 345 So. 2d 330 (Fla. 1977).

Whether the voters approve any sales tax reform proposed that may be placed on a future general election ballot is speculative. However, in the exercise by the Court of its limited jurisdiction to render an advisory opinion on the technical compliance of amendments proposed by initiative, it is suggested that the legislative intent embodied in the constitutional advisory opinion process was "designed to provide a method by which an initiative proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously." CS/HJR 71, Florida House of Rep. Committee on Judiciary Staff Analysis, p. 2. See App. D.

On page 5 of their Answer Brief in these proceedings, the Interested Parties in Opposition make the final argument that "some potential constitutional changes are not amenable to the initiative process." It is difficult to constitutionally conceive that the people have not reserved the power to themselves to direct the Legislature to undertake fundamental sales tax reform. The rendering of the advisory opinion requested will validate the prior reasoning of the Court and the intent of the Legislature to provide a method to accomplish expeditious compliance by citizen initiative with constitutional and statutory technical requirements. Then the voters can choose whether they desire to direct the Legislature to undertake fundamental sales tax reform in the manner proposed by the sponsors of this initiative.

CONCLUSION

Under this special proceeding, the facts presented by the Attorney General for review by the Court are limited to whether the proposed amendment and ballot title and summary comply with Article XI, section 3, Florida Constitution, and section 101.161, Florida Statutes. As conceded by the Interested Parties in Opposition, any "changed circumstances" resulting from the language of the proposed amendment and in the delay of its placement on the ballot are limited to a consideration of the implementation of ballot timing on the single subject and ballot summary analysis before the Court. FAIR has complied with all constitutional and statutory requirements to receive an advisory opinion on the technical requirements of its initiative. Fundamental fairness dictates that an advisory opinion be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing supplemental brief has been furnished by United States Mail with adequate postage to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399; Cynthia S. Tunnick and Howard E. Adams, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Post Office Box 10095, Tallahassee, Florida 32302; and Victoria L. Weber, Dan R. Stengle and David L. Powell, Hopping Green & Sams, P.A., Post Office Box 6526, Tallahassee, Florida 32314, this 29th day of March, 2006.

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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