

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-1833

ADVISORY OPINION TO THE
ATTORNEY GENERAL

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

**ANSWER BRIEF OF THE SPONSOR TO BRIEF OF
INTERESTED PARTIES IN OPPOSITION ON THE
VALIDITY OF THE FINANCIAL IMPACT STATEMENT**

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STATEMENT OF THE CASE AND FACTS

The Sponsor, Floridians Against Inequities in Rates ("FAIR") accepts the Statement of the Case as contained in the Brief of the Interested Parties in Opposition supplemented by the following statements relating to the organization of FAIR in the collateral proceedings pending before the Court in Case No. SC05-1564 seeking an advisory opinion on whether the proposed amendment satisfies the single subject rule and whether the ballot title and summary meets applicable statutory requirements. See App. A (ballot title, ballot summary and ballot text of the proposed amendment in the initiative Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Public Purpose).

The proposed constitutional amendment in the initiative Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose is proposed by FAIR, 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 of FAIR. As reflected in its title, FAIR was organized to present to the people by petition three proposed constitutional amendments directing the Legislature to perform an open review of exemptions and exclusions to the 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.

The constitutional amendment proposed in the initiative Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose is one of three initiatives crafted by FAIR to present to the people three proposed constitutional amendments of sales tax reform. See App. B (ballot title, ballot summary and ballot text of the proposed amendment in the Initiative Directing Manner By Which Sales Tax Exemptions are Granted by the Legislature); App. C (ballot title, ballot summary and ballot text of the proposed amendment in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose).

Such proposed amendments are presented to the public as separate amendments to comply with the reasoning provided by the Court concerning a constitutional amendment previously prepared by FAIR in Advisory Opinion 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).

At issue in this proceeding is the request from the Attorney General for an advisory opinion from the Court on whether the financial impact statement prepared by the Financial Impact Estimating Conference on the proposed amendment is in accordance with Article XI, section 3, Florida Constitution, and section 100.371(6), Florida Statutes. See App. D (Initiative Financial Information Statement containing the Financial Impact Statement of the proposed amendment).

SUMMARY OF THE ARGUMENT

The financial impact statement approved by the Financial Impact Estimating Conference is a clear and unambiguous statement of the probable financial impact resulting from the approval of the proposed amendment. The estimated dollar amounts of the probable financial impact cannot be reasonably determined since they are dependent upon future legislative action. There is no constitutional or statutory requirement that a financial impact statement contain a numeric range of financial impacts. Any numeric range must be capable of a reasonable determination and is limited by the constitutional standard that the statement document the probable financial impact. The inclusion of the numeric range advanced by the opposition is misleading and politically charged to advance their opposition to the proposed amendment.

STANDARD OF REVIEW

The review by the Court of a financial impact statement prepared by the Financial Impact Estimating Conference is limited to a determination of whether the financial impact statement provides a clear and unambiguous statement of the probable financial impact to revenues or costs to the State or local governments resulting from the proposed initiative.

Unlike the statutory requirements for a ballot summary and title provided in section 101.161, Florida Statutes, the content standard of the financial impact statement is prescribed clearly in the Florida Constitution and the implementing general law.

Article XI, section 5(c), Florida Constitution, requires for the provision by general law of "a statement to the people regarding the probable financial impact" of an initiative provision. Id. (emphasis supplied).

Section 100.371(6)(a), Florida Statutes, mandates that the Financial Impact Estimating Conference "complete an analysis and financial impact statement . . . of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative." Id. (emphasis supplied). The phrase in section 100.371(6)(b)3, Florida Statutes, that allows the statement to include a "range of potential impacts" is limited by their constitutional requirement that the statement document the "probable financial impact." See Advisory Op. to Att'y Gen. re: Public Protection From Repeated Medical Malpractice, 880 So. 2d 686 (Fla. 2004).

ARGUMENT

I. THE PROBABLE FINANCIAL IMPACT OF THE PROPOSED AMENDMENT CANNOT BE REASONABLY DETERMINED SINCE ANY INCREASE OR DECREASE IN REVENUES TO THE STATE AND LOCAL GOVERNMENT IS DEPENDENT ON UNPREDICTABLE FUTURE CHOICES BY THE FLORIDA LEGISLATURE.

The proposed amendment is an instruction and direction by the people to the Legislature to review by a date certain all services not subject to the sales tax authorized in Chapter 212, Florida Statutes, and exempt from future taxation only those services that the Legislature determines in its unfettered discretion serve or advance a public purpose. Any increase or decrease in revenues to the state or local government is within the future

discretion of the Legislature in complying with such mandated review. No additional revenues are received as a result of voter approval of the proposed amendment.

As recognized in the financial impact statement adopted by the Financial Impact Estimating Conference, any future action of the Legislature in the performance of the public purpose review of non-taxed services mandated in the proposed amendment cannot be reasonably predicted or determined.¹ The Legislature could reduce the sales tax rate with revenues anticipated to be received by directly taxing or allowing the taxation of services not currently taxed. Any revenue anticipated to be received from a legislative decision to directly tax all of the currently non-taxed services could be appropriated solely for state government purposes and not shared with local governments. The Legislature could elect to tax directly only a portion of a currently non-taxed service and exempt the remainder of the service transaction. All such taxing decisions remain a legislative prerogative. None result as a consequence of approval of the proposed amendment.

The voter is told in the ballot summary that each currently non-taxed service is placed at risk of failing the mandated public review by the Legislature. However, the financial impact resulting from such mandated legislative public purpose review is neither

¹If the probable financial impact of a proposed amendment cannot be determined, the voter is informed of such conclusion consistent with the constitutional and statutory scheme. For example, see the requirement in section 100.371(6)(b)4, Florida Statutes, that when the members of the Financial Impact Estimating Conference cannot agree on a probable financial impact, the financial impact statement that appears on the ballot is, "The financial impact of this measure, if any, cannot be reasonably determined at this time."

estimateable, predictable, nor probable. This probable financial impact is clearly and unambiguously stated in the financial impact statement approved by the Conference:

Although state and local governments could potentially receive substantial revenue for non-taxed services subject to legislative review, the probable impact of the amendment is dependent upon future action of the legislature and cannot be determined. If the legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected. If the legislature fails to exempt one or more services that are currently non-taxed, state and local government revenues will increase.

Initiative Financial Information Statement, p. 1.

The inclusion of the "numeric expression" advanced by the opposition in the financial impact statement would render the financial impact statement misleading. The probable financial impact is that "state and local governments could potentially receive substantial revenue" from the mandated public purpose review, not a speculative numeric range. The fact that the Conference has documented the estimated receipts of each service currently not taxed in the Initiative Financial Information Statement mandated under section 100.371(6)(d)3, Florida Statutes, does not produce a reasonable determination of the numeric range of the probable financial impact in advance of the public purpose review by the Legislature of non-taxed services that is mandated by the proposed amendment.

The proposed amendment title is not a bullet train or class size amendment where approval creates a direct and probable financial impact on the State that is capable of

being reasonably determined at an estimated amount or within a numeric range.² The proposed amendment mandates a review of all non-taxed services to determine whether their exclusion from sales taxation advances or provides a public benefit. A probable numeric financial impact does not occur as a result of the proposed amendment but is solely a consequence of the unknown future legislative action mandated by the voters in their approval of the proposed amendment. For a financial impact statement to include a numeric statement of a range of financial impacts, both the range and its outer limits are constitutionally required to state a probable impact resulting from the approval of the proposed amendment. Otherwise, the financial impact statement is misleading, politically charged and biased.

As recognized by the Court in Advisory Op. to Att'y Gen. re: Medical Malpractice, the statutory authority to include a range of potential impacts "must relate to the phrase 'probable financial impact'" set forth in the Constitution. 880 So. 2d at 687. The numeric range of \$0 to \$19 billion in additional tax revenues clearly fails the paramount constitutional test of "probable financial impact." The outer limit of the numeric range urged by the opposition assumes the Legislature, in conducting its mandated public

² The reliance by the Interested Parties in Opposition on the financial impact statement approved in the Advisory Op. to Att'y Gen. re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities, 882 So. 2d 966 (Fla. 2004), is misplaced. While the slot machine initiative required future implementing legislation, the constitutional test of probable financial impact could be determined in the same manner as that for the bullet train and class size amendments. Unlike the proposed amendment, the legislative authorization of the slot machine amendment had no bearing on the determination of the probable financial impact.

purpose review, will extend the existing sales tax rate to all non-taxed services with no exemptions. A financial impact statement based upon such assumption of future legislative action is not only improbable but is absurd and misleading. An estimate of the probable financial impact based on an assumption that the Legislature's mandated review of non-taxed revenue will exempt all currently non-taxed services is equally improbable and misleading.

The duty of the Court is to review the financial impact statement adopted by the Conference to determine whether the statement provides a clear and unambiguous statement of probable financial impact resulting from the proposed amendment that is not politically charged and does not favor either its sponsor or its opponent. There is no constitutional or statutory requirement or direction that a financial impact statement contain a "numeric expression."

To include in the financial impact statement a probable financial impact of \$19 billion in new revenues resulting from approval of the proposed amendment places the financial impact statement on the ballot squarely in the political debate as a misleading tool of the initiative opponents. The thirty second television ad in opposition can clearly be envisioned, "A vote yes is a vote for \$19 billion in new taxes." Neither the ballot language nor the opinion of the Court can take sides in the political debate on future action by the Legislature in its performance of its public purpose review of non-taxed services mandated in the proposed amendment. As clearly stated in the financial impact

statement, the probable financial impact awaits legislative action. The numeric range urged by the opponents would distort the analysis contained in the Initiative Financial Impact Statement prepared by the Financial Impact Estimating Conference and would be blatantly misleading and inaccurate.³

The financial impact statement, read together with the ballot language and ballot title, asks each voter to cast an intelligent vote on whether he or she wishes to put all non-taxed services at the risk of taxation by mandating a comprehensive legislative review to determine whether the exclusion from taxation of a currently non-taxed service advances or provides a public benefit.

CONCLUSION

The financial impact statement proposed by the Financial Impact Estimating Conference for the initiative Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails to Serve Public Purpose satisfies the requirement of Article XI, section 5(b), Florida Constitution, and section 100.371, Florida Statutes (2005). This Court should approve the financial impact statement for placement on the general election ballot.

Respectfully submitted,

³ Such information is readily available to the voter in detail. Sections 100.371(6)(c)4 and 5, Florida Statutes, require that the Initiative Financial Information Statement be printed and available at each polling place and at the main office of the Supervisor of Elections at the request of each voter and that the statement be posted on the website of the Secretary of State and of those Supervisors of Elections that have website capability.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing 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. Tunnickliff 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 30th day of November, 2005.

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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