

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

**SUPPLEMENTAL 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; AND PRINTING
ASSOCIATION OF FLORIDA
IN OPPOSITION TO THE PROPOSED INITIATIVE**

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

Cynthia S. Tunncliff (FB # 134939)
Howard E. Adams (FB # 322210)
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, FL 32302
Telephone: 850/222-3533
Facsimile: 850/222-2126

Victoria L. Weber (FB # 266426)
Dan R. Stengle (FB # 352411)
David L. Powell (FB # 656305)
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314
Telephone: 850/222-7500
Facsimile: 850/224-8551

Attorneys for Interested Parties

TABLE OF CONTENTS

CITATION OF AUTHORITIES..... ii

STATEMENT OF INTERESTS1

SUMMARY OF SUPPLEMENTAL ARGUMENT.....1

SUPPLEMENTAL ARGUMENT.....3

 I. The Court’s Jurisdiction to Render an Advisory Opinion in this Matter
 is not Limited by the Failure of the Attorney General to Enumerate
 Specific Factual Issues..... 3

 II. The Issue of Changed Circumstances is not Collateral to the Court’s
 Exercise of its Jurisdiction..... 5

 III. The Sponsor is Entitled by Law to an Advisory Opinion in this
 Matter.....8

CONCLUSION.....10

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

CITATION OF AUTHORITIES

JUDICIAL DECISIONS **PAGE**

*Advisory Op. to the Att’y Gen. re Florida Locally
Approved Gaming*
656 So. 2d 1259 (Fla. 1995) passim

FLORIDA CONSTITUTION

Article XI, section 3..... 10
Article XI, section 5..... 10

FLORIDA STATUTES

Section 101.161(1), Florida Statutes..... 10

STATEMENT OF INTERESTS

The interests of the Interested Parties are set forth in their Initial Brief in this validation proceeding concerning the initiative entitled “Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose.”

SUMMARY OF SUPPLEMENTAL ARGUMENT

The Sponsor mischaracterizes the issues arising from the changed circumstances herein as beyond the notice and single-subject issues of this proceeding as they go to the merits or wisdom of the proposed amendment. In so doing, the Sponsor extrapolates that, in order for the Court to have jurisdiction over the changed circumstances, the Attorney General must have exercised his option to enumerate specific factual issues. The circumstances arising from the date-specific issue were not considered as directed to the wisdom or merits, and therefore were not beyond the scope of the proceeding, in *Advisory Op. to the Att’y Gen. re Florida Locally Approved Gaming*, 656 So.2d 1259, 1264 (Fla. 1995), and they are not here. The changed circumstances are thus within the purview of the Court in this proceeding, and are not dependent upon their enumeration by the Attorney General.

Likewise, the changed circumstances are not collateral to the issues to be determined by the Court in its review of the proposed amendment. The Sponsor

frames the issue for determination to be whether the proposed amendment will appear on the 2008 ballot. To the contrary, the issue is whether the proposed amendment – considering among other issues the changed circumstances – comports with the notice and single-subject provisions required by the constitution and statutory law. Since it does not, the proposed amendment is invalid.

Finally, the Sponsor is entitled by law to an advisory opinion on the validity of the proposed amendment in this matter. In so doing, the Court should consider the changed circumstances as identified and briefed by Interested Parties, as doing so would comport with fairness and further the interests of providing an expeditious method of determining the proposed amendment's compliance with the constitution and governing statutes.

For the reasons provided herein and in the Interested Parties' Amended Initial Supplemental Brief, the proposed amendment's ballot summary is clearly and conclusively defective, and the proposed amendment violates the single-subject limitation. The proposed amendment therefore should be determined to be invalid and should be stricken.

SUPPLEMENTAL ARGUMENT

I. THE COURT’S JURISDICTION TO RENDER AN ADVISORY OPINION IN THIS MATTER IS NOT LIMITED BY THE FAILURE OF THE ATTORNEY GENERAL TO ENUMERATE SPECIFIC FACTUAL ISSUES.

In its Supplemental Brief, the Sponsor mischaracterizes the issues arising from the changed circumstances that Interested Parties have brought before the Court as beyond the issues of whether the proposed initiative satisfies the constitutional single-subject limitation, and whether the ballot title and summary comport with constitutional and statutory requirements. The Sponsor asserts that the issue of changed circumstances is one that deals with the merits or wisdom of the proposed initiative. From that assertion, the Sponsor extrapolates that, in order for the Court to have jurisdiction to determine the impact of the changed circumstances, the Attorney General must have exercised his statutory option to enumerate specific factual issues, which he has not done. Sponsor’s Supplemental Brief, at 4-8. The argument is meritless, as it ignores the only reasonable reading of *Advisory Op. to the Att’y Gen. re Florida Locally Approved Gaming*, 656 So.2d 1259, 1264 (Fla. 1995) [hereinafter *FLAG Initiative*]: that the date-specific issue is directly relevant to the Court’s jurisdiction.

In *FLAG Initiative*, the Supreme Court specifically stated the scope of its review, and recognized, “[W]e have no authority to rule on the merits of a

proposed amendment.” *See, FLAG Initiative*, 656 So.2d at 1262. It thereafter proceeded to consider the date-specific issue included in the initiative proposed in that case, characterizing that issue, raised by the Governor and Cabinet, as one that “challenges the ballot title and summary.” *Id.* at 1263 [E.A.]. Moreover, it is notable that it was not an issue apparently raised by the Attorney General in his petition in that case, as the Court attributes the issue entirely to the brief of an opponent to the measure, the Governor and Cabinet. *Id.*

The Supreme Court did not determine in *FLAG Initiative* that the date-specific issue was beyond its jurisdiction to consider in that case; rather, the court analyzed the arguments presented in the case and determined under the circumstances that it did not render the ballot summary misleading for the reasons fully iterated in Interested Parties’ Amended Initial Supplemental Brief. Wholly contrary to the Sponsor’s argument, the Supreme Court did not consider this to be beyond the scope of its review of the proposed amendment unless specifically enumerated by the Attorney General.

As well as considering the issue, the Supreme Court in that matter advised, “[O]ur decision should not be construed as a comment on the merits of the proposed amendment.” *Id.* at 1264. For the Sponsor to persist in mischaracterizing the date-specific issue as one going to the merits, wisdom, or constitutionality of

the proposed amendment simply promotes confusion in this matter, and ignores the context in which the Supreme Court considered the issue in *FLAG Initiative*. The review and evaluation of the changed circumstances herein are wholly within the purview of the Court, as the date-specific issue was in *FLAG Initiative*. While the issue of the changed circumstances is properly before this Court, for the reasons articulated in Interested Parties' Amended Initial Supplemental Brief, a result different than that reached in *FLAG Initiative* is compelled in this proceeding.

II. THE ISSUE OF CHANGED CIRCUMSTANCES IS NOT COLLATERAL TO THE COURT'S EXERCISE OF ITS JURISDICTION.

In its Supplemental Brief, the Sponsor argues that date-specific issue is collateral to the Court's review of a proposed initiative by contrasting the circumstances herein with those in *FLAG Initiative*. Sponsor's Supplemental Brief, at 8-10. In fact, the procedural circumstances of the case at bar and those of *FLAG Initiative* appear to be quite similar, and demonstrate that the date-specific issue is not collateral to the Court's evaluation of the ballot title and summary and the single-subject rule.

In *FLAG Initiative*, the Attorney General informed the court that the requisite number of signatures had not been verified for placement on the November 1994 ballot. As argued by the sponsor of the proposed initiative, sufficient signatures had been obtained to entitle the sponsors in that case to an advisory opinion, the signatures were valid for four years by law, "and that, should it meet all other legal requirements, [the] proposed amendment could appear on the 1996 ballot." *FLAG Initiative*, 656 So.2d at 1260-1261.

As in *FLAG Initiative*, the Sponsor here has obtained the requisite number of signatures for Court review, although it will not appear on the next ballot. It is not for the Court here to consider **whether** the proposed amendment will appear on the

2008 ballot – as Sponsor asserts – but if it meets the legal requirements to allow it to appear on the 2008 ballot. As in *Flag Initiative*, the consideration of the date-specific issue is not collateral to the Court’s review and, for the reasons fully iterated in Interested Parties’ Amended Initial Supplemental Brief, the proposed amendment does not meet those legal requirements and should not be allowed to be placed on the 2008 ballot.

III. THE SPONSOR IS ENTITLED BY LAW TO AN ADVISORY OPINION IN THIS MATTER.

The Sponsor argues in its Supplemental Brief that fundamental fairness requires the rendering of an advisory opinion in this matter. Sponsor's Supplemental Brief, at 10-12. The Interested Parties believe that the Sponsor is indeed entitled to such an advisory opinion. The Florida Division of Elections has confirmed that the Sponsor has submitted to the appropriate supervisors for verification, and the supervisors have verified, forms signed and dated equal to 10 percent of the number of electors statewide and in a least one-fourth of the congressional districts. *See*, § 15.21(3), Fla. Stat., and <http://election.dos.state.fl.us/initiatives>. Fundamental fairness notwithstanding, the Sponsor appears to have met the constitutional and statutory requirements for review of the proposed amendment by the Florida Supreme Court.

Finally, the Sponsor notes that the advisory opinion process is designed to provide an expeditious method by which to judge a proposed initiative's compliance with constitutional and statutory mandates. Sponsor's Supplemental Brief, at 12. Notwithstanding that notation, however, the Sponsor would defer to another time and a different proceeding the Court's determination of the impact of the changed circumstances in this matter. Sponsor's Supplemental Brief, at 10. For the reasons articulated above and provided as well by the Interested Parties in their

Initial Supplemental Brief, the issue of changed circumstances is properly before the Court. In the interests of fairness and in order to achieve an expeditious determination of compliance with constitutional and statutory mandates, the Court should consider and issue an advisory opinion on the proposed initiative, including the impact of the changed circumstances on the notice and single-subject issues properly raised in this proceeding.

CONCLUSION

For the reasons articulated herein, and in Interested Parties' Amended Supplemental Initial Brief, the changed factual circumstances are within the purview of the Court in this proceeding. The proposed initiative is clearly and conclusively defective as a result of the changed circumstances as iterated in Interested Parties' supplemental briefs in this matter, and for the reasons otherwise iterated in Interested Parties' main briefs in this matter. Interested Parties therefore respectfully request that a written opinion determining that the proposed amendment's ballot summary is clearly and conclusively defective under the standards set forth in Article XI, section 5, Fla. Const., and section 101.161(1), Florida Statutes; that it violates the single-subject requirement of Article XI, section 3; and that it is invalid as a proposed constitutional amendment.

Respectfully submitted on this 18th day of April, 2006.

Cynthia S. Tunnicliff (FB # 134939)
Howard E. Adams (FB # 322210)
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, FL 32302
Telephone: 850/222-3533
Facsimile: 850/222-2126

Victoria L. Weber (FB # 266426)
Dan R. Stengle (FB # 352411)
David L. Powell (FB # 656305)
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314
Telephone: 850/222-7500
Facsimile: 850/224-8551

Attorneys for Interested Parties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this 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 18th day of April, 2006.

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.

Attorney