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 REPLY 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

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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 REPLY ARGUMENT

Sponsor argues, for the first time in its Supplemental Answer Brief, that the initiative is not self-executing, and therefore the Legislature may provide new dates for the effectiveness of the initiative after the passage of the deadline for legislative action by the date of voter approval. Sponsor's position is untenable. It represents a reversal of the earlier representations of the Sponsor, and it has no support in logic or the common law. It therefore should be rejected, and the Court should conclude that the ballot summary is clearly and conclusively defective.

Sponsor also argues that the single-subject rule is not implicated by the potential need of the judiciary to rewrite the amendment, following its approval by the electors, to provide new dates for legislative review. Since the time for legislative action will have passed by the date of anticipated voter approval, it most likely will devolve to the judiciary to rewrite the amendment. This further exacerbates the initiative's violation of the single-subject rule. In this regard, as well, the initiative is clearly and conclusive defective and it should be invalidated.

SUPPLEMENTAL REPLY ARGUMENT

Sponsor's attempt to explain away the fatal defects in the proposed amendment demonstrate precisely why it is clearly and conclusively defective: for the proposed amendment to be salvaged, it will require substantial rewriting by the courts. As a result, it does not deliver what it promises in the ballot summary, and it violates the single-subject rule. It therefore is invalid. Its infirmities will cause voter confusion and disruption of established governmental roles and functions, which the notice requirements and single-subject limitation, and indeed this advisory opinion process, are designed to avoid.

I. SPONSOR'S CONCLUSION THAT THE PROPOSED AMENDMENT IS NOT SELF-EXECUTING IS ERRONEOUS.

In this proceeding, the Sponsor relies upon *Advisory Op. to the Att'y Gen. re Florida Locally Approved Gaming,* 656 So.2d 1259 (Fla. 1995) [hereinafter *FLAG Initiative*] as supporting the initiative. Interested Parties demonstrate the flaw in such reliance in their earlier supplemental briefs. In relying on *FLAG Initiative* in its Supplemental Answer Brief, however, for the first time in this proceeding, Sponsor erroneously characterizes the initiative as "not self-executing" [Sponsor's Supplemental Answer Brief, at 7], reversing its many prior characterizations.

For example, in its Initial Brief in this matter, Sponsor states:

> 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 [E.A.].

Sponsor's Initial Brief, at 8. Sponsor's briefs in this matter are replete with such representations.[1]

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[1] Other examples of Sponsor's prior statements in this proceeding include the following: "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." Sponsor's Initial Brief, at 12 [E.A.]. "Non-taxed services that are not exempted by the Legislature shall be subject to the sales tax on January 1, 2009." Sponsor's Initial Brief, at 13 [E.A.]. "If the Legislature determines that certain non-taxed services are to be subject to the sales tax, it can directly tax the category of services, with such exemption, classification or limitation it chooses, or the Legislature can allow the category of services to be taxed on January 1, 2009, by its inaction. Sponsor's Answer Brief, at 9 [E.A.]. "All non-taxed services which the Legislature determines pursuant to its mandated review are not entitled to an exemption will be taxed either directly by the Legislature or by operation of the constitutional proposal on January 1, 2009. Sponsor's Answer Brief, at 16 [E.A.]. "The Legislature can directly tax some or all services that are not currently subject to the sales tax or allow a category of services to be taxed on January 1, 2009, by inaction." Sponsor's Answer Brief, at 17 [E.A.]. "Under the proposed amendment, it is the Legislature that reviews each category of non-taxed services and determines whether to grant an exemption or allow a category of services to be taxed on January 1, 2009, by operation of the constitutional amendment. Sponsor's Answer Brief, at 21 [E.A.]. "[T]he voter is clearly informed that, if the Legislature, pursuant to its review of all non-taxed services, fails to act by granting an exemption, except for employee services and benefits, such services will be subject to the existing sales tax effective January 1, 2009." Sponsor's Answer Brief, at 21 [E.A.]

Sponsor elaborates in this regard, as follows:

> Only if the Legislature stands silent in the face of the demand by the people for a deliberate review of non-taxed services will such services be taxed without explicit legislative implementation. Such inaction is unlikely and such argument is grounded in a cynicism on the integrity of the Legislature.

Sponsor's Answer Brief, at 10 [E.A.]. Irrespective of Sponsor's characterization of Interested Parties' argument as "unlikely," we are well past that point now. As Interested Parties argue in their supplemental briefs in this matter, legislative inaction is certain due to the passage of the mandatory date for legislative action that will result under the express provisions of the proposed amendment. That the text of the initiative contains an express and immutable date for the effectiveness of its sweeping changes to the tax system in Florida is beyond dispute.

But Sponsor now treats the certainty of legislative inaction dismissively, by stating in its most recent brief, "[T]he 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." Sponsor's Supplemental Answer Brief, at 7. This assertion turns on its head the appropriate legal analysis of a self-executing constitutional provision. *Flag Initiative* certainly does not stand for the proposition that, once a proposed amendment's express deadlines for legislative action have passed, the amendment is not self-executing.

In *Flag Initiative*, the Supreme Court determined that the proposed amendment was not self-executing and therefore there was a remedy available even when a deadline for legislative action had passed. It did not evaluate the proposed amendment in the reverse way that the Sponsor urges: if the legislative deadlines have passed, then the proposed amendment is not self-executing. The absurdity of this proposition is palpable, it has no support in the common law, [2] and it should be rejected.

The Sponsor asserts that the Legislature can establish its own schedule apart from the mandatory provisions of the proposed constitutional text, because the Legislature must "convene at least once" before the effective date of the initiative. Sponsor's Supplemental Answer Brief, at 10. Although the Sponsor does not

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[2] Sponsor's reliance on *Advisory Op. to the Gov.*, 225 So.2d 512 (Fla. 1969), likewise is misguided, because the case is grounded in a wholly different context and with a constitutional directive substantially more general than in the present circumstance. That case was an executive inquiry by the Governor to determine whether he could appoint a legislator to the position of Secretary of Administration notwithstanding that a member of the Legislature was prohibited from filling an office that the legislator helped create ("anti-featherbedding" restrictions).

The court held that the Secretary of Administration was an office created by the Legislature in carrying out Article IV, section 6 of the 1968 Constitution. In response to the constitutional mandate, the Legislature created 22 departments, including the Department of Administration. The court determined that the constitutional provision was not self-executing, so that the appointment restrictions applied to a legislator with regard to an office created by the Legislature.

In the instant matter, the proposed constitutional text of the initiative is much more specific, and its nature as self-executing or not cannot be gleaned from reliance on this inapplicable earlier decision.

specify, this reference presumably is to Article III, section 3(a) of the Florida Constitution, in which 14 days after its election the Legislature is directed to "convene for the exclusive purpose of organization and selection of officers." Alternatively, Sponsor assures the Court, the Legislature can cure the defect by calling itself into special session. Sponsor's Supplemental Answer Brief, at 10.

Setting aside the issue of whether the Legislature could conduct a meaningful and legitimate review of sales tax policy between the general election on November 4, 2008, and the organizational session two weeks later, Sponsor's proposed legislative solutions to the mandatory date in the proposed constitutional text ignore the plain language of the initiative: that unless the Legislature "prior to July 1, 2008" has enacted exemptions to the sales tax on services created by the amendment, "all services that are not exempted by the legislature shall be subject to the existing sales tax effective January 1, 2009."

No legislative sleight of hand in the organizational session in November 2008 or in special session before the ensuing new year can change that. If the prior legislative body has not conducted a review and exemption process prior to July 1, 2008 – more than four months prior to the date that the proposed amendment will be voted on – the plain language of the amendment requires the sales tax on

services to be effective on January 1, 2009. Sponsor recognized this earlier in this proceeding, and should not be heard to deny it now.

II. REQUIRED JUDICIAL REWRITING OF THE PROPOSED AMENDMENT EXACERBATES ITS SINGLE-SUBJECT INFIRMITIES.

In their Amended Supplemental Initial Brief, Interested Parties argue that the changed circumstances leave the ballot summary bereft of disclosure that the proposed constitutional text must be rewritten by the judiciary in order to deliver on its full promise to the voters. Additionally, Interested Parties argue that any necessity for judicial action to rewrite the proposed amendment so that it may be implemented exacerbates the violations of the single-subject requirement identified in their initial briefs.[3]

Sponsor relies on two opinions in urging the Court not to interfere with "legislative prerogatives": *Dade County Classroom Teachers Association v. Legislature*, 269 So.2d 684 (Fla. 1972), and *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130 (Fla. 1990). Both cases are readily distinguishable from the case at bar. Indeed, their fundamental

[3] Apparently, the changed circumstances have compelled Sponsor to acknowledge at least some possibility of the need for judicial rewriting of the proposed amendment, as Sponsor concedes: "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." Sponsor's Supplemental Answer Brief, at 10 [E.A.].

distinctions demonstrate the infirmity of the initiative, and thus the fallacy in Sponsor's argument: the constitutional provisions in those cases did not contain specific dates by which the Legislature was required to act, and the Legislature still had an opportunity to act.

As Interested Parties have argued throughout in addressing these changed circumstances, and as is readily apparent from a plain reading of the initiative, the Legislature will have been deprived of its promised opportunity to enact exemptions to the sales tax on services by the time the amendment is voted on in November 2008. The prior Legislature would have had to avail itself of such an opportunity by July 1, 2008, in order to avoid the creation of the sales tax on services on January 1, 2009, but it would have had to do so only in anticipation of the citizens' vote on the constitutional amendment creating the sales tax on services. As a consequence, it will no doubt devolve to the judiciary to untangle this Gordian knot.

Since that is so, and for the reasons iterated in Interested Parties' earlier supplemental briefs in this matter, the changed circumstances exacerbate the proposed amendment's violation of the single-subject rule. The advisory opinion process for evaluating proposed constitutional initiatives is designed to invalidate them when that fundamental rule is violated, and it therefore is not only appropriate that the Court invalidate the proposed amendment, it is required.

CONCLUSION

For the reasons articulated herein, and in Interested Parties' Amended Supplemental Initial Brief and Supplemental Answer Brief, the changed factual circumstances make the proposed initiative clearly and conclusively defective. Therefore, and for the other reasons iterated in Interested Parties' main briefs in this matter, Interested Parties respectfully request that the Court determine 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 1st day of May, 2006.

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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 1st day of May, 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.

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Attorney