

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

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STATEMENT OF THE CASE AND FACTS

FAIR readopts the Statement of the Case and Facts provided in its Supplemental Brief.

SUMMARY OF THE ARGUMENT

The proposed amendment is not self-executing when placed on the 2008 general election ballot. The primary purpose of the proposed amendment is to mandate and direct a legislative review of all services not taxed under the existing sales tax and an exemption from future sales taxation by the Legislature only of those services it determines advances or serves a public purpose. The taxation of currently non-taxed services is dependent on the consequences of legislative action taken pursuant to the mandated review. Under the clear language of the proposed amendment, the potential taxation of non-taxed services is dependent upon the mandated legislative review directed by the voters in their approval of the proposed amendment.

Any required enforcement of the primary purpose of the proposed amendment by subsequent judicial proceedings to establish reasonable deadlines in the absence of legislative action does not alter the single-subject analysis of the proposed amendment in these special proceedings.

Fundamental fairness requires the Court to render an advisory opinion on the technical requirements of the proposed amendment under the limited jurisdiction of the Court in these special proceedings.

ARGUMENT

I. WHETHER ELECTOR APPROVAL OF THE PROPOSED AMENDMENT ON THE 2008 GENERAL ELECTION BALLOT WILL REQUIRE JUDICIAL INTERPRETATION OR DIRECTION IS A COLLATERAL ISSUE BEYOND THE LIMITED JURISDICTION OF THE COURT TO RENDER AN ADVISORY OPINION UNDER ARTICLE V, SECTION 3(d), FLORIDA CONSTITUTION.

The Interested Parties in Opposition attempt to inject issues into these special proceedings that are beyond the scope of the narrow jurisdictional review authorized under the Florida Constitution and implementing general law. Although FAIR will address the arguments raised in the Second Amended Supplemental Brief of Interested Parties in Opposition (hereinafter the "Opposition Brief"), it reiterates that the arguments of the Interested Parties in Opposition deal more specifically with the implementation -- and therefore the merits and wisdom of the initiative -- than with the narrow scope of this review. See Advisory Op. to the Att'y Gen. re: Tax Limitation, 644 So. 2d 486 (Fla. 1994). Moreover, the fears that the Parties in Opposition raise have been addressed in other contexts by the judiciary in a variety of proceedings other than these special proceedings constitutionally provided to consider merely whether the ballot title of an initiative is misleading and whether the initiative violates the single subject requirement of the constitution. See, e.g., Advisory Opinion to the Governor -- 1996 Amendment 5, 706 So. 2d 278, 279-280 (Fla. 1997) (hereinafter "1996 Advisory Opinion") (Governor seeks advisory opinion to clarify initiative approved by voters); Dade County Classroom Teacher Assoc. v. Legislature, 269 So. 2d 684 (Fla. 1972) (Petitioners sought writ of

mandamus in circuit court against Legislature). Instead, such collateral proceedings were framed to address issues that arose in the implementation or enforcement of an adopted and thus existing constitutional amendment. See, e.g., Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969) (hereinafter "1969 Advisory Opinion"). Such would be the procedural posture of any subsequent judicial procedure relating to implementation if the proposed amendment is approved by the electors in the 2008 general election. Consideration of how such concerns might occur or be resolved are simply beyond the limited review process which brings this initiative petition before the Court at this time.

Even where the passage of an otherwise valid ballot initiative might impair a constitutional right or create a cause of action for breach of contract, the judiciary has nevertheless declined to remove such a measure from the ballot. Brooks v. Watchtower Bible and Tract Society of Florida, Inc., 706 So. 2d 85, 89 (Fla. 4th DCA 1998) ("We think that it is premature to determine that repealing the ordinance, which authorized the execution of the contract for sale, will impair the contract between the City and Watchtower in the constitutional sense"). The list of conjectural problems raised in the Opposition Brief and speculated solutions is lengthy. But, it is not within the limited jurisdiction of the Court in these special proceedings to pass on what difficulties the Legislature might encounter in implementing this initiative. This constitutionally mandated review in these special proceedings confines itself to two narrow issues, the accuracy of the ballot summary and whether the initiative embraces but a single subject.

II. THE SUBSTANTIVE PROVISIONS OF THE PROPOSED AMENDMENT MANDATES THE LEGISLATURE TO REVIEW NON-TAXED SERVICES TO DETERMINE WHETHER THEIR EXCLUSION FROM TAXATION SERVES A PUBLIC PURPOSE AND THE DATES SPECIFIED FOR THE CONDUCT AND COMPLETION OF THE MANDATED LEGISLATIVE REVIEW ARE NOT MANDATORY IF THE PROPOSED AMENDMENT APPEARS ON THE 2008 GENERAL ELECTION BALLOT IF THE REVIEW IS PERFORMED WITHIN A REASONABLE PERIOD OF TIME.

The Interested Parties in Opposition advance two arguments for the Court to declare that the proposed amendment is "invalid and unsuitable for further circulation as a proposed constitutional amendment." Opposition Brief, p. 14. First, they argue that placement of the proposed amendment on the 2008 general election ballot will result in "the automatic extension of the sales tax to non-taxed services on January 6, 2009, without the promised mandatory legislative review[.]" In the alternative, they argue that the Judicial Branch will be required "to re-write the substantive terms of the measure in order to impose a new deadline for the mandatory legislative review and a new effective date for extension of the sales tax to non-taxed services." Opposition Brief, p. 14. Neither argument has merit or is within the limited jurisdiction of the Court in its review of a proposed amendment by initiative in these special proceedings.

A. The Legislative Review of Non-taxed Services That is the Primary Purpose of the Proposed Amendment is a Condition Precedent to Any Extension Of the Sales Tax to Include Services Not Currently Taxed.

FAIR has consistently advanced and maintained the position in their argument that the primary purpose and essential thrust of the proposed amendment is to allow the

people to direct the Legislature to conduct a review of all untaxed services and make specific determinations on whether those services excluded from sales taxation advance or provide a public benefit. This primary purpose of the proposed amendment is clearly stated in both the ballot summary and ballot title. The ballot summary provides that "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." The ballot title contemplates a public purpose determination by the Legislature by "[e]xtending existing sales tax to non-taxed services where exclusion fails to serve public purpose."

Should this initiative be approved by the electors in the 2008 general election, all parts of the proposed amendment must be given effect. Where the Florida Constitution contains multiple provisions on the same subject, each provision must be read in pari material to ensure a logical and consistent meaning that gives effect to the entire provision. 1996 Advisory Opinion, 706 So. 2d at 281. If the proposed amendment is approved by the electors in the 2008 general election, the primacy of the mandated review by the Legislature must be given effect. The obvious and apparent primary purpose and essential thrust of the proposed amendment is to mandate a legislative review of all non-taxed services and to exempt from future taxation only those services the Legislature determines to advance or serve a public purpose. Only if the Legislature fails to exempt a service pursuant to such mandated review is a service subject to the existing sales tax. Legislative review is thus a condition precedent to any extension of the sales tax

to previously non-taxed services. Under the clear language and obvious primary purpose of the proposed amendment, the Legislature must have had an opportunity to review non-taxed services rendered for compensation and fail to exempt an untaxed service before the sales tax is extended to those services not exempted.

The Parties in Opposition argue that placement on the 2008 general election ballot will render the mandated legislative review impossible. As a result, they claim that this amendment flies under false colors and that the ballot summary is thus inaccurate because part of the proposed amendment will become self-executing and will automatically extend the sales tax to previously non-taxed services. The Parties in Opposition further argue that only part of the amendment can be timely implemented under the deadlines provided in the proposed amendment, namely an automatic extension of the sales tax to non-taxed services. Opposition Brief, pp. 5, 10. According to the Parties in Opposition, only this part becomes self-executing. Ignored is the primary purpose of the proposed amendment to direct a legislative public purpose review of non-taxed services as a prior condition to the future taxation of currently untaxed services.

The argument of the Parties in Opposition ignores basic principles of constitutional construction. The test for determining whether a constitutional provision is self-executing or not is whether the provision lays down a sufficient rule by which the underlying purpose of the amendment can be achieved without the aid of legislative enactment. See Gray v. Bryant, 125 So. 2d 846 (Fla. 1960). Even a clear constitutional mandate to the Legislature to take some specific action is not necessarily self-executing. 1969 Advisory

Opinion, 225 So. 2d at 515. Giving effect to the requirement for legislative review necessarily means that there must be some reasonable opportunity for the Legislature to act before the sales tax can be extended to non-taxed services. If each part of the initiative is to be given force and effect, legislative review must be considered a condition precedent to the extension of the sales tax to non-taxed services. As a consequence, the proposed amendment, when placed on the 2008 general election ballot, is not self-executing since the deadlines provided for the mandated legislative review of non-taxed services will have passed.

Ironically, the Parties in Opposition rely upon Advisory Op. to the Att'y General re: Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995) (hereinafter "FLAG Amendment"). There, a proposed initiative also had a deadline for compliance. The face of the amendment in question required, "By general law enacted no later than July 1, 1995, the legislature shall implement this section with legislation to license, regulate and tax gaming." Id. at 1260, n. 2. Proponents of that initiative faced the same problem as FAIR, the sponsor of this initiative. They had obtained sufficient signatures to trigger review by the Court, but not enough signatures for the initiative to appear on the 1994 ballot. However, the proponents planned to obtain enough signatures so the initiative could appear on the 1996 ballot. Id. at 1260. The Governor and Cabinet argued that by placing the proposal on the 1996 ballot, the deadline for the Legislature to adopt implementing legislation had passed, and thus it would be impossible to comply with the terms of the amendment.

The Court answered that argument by noting that the provision was not self-executing. "The fact that the Legislature will not be able to exercise that authority by the specific date noted in the proposed amendment does not, in our view, void the amendment." Id. at 1263. The Court went on to criticize the use of specific deadlines to implement directives in initiatives and concluded that what really is meant is that the Legislature must act within a "reasonable time." Id. at 1264.

In the instant initiative, the face of the amendment requires the Legislature to undertake a review of all non-taxed services as a condition precedent to the extension of the sales tax to these services. Just as legislative compliance with a strict deadline was impossible in FLAG Amendment, so is it here. But just as the Court in FLAG Amendment noted that the specific date did not effect the substance of the amendment, so here the inability to comply with the specific deadlines does not interfere with what FAIR has consistently claimed -- that the purpose of this initiative is to direct the Legislature to review all untaxed services and make specific determinations whether those exclusions from taxation advance or provide a public purpose.

B. The Potential For Judicial Interpretation Of and Direction On Implementation of the Proposed Amendment If Adopted Does Not Expand the Single Subject Analysis Required in These Special Proceedings.

The Parties in Opposition argue that if the voters approve this initiative in 2008, the judiciary will effectively need to rewrite the initiative to implement it. This argument is extended to conclude that the initiative as now written would violate the single subject

requirement because it would implicate more than one branch of government. The Parties in Opposition argue, "this initiative can only be given its full promised effect through judicial action. Only if the judiciary acts can the Legislature exercise the discretion touted by the Sponsor." Opposition Brief, p. 10. The argument continues:

To avoid an outcome in which the sales tax is automatically extended to non-taxed services on January 6, 2009, without the promised mandatory legislative review, the Judicial Branch would have to revise the measure after adoption by imposing a new deadline for legislative review and a new effective date for extension of the sales tax to non-taxed services.

Opposition Brief, pp. 10-11 (emphasis added).

In the Parties in Opposition's hypothetical, the role of the judiciary would parallel that taken in Dade County Classroom Teachers Association v. Legislature, *supra*, where the Court refrained from imposing a remedy where the Legislature was acting in good faith to implement a constitutional directive. Petitioners in that case sought a writ of mandamus directing the Legislature to implement the rights of public employees to bargain collectively. Article I, section 6 of the 1968 Florida Constitution conferred such a right upon public employees, and the Court, in Dade County Classroom Teachers Assoc. v. Ryan, 225 So. 2d 903 (Fla. 1969), confirmed such a right. Notwithstanding the existence of this constitutionally guaranteed right, public employees waited for the Legislature to implement this right. Dade County Classroom Teachers Assoc., 269 So. 2d at 685. But because the Legislature was engaged in the process of implementation,

the Court denied the relief sought, warning that if the Legislature ultimately failed to act, the Court would impose a remedy. Id. at 687-688.

Similarly, the Court did not intrude upon legislative prerogatives in In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990). Again, the Court was faced with legislative failure to act to give meaning to the fundamental right to counsel under the State Constitution. But instead of exercising a "law giving" function, the Court instead acted within its own power, advising the Legislature that it would grant petitions for meritorious habeas corpus petitions and free such petitioners pending appeal. Id. at 1139.

The Legislature itself will have the opportunity to establish a schedule for review within a reasonable time period and will be able to adopt an interim continuation of the exclusion of non-taxed services from the sales tax. Since the Florida Constitution requires the Legislature to convene at least once before the putative effective date of the initiative urged by the Parties in Opposition and since the Legislature is also able to convene itself into special session, the Legislature will in fact be able to comply with the requirements to avert the problem conjectured by the Parties in Opposition. This legislative action would forestall the apocalypse prophesied by the Parties in Opposition. In the event the Legislature fails to act, appropriate judicial proceedings can be brought to establish reasonable deadlines for the Legislature to comply with the instructions of the people in their approval of the proposed amendment.

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

As argued more extensively under Point III in its Supplemental Brief, FAIR urges that fundamental fairness requires the Court to render an advisory opinion at the request by the Attorney General in these proceedings. FAIR has twice incurred the expense and undertaken the effort to obtain the requisite citizen signatures to meet the threshold of public interest necessary to receive an advisory opinion on this element of fundamental sales tax reform. Whether voters approve any sales tax reform proposals that may be placed on the 2008 general election ballot is speculative. However, the limited jurisdiction of the Court to render an advisory opinion on the technical compliance of amendments proposed by initiative should be exercised in response to a general law scheme designed so that compliance with constitutional and statutory requirements can be ascertained expeditiously by initiative sponsors.

CONCLUSION

The proposed amendment is not self-executing when placed upon the 2008 general election ballot since the primary purpose of the amendment is to allow the people to direct the Legislature to conduct a review of all untaxed services and make specific determination of the public purpose advanced by their exclusion from sales taxation. The extension of sales taxation to currently untaxed services under the proposed amendment is dependent upon completion of such legislative review. In the event of approval of the proposed amendment, the Legislature will have the opportunity to establish a schedule for

implementation and review of the untaxed services. Absent such legislative action, a reasonable time period for implementation of the mandated legislative review embodied in the proposed amendment can be established by subsequent judicial proceedings. In any event, none of these consequences are at issue in the single subject and ballot summary analysis before the Court in these special proceedings. The merits and wisdom of the proposed amendment are not before the Court. The potential for subsequent judicial intervention or interpretation does not alter the single subject analysis in these special proceedings. FAIR has complied with all constitutional and statutory requirements for receiving 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 answer 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. Tunnicliff 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 ____ day of April, 2006.

David G. Tucker

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.

David G. Tucker

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