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

SECOND AMENDED SUPPLEMENTAL INITIAL 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 CHEMISTRYCOUNCIL, 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. 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

TABLE OF CONTENTS

CITATION OF AUTHORITIES

JUDICIAL DECISIONS **PAGE**

FLORIDA CONSTITUTION

FLORIDA STATUTES

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" [hereinafter "Services Tax Amendment"].

SUPPLEMENTAL STATEMENT OF THE CASE AND OF THE FACTS

Supplemental Statement of the Case

On February 2, 2006, the Interested Parties served a Motion for Leave to File Supplemental Briefs on Changed Circumstances and a Notice of Supplemental Authority in this validation proceeding. On February 8, 2006, the Sponsor of the initiative, Floridians Against Inequities in Rates ("FAIR"), served a Response and Motion to Strike the Interested Parties' Motion for Leave to File Supplemental Briefs on Changed Circumstances. On February 13, 2006, the Interested Parties served a Response to Motion to Strike the Interested Parties' Motion for Leave to File Supplemental Briefs on Changed Circumstances.

On March 9, 2006, the Court entered an Order granting the Interested Parties' Motion for Leave to File Supplemental Briefs on Changed Circumstances and directing the preparation and filing of supplemental briefs by the parties.

Supplemental Statement of the Facts

On February 2, 2006, the Secretary of State certified all of the initiative petitions for which an adequate number of verified signatures had been timely submitted in order to secure a ballot position on the general election ballot of November 2006. The Services Tax Amendment was not so certified. The Secretary of State reported on that date a total of 63,464 certified signatures had been submitted out of a total needed of 611,009. [A.1]

SUMMARY OF SUPPLEMENTAL ARGUMENT

Because the Services Tax Amendment cannot be presented to the electors before November 2008, the inclusion in the proposed constitutional text of a date-specific deadline for a mandatory legislative review of sales tax exclusions for non-taxed services in order to avoid future taxation has resulted in additional defects that require this measure to be invalidated.

The ballot summary promises that "all non-taxed services shall be reviewed by the Legislature" prior to July 1, 2008, and that such services "not exempted from taxation by the Legislature shall be subject to the sales tax on January 1, 2009." [E.A.] Thus, the Services Tax Amendment promises a legislative review which cannot be held under any set of circumstances, even though extension of the sales tax to non-taxed services would occur as promised. This impossible deadline

results in a violation of the requirement in Article XI, section 5 for the ballot summary to give the electors full and fair notice of the decision they must make.

Because of the changed circumstances in which the initiative must now be evaluated in this validation proceeding, the ballot summary now "flies under false colors" concerning a material element of the measure, namely, the impossibility of the Legislature holding the promised mandatory review "prior to July 1, 2008[.]" Thus, the Services Tax Amendment violates the requirement of Article XI, section 5 for full and fair disclosure to the electors.

The changed circumstances result in an additional infirmity under the single-subject requirement of Article XI, section 3: The Judicial Branch would have to revise the substantive terms of the measure in order to give it the full effect promised to the electors in the ballot summary by imposing a new deadline for the legislative review and a new effective date for extension of the sales tax to non-taxed services. This outcome would mean the amendment – which the Sponsor has intended to be self-executing -- had conferred lawmaking powers on the Judiciary, probably this Court. Thus, the Services Tax Amendment is not "sufficiently complete within itself" for implementation as promised.

In light these material defects, as well as those identified in the earlier briefs of the Interested Parties, the Services Tax Amendment is clearly and conclusively defective and must be invalidated by the Court.

SUPPLEMENTAL ARGUMENT

An initiative may only be presented to the electors on the general election ballot; it may not be presented at a special election. Art. XI, § 5 (b), Fla. Const. Further, the petitions supporting each initiative which is to be submitted to the electors must be filed with the custodian of state records no later than February 1 of the year in which the general election is to be held. Art. XI, § 3; art. XI, § 5 (b), Fla. Const. All certifications of signature verification by the supervisors of elections must be received by the Secretary of State no later than February 1 of the year in which the general election is to be held. § 100.371(2) Fla. Stat. (2005).

On February 2, 2006, the Secretary of State reported an insufficient number of signatures for placement of the Services Tax Amendment on the November 2006 ballot. Consequently, the initiative will not appear on the general election ballot in 2006. The signatures gathered and verified for this measure are valid for four years, however, under the applicable law the earliest that this measure could qualify for placement on the general election ballot is the general election to be held in November 2008. *See* § 100.371(2), Fla. Stat. (2005).

These changed circumstances present additional grounds upon which the Services Tax Amendment must be invalidated for violating the single-subject rule of Article XI, section 3, and for failing to give the voter fair and accurate notice of the decision he or she must make as required by Article XI, section 5.

I. THIS INITIATIVE IS INVALID BECAUSE THE BALLOT SUMMARY PROMISES A MANDATORY LEGISLATIVE REVIEW OF NON-TAXED SERVICES WHICH CANNOT BE PERFORMED.

The Services Tax Amendment contains a deadline for the Legislature to complete a mandatory review of sales tax exclusions for non-taxed services in order for such services to avoid future taxation by operation of law. By the express terms of the measure, if a non-taxed service is not exempted by an affirmative enactment of the Legislature "prior to July 1, 2008," then that service "shall be subject to the existing sales tax effective January 1, 2009." [A. 4]

In briefing this matter for the Court, the Sponsor of the Services Tax Amendment placed great emphasis on the mandatory legislative review of non-taxed services before they would be subject to tax. Indeed, the Sponsor would have the Court believe that the "proposed amendment places before the electors the sole question of whether they desire to instruct and direct the Legislature to perform this essential step in sales tax reform." Sponsor's Initial Brief, at 9 [E.A.]. Only if the Legislature chose not to act, we were told, would the sales tax be extended to services which are presently not taxed.

Now we learn that the mandatory legislative review cannot take place as promised. The ballot summary asserts that "all non-taxed services shall be reviewed by the Legislature" prior to July 1, 2008, and that such services "which are not exempted from taxation by the Legislature shall be subject to the sales tax

on January 1, 2009." [A. 4] [E.A.] The process contemplated by this initiative would require the legislative review to be complete four months prior to the Services Tax Amendment appearing on the ballot in November 2008. Thus, "the proposed amendment has established an impossible deadline" for the legislative review. *Advisory Op. to the Att'y Gen. re Florida Locally Approved Gaming*, 656 So.2d 1259, 1264 (Fla. 1995) [hereinafter *FLAG Initiative*].

Moreover, the sales tax would be extended to such non-taxed services automatically upon the Services Tax Amendment becoming legally effective. Under the Constitution, if the Services Tax Amendment is approved by the electors in November 2008, it will become effective on the first Tuesday after the first Monday in January 2009, because there is no effective date specified in the measure. Art. XI, § 5(e), Fla. Const.

Thus, the amendment will become effective after the January 1, 2009, effective date specified for automatic extension of the sales tax to non-taxed services for which the Legislature does not enact an affirmative exemption. The only logical construction of the measure is that the tax would be automatically extended to such services on January 6, 2009, without a mandatory legislative review or a legislative determination concerning a public purpose.

This anomaly is more than a mere curiosity. It goes to the heart of the decision that the electors are being told they will make. In its Initial Brief, the

Sponsor asserts: "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." Sponsor's Initial Brief, at 19.

And in its Amended Answer Brief, the Sponsor argues further: "The ballot clearly informs the voter that he or she is directing the Legislature to perform a review of each service not currently taxed under the existing sales tax and exempt only those services that advance or serve a public purpose." Sponsor's Amended Answer Brief, at 22.

Even if those arguments were sufficient to determine that this initiative met the constitutional notice requirements prior to February 1, 2006 – which they did not, as we demonstrated in our earlier briefs -- they no longer do so. In light of the Sponsor's unilateral determination to seek a ballot position for this measure no earlier than November 2008, the Legislature cannot be required to perform the mandatory review prior to July 1, 2008, if the measure is adopted. The earliest regular legislative session in which such a mandatory review could be performed will not commence until March 2009.

These changed circumstances result in an additional infirmity in the Services Tax Amendment, further demonstrating its invalidity. These new facts mean that the initiative now "flies under false colors" by promising a mandatory legislative review of non-taxed services which cannot occur before automatic extension of the sales tax to those services on January 6, 2009. *Armstrong v. Harris*, 773 So.2d 7, 16 (Fla. 2000).

The promised legislative review is the lynchpin of the Services Tax Amendment. The Sponsor asserts that the central purpose of this initiative is "to focus legislative labor on this essential element of sales tax reform." Sponsor's Initial Brief, at 21. Thus, the Services Tax Amendment is "clearly and conclusively defective" by promising a mandatory legislative review of non-taxed services which cannot in fact occur before such services automatically become subject to the sales tax. *Armstrong*, 773 So.2d at 11.

The Court's decision in *FLAG Initiative* does not support the validity of this measure. The Court held that the casino gambling initiative at issue there was <u>not</u> self-executing, and therefore the date-specific provision in section (d) requiring legislative implementation meant only that the Legislature had a reasonable period of time within which to implement the initiative by statute. The Court held:

> We find that, in the instant case, this deadline for legislative action does not void the proposal because we conclude that <u>it does not affect the substantive provisions of the proposed amendment requiring the Legislature to implement the proposal</u>. The intent is clear that the

> Legislature must act within a reasonable time. If the Legislature does not act, there is a remedy.

FLAG Initiative, 656 So.2d at 1264 (citing *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So.2d 684 (Fla. 1972)) [E.A]. Thus, it was the FLAG initiative's non-self-executing nature which preserved its validity in the face of that impossible deadline because the Court could impose a new deadline by judicial construction without addressing any substantive policy choice. No legal change would take place until the Legislature acted.

Here, the situation is exactly the opposite. The Services Tax Amendment is intended to be self-executing. It would put the State's taxing authority on automatic pilot so that, in the face of legislative inaction, the sales tax would be automatically extended to non-taxed services. That is the Sponsor's very design. The measure only provides a grace period for legislative action, expiring on June 30, 2008, before the effective date for automatic extension of the sales tax.

The two dates in the initiative have more than procedural significance. They establish a deadline for legislative action -- which it is impossible to meet -- and the effective date on which a legal change will take place absent legislative action. Therefore, the impossible dates in the Services Tax Amendment do "affect the substantive provisions of the proposed amendment requiring the Legislature to implement the proposal" by conducting a mandatory review of non-taxed services. *FLAG Initiative*, 656 So.2d at 1264.

For these additional reasons, the ballot summary for the Services Tax Amendment is "clearly and conclusively defective" for promising a mandatory legislative review of non-taxed services prior to extension of the sales tax to such services when such a review cannot in fact occur if the amendment is adopted in November 2008 or thereafter. *Armstrong,* 773 So.2d at 11.

II. THE SERVICES TAX AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT IF IT EMPOWERS THIS COURT TO RE-WRITE THE MEASURE WITH NEW DEADLINES.

In its Initial Brief, the Sponsor argues that the Services Tax 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." Sponsor's Initial Brief, at 15-16. In its answer, the Sponsor further argues: "The discretion of the Legislature is absolute and unfettered." Sponsor's Amended Answer Brief, at 13.

And yet the fact that the Services Tax Amendment cannot appear on the general election ballot until November 2008, necessarily means that 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.

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 a legislative review and a new effective date for extension of the sales tax to non-taxed services. That outcome would mean that the Services Tax Amendment had conferred lawmaking powers on the Judiciary – probably this Court -- in violation of the single-subject requirement of Article XI, section 3, and without notice to the electors.

In *FLAG Initiative*, this Court observed that the "impossible deadline" in that casino gambling initiative could be remedied through judicial construction of what, on its face, was a non-self-executing amendment. In doing so, the Court said that the intent of the measure was clear, namely, for the Legislature to "act within a reasonable time." *FLAG Initiative,* 656 So. 2d at 1264. The implication of the Court's decision was that such judicial construction of a non-self-executing amendment would not impermissibly confer power on the Judicial Branch.

The situation here is distinctly different. The Services Tax Amendment is intended to be self-executing, thus the Court would have to re-write substantive terms of the measure in order to remedy the instant defect. The Court would have to establish a new deadline for the legislative review, and a new effective date for the extension of the sales tax to non-taxed services. The adoption of such dates by the Court – with fiscal consequences for the public – would impermissibly "leave this important choice regarding the application of the proposal to the total

discretion of this Court." *Evans v. Firestone,* 457 So.2d 1351, 1356 (Fla. 1984) (Overton, J., concurring).

Aside from the ballot summary's obvious failure to disclose such a consequence, the necessity for such judicial action means that the Services Tax Amendment violates the single-subject requirement because it is not "'sufficiently clear so that the reader, whether layman or judge, can understand what it purports to do and perceive its limits[.]'" *Advisory Op. to the Att'y Gen. re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Pari-mutuel Facilities*, 880 So.2d 522, at 528-29 (Bell, J. specially concurring) (quoting *Fine v. Firestone*, 448 So. 2d 984, 998 (Fla. 1984) (Shaw, J., concurring in result)).

Even if the Services Tax Amendment complied with the single-subject requirement before February 1, 2006 – and we demonstrated in our earlier briefs that it did not – it no longer meets the Constitution's command to be "sufficiently complete within itself, requiring no other amendment to effect its purpose." *Fine,* 448 So. 2d at 990 (quoting *Weber v. Smathers,* 338 So. 2d 819, 822 (Fla. 1976)) (E.A.). The two indispensable components of the measure are the mandatory legislative review and the extension of the sales tax to non-taxed services. This Court would have to re-write substantive terms of both components of this initiative in order to make them work together as promised.

In its Amended Answer Brief, the Sponsor argues that the Interested Parties "wring their hands and fret that the Legislature will act irresponsibly." Sponsor's Amended Answer Brief, at 18. We do not doubt the intention or the ability of the Legislative Branch to act responsibly. Rather, in light of the changed circumstances in which the Services Tax Amendment must now be evaluated, we respectfully submit that the Legislature cannot possibly know what it must do in order to discharge its responsibilities under this patently incomplete initiative.

Accordingly, the Services Tax Amendment violates the single-subject requirement of Article XI, section 3 to the extent that the Court would be empowered to establish a new deadline for the mandatory legislative review and a new effective date for automatic extension of the sales tax to non-taxed services. "Only the judiciary has the authority or the obligation to enforce this vital one-subject rule." *Evans*, 457 So. 2d at 1358 (Ehrlich, J., specially concurring). The Court must invalidate this initiative.

CONCLUSION

We have shown that the error in the Services Tax Amendment is more than a scrivening error in its consequences. Under the changed factual circumstances of this proceeding, adoption of this initiative would result in either (a) the automatic extension of the sales tax to non-taxed services on January 6, 2009, without the promised mandatory legislative review; or (b) the Judicial Branch assuming the power 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. Either outcome would violate the constitutional requirements for an initiative.

For the foregoing reasons of law and policy, the Interested Parties respectfully request that the Justices render a written opinion which determines that the Services Tax Amendment:

(a) 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;

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

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

Respectfully submitted on this 3rd 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

238687

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 3rd 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

238687

APPENDIX