

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-1565

ADVISORY OPINION TO THE
ATTORNEY GENERAL

RE: INITIATIVE REQUIRING LEGISLATIVE
DETERMINATION THAT SALES TAX
EXEMPTIONS SERVE A PUBLIC
PURPOSE

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

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STATEMENT OF THE CASE AND FACTS

As stated in the Initial Brief, the Initiative Requiring Legislative Determination That Sales Tax Exemptions Serve a Public Purpose is one of three proposed constitutional amendments sponsored by Floridians Against Inequities in Rates ("FAIR") 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 by the Legislature.

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 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 App. B. to the Initial Brief).

Each of the three separate amendments has constitutional validity and advance independently the objective of FAIR even if one or both of the other two amendments proposed by FAIR are rejected by the electors. The Interested Parties in this case filed a brief objecting to the proposed amendment currently before the Court in this case and have filed a brief objecting to the constitutional amendment proposed in the Initiative Extending Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Public Purpose in Case No. SC 05-1564. See App. D to the Initial Brief (providing the ballot title, ballot summary and ballot text of such initiative).

The Interested Parties in this case did not file a brief objecting to the constitutional amendment prepared by FAIR in the Initiative Directing Manner By Which Sales Tax Exemptions are Granted by the Legislature. See App. C to the Initial Brief (providing ballot title, ballot summary and ballot text of such initiative).

SUMMARY OF THE ARGUMENT

In their Initial Brief, the Interested Parties assert multiple reasons to support their argument that the proposed amendment violates both the single-subject rule of Article XI, section 3, Florida Statutes, and the ballot notice requirements of section 101.161, Florida Statutes. Such asserted reasons and arguments misconstrue and distort the plain language of the proposed amendment and conflict with longstanding principles of judicial deference established by the Court in its review of constitutional amendments proposed by citizen initiative.

First, the Interested Parties erroneously argue that the Court should prevent the voters from considering the proposed amendment because it is unwise. The wisdom of a constitutional amendment proposed by citizen initiative is decided by the voters.

Second, the Interested Parties ground their arguments on the untenable assumption that the Legislature will stand silent or act irresponsibly in its implementation of the proposed amendment if approved by the electors. Any assumption of inaction by the Legislature has no place in a single-subject analysis of a citizen initiative and is not a factor in the review by the Court of the proposed amendment.

Citizen initiatives proposing constitutional amendments are reviewed under a forgiving standard and it is the Court's "duty is to uphold the proposal unless it can be shown to be 'clearly and conclusively defective.'" Advisory Op. to the Att'y Gen. re Florida's Amendment to Reduce Class Size, 816 So. 2d 580, 582 (Fla. 2002) (quoting (Advisory Op. to the Att'y Gen. re Tax Limitation, 673 So. 2d 864, 867 (Fla. 1996);

Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337, 399 (Fla. 1978)).

Consistent with this concept of judicial deference and restraint, the Court has frequently held that the wisdom and necessity of amendments proposed by initiative is for the people to decide. "In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment." Florida's Amendment to Reduce Class Size, 816 So. 2d at 582. See also Advisory Op. to the Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367, 369 (Fla. 2000).

Further, the proposed amendment is consistent with the reasoning provided by the Court concerning the constitutional amendment previously prepared by FAIR 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 App. B. to the Initial Brief).

The proposed amendment is a constitutional mandate by the citizens of Florida to instruct and direct the Legislature to periodically review all exemptions from the sales tax, except those expressly excluded from such review, and to adopt or continue only those that advance or serve a public purpose. All of the legislative prerogatives of the

Legislature in the performance of its mandated review of sales tax exemptions remain intact.

The power of the people to directly submit for approval at general elections constitutional amendments unfiltered by the executive and legislative branches of government is an express reservation of political power. In granting constitutional political power to all branches of government, the people reserved to themselves the power and right to consider the wisdom of future initiatives proposed by constitutional amendment by the requisite number of their fellow citizens.

INTRODUCTION

The Florida Constitution, by express provision and by its reservation of power to the people embodied in the constitutional initiative process, recognizes that all political power in Florida is ultimately derived by a grant from its citizens. Article I, section 1, Florida Constitution, expressly states that "[a]ll political power is inherent in the people." Art. I, § 1, Fla. Const. The power of the people to directly submit for approval at general elections constitutional amendments unfiltered by the executive and legislative branches of government is an express reservation of political power. Art. XI, § 3, Fla. Const. Within its express limitations, the constitutional citizen initiative process is a right of self determination reserved by the people to themselves in their approval of the Florida Constitution. In granting constitutional political power to all branches of government, the people reserved to themselves the power and right to consider the wisdom of future initiatives proposed by constitutional amendment by the requisite number of their fellow citizens.

The sanctified nature of this reservation of the right of self determination preserved for all Florida citizens has, on numerous occasions, been recognized by the Court:

This Court traditionally has been reluctant to interfere with this right by barring citizens from formulating their own organic law:

There is no lawful reason why the electors of this State should not have the right to determine the manner in which the Constitution may be amended. This is the most sanctified area in which a court can exercise power. Sovereignty

resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of [the law].

Advisory Op. to the Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002) (quoting Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958)).

This clear statement of judicial restraint and deference in reviewing the right of citizens to determine organic law by constitutional amendment was recognized by the Court in Non-Violent Drug Offenses, to be "especially appropriate in the case of proposed constitutional amendments arising through the citizen initiative process." 818 So. 2d at 494. Such initiatives are reviewed under a forgiving standard and it is the Court's "duty is to uphold the proposal unless it can be shown to be 'clearly and conclusively defective.'" Advisory Op. to the Att'y Gen. re Florida's Amendment to Reduce Class Size, 816 So. 2d 580, 582 (Fla. 2002) (quoting Advisory Op. to the Att'y Gen. re Tax Limitation, 673 So. 2d 864, 867 (Fla. 1996); Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337, 339 (Fla. 1978)).

Consistent with this concept of judicial deference and restraint, the Court has frequently held that the wisdom and necessity of amendments proposed by initiative is for the people to decide. "In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide

whether the Legislature should more appropriately address the subject matter of the proposed amendment." Florida's Amendment to Reduce Class Size, 816 So. 2d at 582. See also Advisory Op. to the Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367, 369 (Fla. 2000).

The Court has emphasized the high degree of restraint required in its review of initiative petitions, "the Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). Specifically, where citizen initiatives are concerned, "the Court has no authority to inject itself in the process, unless the laws governing the process have been 'clearly and conclusively' violated." Advisory Op. to Att'y Gen. re Right to Treatment and Rehabilitation for Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002) .

As a consequence, the limited judicial inquiry in the review of a citizen petition for constitutional amendment is whether the constitutional proposal violates the constitutional single subject requirement and whether the ballot language and summary is clear to the average voter.

The proposed amendment is a constitutional mandate by the citizens of Florida to instruct and direct the Legislature to periodically review all exemptions from the sales tax, except those expressly excluded from such review, and to adopt or continue only those that advance or serve a public purpose. All of the legislative prerogatives of the

Legislature in the performance of its mandated review of sales tax exemptions remain intact.

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 by conducting a public purpose review of all sales tax exemptions. Faced with a reluctant Legislature, the people have reserved to themselves the power to act by citizen initiative. No organic law is directly proposed by the proposed amendment. The Legislature is directed by the people to conduct a deliberate public purpose review of sales tax exemptions not taxed under the existing sales tax under its existing legislative power.

Pursuant to such a review, the Legislature can reenact and continue all sales tax exemptions, directly repeal an exemption or allow an exemption to lapse and end effective on the January 1 date specified in the proposed constitutional amendment. Additional sales tax revenues estimated to be received from such taxation can be applied by the Legislature to reduce sales tax rates or appropriated by the Legislature under its constitutional appropriation power.

All legislative prerogatives remain intact by the proposal except that the Legislature cannot ignore the instruction and demand by the people to review the fairness and public purpose advanced by each sales tax exemption except those enumerated exemptions expressly excluded or insulated from the mandated review.

The proposed amendment has the logical and oneness of purpose to place before the voters the proposition of whether they desire to instruct and direct by constitutional amendment a periodic public purpose review by the Legislature of sales tax exemptions.

The power of the people to instruct and direct the Legislature in the manner provided in the proposed amendment should not be restrained by an argument that the Legislature will not act responsibly in performing its mandated review or in its implementation of the proposed amendment. Only if the Legislature stands silent in the face of the demand by the people for a deliberate review of the sales tax exemption will exemptions lapse and end without explicit legislative implementation. Such inaction is unlikely and such argument is grounded in a cynicism on the integrity of the Legislature. An argument founded on a fear that the Legislature will not perform its constitutional duty or undertake traditional legislative functions in face of a constitutional mandate cannot be applied as to a bar to an exercise of the citizen initiative power the people reserved to themselves.

ARGUMENT

I. THE PROPOSED AMENDMENT COMPLIES WITH SINGLE-SUBJECT REQUIREMENT OF ARTICLE IX, SECTION 3, FLORIDA CONSTITUTION.

The objections of the Interested Parties raise a cry of hysteria and present a parade of horrors that distorts both the thrust of the proposed amendment and its plain language.

The proposed amendment is an instruction and direction by the people to the Legislature to periodically review all sales tax exemptions, except those expressly excepted from the mandated review and reenact or continue only those exemptions that advance or serve a public purpose. The power of the people to direct and instruct the Legislature is a fundamental power reserved by the people in the constitutional initiative process embodied in Article XI, section 3, Florida Constitution. The proposed amendment appropriately instructs and directs the legislative branch under the Florida Constitution to perform a measure of sales tax reform by undertaking a mandated review of sales tax exemptions to determine whether the exemption serves a public purpose.

In performing such a review, the power of the Legislature remains unfettered. Under the proposed amendment, it is the Legislature that decides whether to expressly reenact or continue a sales tax exemption or allow a sales tax exemption to lapse and end on the January 1 date specified in the proposed constitutional amendment. The discretion of the Legislature to reenact and continue a sales tax exemption is absolute and unfettered.

Any additional State sales tax revenues estimated to be created as a consequence of

legislative action or operation of the proposed amendment is subject to legislative appropriation or direction in the same manner as any other State revenue.

If the Legislature determines, pursuant to the constitutional mandate that a sales tax exemption does not advance or serve a public purpose, it has two constitutional choices under the proposed amendment. First, it can repeal or modify the enacted sales tax exemption. Second, it can allow the sales tax exemption not excluded from the mandated review to lapse and end on the January 1 date specified in the proposed constitutional amendment.

The voter's decision is crystal clear. Does he or she want sales tax exemptions, except those expressly excluded, to be reviewed by the Legislature to determine whether the exemption serves or advances a public purpose. In other words, does the voter want to instruct and direct the Legislature to focus its legislative power on a review of sales tax exemptions in the manner contemplated in the proposed amendment?

The question for the voters is whether they want to instruct and direct the Legislature to perform a review of sales tax exemptions and determine, under the traditional legislative process, whether each exemption serves or advances a public purpose. The determination of public benefit is a legislative prerogative but the legislative obligation to perform the review is mandated by the people.

Under the proposed amendment, the Legislature is the branch of government instructed and directed by the voters to review the fairness of a sales tax exemption. Such instruction and direction is consistent with the assignment of governmental power

within the Florida Constitution. The proposed amendment does not impose a sales tax nor favor one exemption over another.

The people are simply and clearly directing and instructing the Legislature to review all sales tax exemption except those expressly excluded from such review to determine whether the sales tax exemption serves or advances a public purpose. Except for the exemption provided for food; prescription drugs; health services; and residential rent, electricity and heating fuel, all sales tax exemptions are either reenacted and continued by the Legislature or repealed directly by the legislature or by the operation of the constitutional proposal on the January 1 date specified. The repeal of all or a portion of those enumerated exemptions excluded and insulated from the mandated review cannot occur by legislative inaction.

The Interested Parties wring their hands and fret that the Legislature will act irresponsibly. If the Legislature determines that additional implementing legislation is necessary as a consequence of its determination that a sales tax exemption is to be repealed by express enactment or by operation of the constitutional amendment on the January 1 date specified in the proposed constitutional amendment, it has to be constitutionally assumed that the Legislature will act responsibly to incorporate its tax decision appropriately in the Florida tax structure. Why do the Interested Parties assume that the Legislature will not deal with any necessary issues of use, tax collection or nexus if, pursuant to its review, it determines that a sales tax exemption should be ended? Such assumption has no place in any single subject analysis and is not a factor in the review by

the Court of the proposed amendment. A constitutional amendment proposed by initiative is not required to resolve and explore every issue of implementation, particularly where the power of the Legislature is not limited within the context of the proposed amendment.¹

The Legislature's power remains intact. The Legislature can reenact and continue an exemption. The Legislature can directly repeal any exemption, in whole or in part, or allow an exemption to terminate and end by inaction on the January 1 date specified in the proposed constitutional amendment. Under the proposed amendment, the enumerated exemptions are excluded and insulated from the mandated review and they lapse or end only by an express act of the Legislature.

The essence of the argument of the Interested Parties is that the people have reserved to themselves only the power to instruct and direct a review, one by one, of each sales tax exemption or has reserved the power to instruct and direct the Legislature to repeal only one specific sales tax exemption at a time. The reserved power to amend the Florida Constitution by petition in Article XI, section 3, is not so narrowly drawn.

Nothing in the proposed amendment creates a cataclysmic change to the Florida Constitution. Those who benefit from the sales tax exemption may fear that a comprehensive review by the Legislature of the public service advanced by each sales tax

¹See, for example, the direction in the class size amendment to Article IX, section 1, Florida Constitution, which directs the Legislature, beginning with the 2003-2004 fiscal year, to provide sufficient funds to meet the class size mandate directed by the people. The political power of the people in this initiative was not suppressed by any concern the

exemption may be cataclysmic to their private interest. However, placing the light of public scrutiny on whether the sales tax exemption serves a public interest is a power reserved to the people. The voters are entitled to assume that the Legislature will act responsibly in obeying their instruction and direction.

II. THE BALLOT TITLE AND SUMMARY PROVIDE FAIR NOTICE OF THE AMENDMENT'S CONTENT AND UNAMBIGUOUSLY DISCLOSE THE CHIEF PURPOSE OF THE AMENDMENT.

The title and summary must be drafted "so the voter will have fair notice of the content of the proposed amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." Advisory Op. to the Att'y Gen. re Stop Early Release of Prisoners, 661 So. 2d 1204, 1206 (Fla. 1995). An informed vote does not equate to providing the voter with every potential detail or ramification of the proposal. Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986) (citing Miami Dolphins v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981)). In other words, the ballot summary "is not required to include all possible effects . . . nor to 'explain in detail what the proponents hope to accomplish.'" Advisory Op. to the Att'y Gen. re Tax Limitation, 673 So. 2d 864, 868 (Fla. 1996) (quoting Advisory Op. to the Att'y Gen. English -- The Official Language of Florida, 520 So. 2d 11, 13 (Fla. 1988)).

Legislature will act irresponsibly and not appropriate sufficient funds.

The Interested Parties argue that the ballot language for the proposed amendment is misleading because the proposed amendment requires a mandated review and repeal of sales tax exemptions without a corresponding review of the use tax exemption for the same transaction. Most sales tax exemptions apply equally to both a sales and a use tax. See § 212.08, Fla. Stat (2005). As recognized by the Interested Parties, each tax compliments the other and both taxes work in harmony to provide a uniform system of taxation regardless of whether the property is sold or used in this State.

To argue that the Legislature would repeal or allow a sales tax exemption to lapse and end and not exempt a use tax for the same transaction assumes the Legislature would act irresponsibly and reject its long standing policy of providing a uniform system of taxation regardless of whether the goods are sold or used in this State. The proposed amendment has to be considered in the context that all branches of government will perform their constitutional duty responsibly. The ballot language expresses the citizen's intent of the proposed amendment and is not misleading.

The Interested Parties argue that the ballot language is misleading because Florida law does not exempt any "health services" which are insulated from the mandated review of sales tax exemptions directed in the proposed amendment.² The exemptions insulated

² While the proposed amendment does not instruct and direct the Legislature to review exemptions provided for "food; prescription drugs; health services; and residential rent, electricity and heating fuel" the proposed amendment does not restrain or limit the power of the Legislature to repeal all or any part of the enumerated exemptions by direct legislative enactment.

from the mandated legislative review would not lapse or end under the proposed amendment by legislative inaction.

First, it is speculative to determine which health services may be expressly exempted on the effective date of the proposed amendment. To the extent a component of health services is exempted, such component would be insulated from the legislative review mandated under the proposed amendment and from sales taxation by inaction.³

Second, section 212.08(7)(i), Florida Statutes (2005), creates an express exemption for meals provided patients and inmates of any hospital or facility for the statutory classifications of ill or aged individuals and constitutes an exemption for a component of health services.

The ballot language expresses the clear intent of the proposed amendment and is not misleading.

Under the proposed amendment, it is the Legislature that reviews sales tax exemptions and determines whether to enact or continue the exemption or allow a sales tax exemption to lapse and end on the January 1 date specified in the proposed constitutional amendment. Unaffected by the proposal is the power of the Legislature to repeal a sales tax exemption, place a condition or limitation on an exemption granted or

enact necessary implementing legislation as a consequence of their mandated public purpose review.

The ballot clearly informs the voter that he or she is directing the Legislature to perform a review of each sales tax exemption except those enumerated exemptions expressly excluded and insulated from the mandated review and reenact and continue only those exemptions that advance or serve a public purpose. Additionally, the voter is clearly informed that, if the Legislature, pursuant to its review, fails to reenact or continue an exemption, except for those enumerated exemptions excluded and insulated from the mandated review, such sales tax exemptions will lapse and end effective on the January 1 date specified in the proposed constitutional amendment.

³ The enactment of an exemption from a component of health services could also likely occur as a consequence of the review of services not taxed under the existing sales tax in the Initiative Extending Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose. See App. D of Initial Brief for ballot title, ballot summary and ballot text.

CONCLUSION

It is submitted that the proposed amendment fully meets the requirements of Article XI, section 3, Florida Constitution, and section 101.161, Florida Statutes, and qualifies for submission to the electorate when the requisite signatures are collected.

Respectfully submitted,

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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 ___ day of October, 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.

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