

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

**INITIAL BRIEF AND APPENDIX OF THE SPONSOR
FLORIDIANS AGAINST INEQUITIES IN RATES**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
Jurisdiction	1
The Petitioner.....	1
Ballot Title, Ballot Summary and Text of Amendment.....	2
Certification By the Secretary of State; Attorney General's Request for Advisory Opinion	4
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	9
I. STANDARD OF REVIEW	9
II. THE PROPOSED AMENDMENT COMPLIES WITH THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION	10
III. THE BALLOT TITLE AND SUMMARY PROVIDE FAIR NOTICE OF THE AMENDMENT'S CONTENT AND UNAMBIGUOUSLY DISCLOSE THE CHIEF PURPOSE OF THE AMENDMENT.....	15
CONCLUSION.....	19
CERTIFICATE OF SERVICE	20
CERTIFICATE OF FONT.....	21
INDEX TO APPENDIX.....	A-1

TABLE OF AUTHORITIES

Page(s)

CASES

<u>Adams v. Gunter,</u> 238 So. 2d 824 (Fla. 1970).....	11
<u>Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Public Educ.,</u> 778 So. 2d 888 (Fla. 2000).....	18
<u>Advisory Op. to the Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.,</u> 769 So. 2d 367 (Fla. 2000).....	11-13
<u>Advisory Op. to the Att'y Gen. re Funding For Criminal Justice,</u> 639 So. 2d 972 (Fla. 1994).....	12
<u>Advisory Op. to the Att'y Gen. re Ltd. Casinos,</u> 644 So. 2d 71 (Fla. 1994).....	13
<u>Advisory Op. to the Att'y Gen. re Ltd. Political Terms in Certain Elected Offices,</u> 592 So. 2d 225 (Fla. 1991).....	13
<u>Advisory Op. to the Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses,</u> 818 So. 2d 491 (Fla. 2002).....	9
<u>Advisory Op. to the Att'y Gen. re Stop Early Release of Prisoners,</u> 661 So. 2d 1204 (Fla. 1995).....	11, 12, 13, 16

Table of Authorities Continued

Page(s)

Advisory Op. to the Att'y Gen. re Term Limits Pledge,
718 So. 2d 798 (Fla. 1998)..... 17

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)..... passim

Askew v. Firestone,
421 So. 2d 151 (Fla. 1982).....9, 17

Carroll v. Firestone,
497 So. 2d 1204 (Fla. 1986)..... 16

Fine v. Firestone,
448 So. 2d 984 (Fla. 1984)..... 9-11

Gray v. Golden,
89 So. 2d 785 (Fla. 1956)..... 9

In re Advisory Op. to the Att'y Gen.--Restricts
Laws Related to Discrimination,
632 So. 2d 1018 (Fla. 1994)..... 10

In re Advisory Op. to the Att'y Gen.--Save Our Everglades,
636 So. 2d 1336 (Fla. 1994)..... 11, 17

League of Women Voters v. Smith (Advisory Op. to the Att'y
Gen. re Tax Limitation),
644 So. 2d 486 (Fla. 1994)..... 9-11

Miami Dolphins v. Metropolitan Dade County,
394 So. 2d 981 (Fla. 1981)..... 16

Weber v. Smathers,

Table of Authorities Continued

Page(s)

338 So. 2d 819 (Fla. 1976)..... 9, 10, 12

FLORIDA CONSTITUTION

Article IV, section 10 1, 5

Article V, section 3(b)(10) 1, 5

Article XI, section 3..... passim

FLORIDA STATUTES

Section 101.161..... 5, 10, 20

Section 101.161(1) 7, 16, 18

Section 15.21 4

Section 16.061 1, 5

STATEMENT OF THE CASE AND FACTS

Pursuant to the provisions of Article IV, section 10, Florida Constitution and section 16.061, Florida Statutes, the Florida Attorney General has requested an advisory opinion on the validity of the FAIR Amendment proposed through the initiative petition process of Article XI, section 3, Florida Constitution. See App. A.

Jurisdiction

The Court has jurisdiction pursuant to the provisions of Article V, section 3(b)(10), Florida Constitution.

The Petitioner

The constitutional amendment in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose is proposed by Floridians Against Inequities in Rates ("FAIR"), a political action committee organized by three citizens of Florida 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.

Ballot Title, Ballot Summary and Text of Amendment

The ballot title for the proposed amendment provides:

Initiative requiring legislative determination that sales tax exemptions serve a public purpose

The ballot summary for the proposed amendment provides:

The legislature shall periodically review all sales tax exemptions except those currently provided for: food; prescription drugs; health services; and residential rent, electricity and heating fuel. After such review, the legislature shall reenact and continue only those exemptions that advance or serve a legislatively determined public purpose. Sales tax exemptions not reenacted and continued by the legislature shall be eliminated.

The text for the proposed amendment provides:

Article III of the Florida Constitution is hereby amended to add the following as Section 20:

Periodic legislative review of sales tax exemptions.--

Except for the current exemptions provided for: food; prescription drugs; health services; and residential rent, electricity and heating fuel, the legislature shall, prior to July 1, 2008, and prior to the first day of July for each tenth year thereafter, review all exemptions from the sales tax existing on or created subsequent to the effective date of this amendment.

The Legislature shall reenact and continue only those exemptions determined to advance or serve a public purpose.

Those exemptions not reenacted and continued shall lapse and end effective January 1 subsequent to the July 1 deadline enumerated in this section for the review of sales tax exemptions.

The constitutional amendment proposed in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose is one of three amendments proposed by FAIR and crafted to present to the people 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. Such proposed amendments are presented to the public as separate amendments to comply with the reasoning provided by the Court in its opinion concerning a prior constitutional amendment proposed 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) (attached hereto as Appendix B).

In that decision, the Court held that the amendment then proposed by FAIR violated the single-subject rule of Article XI, section 3, Florida Constitution, by containing the following three disparate subjects:

Although FAIR argues that the proposed amendment deals with the single-subject of sales tax, in reality, the initiative before the Court for review contains three disparate subjects: (1) a scheme for the Legislature to review existing exemptions to the sales tax under chapter 212; (2) the creation of a sales tax on services that currently does not exist; and (3) limitations on the Legislature's ability to create or continue exemptions and exclusions from the sales tax.

Fairness Initiative, 880 So. 2d at 634. See also App. B.

The constitutional amendment currently before the Court as proposed in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose has independent constitutional viability and advances the objectives of FAIR even if the other two initiatives proposed by FAIR are rejected by the electors. See App. C (ballot title, ballot summary and ballot text of proposed amendment in the Initiative Directing Manner By Which Sales Tax Exemptions are Granted by the Legislature). See App. D (ballot title, ballot summary and ballot text of proposed amendment in the Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Public Purpose).

Certification By the Secretary of State;
Attorney General's Request for Advisory Opinion

After the Secretary of State approved the format of the Petition, FAIR began collecting the signatures required by section 15.21, Florida Statutes (2004), beginning the process leading to the Secretary of State's certification.

The Attorney General received the certification from the Secretary of State on August 24, 2005, and, pursuant to Article IV, section 10 and Article V, section 3(b)(10), Florida Constitution, and section 16.061, Florida Statutes (2004), petitioned the Court for an advisory opinion. See App. A. The advisory opinion is to ensure the amendment's

text complies with Article XI, section 3, Florida Constitution, and to ensure the proposed ballot title and summary comply with section 101.161, Florida Statutes (2004). The Court issued an interlocutory order on September 2, 2005, containing a briefing schedule. This brief supports the constitutionality of the Petition.

SUMMARY OF ARGUMENT

The Court has recognized the sovereign right of the people to amend their Constitution and has been reluctant to interfere with that right. While the standard of review is *de novo*, the Court accords deference to the initiative process, including proposed amendments. It is only when the proposed amendment is clearly and conclusively defective that the Court will remove it from the ballot.

Point I - The Amendment Satisfies the Single Subject Rule.

The amendment must comply with the single subject rule of Article XI, section 3, Florida Constitution.

The constitutional amendment proposed by FAIR addresses the single subject of requiring the Legislature to periodically review all sales tax exemptions except those expressly exempted and to reenact only those exemptions determined to advance or serve a public purpose.

The proposed amendment has a logical and oneness of purpose of directing the Legislature to periodically review the sales tax to ensure that exemptions advance or serve a public purpose. The amendment does not impact the functions of multiple branches of government nor does it impact multiple provisions of the Florida Constitution. The constitutional appropriation power of the Legislature remains unfettered. The discretion of the Legislature to adopt exemptions to the sales tax in order to reduce sales tax rates

remains intact. The amendment is straightforward and clear and does not affect any collateral powers of the Legislature.

Point II - The Ballot Title & Summary Meet Applicable Statutory Requirements.

Section 101.161(1), Florida Statutes (2004), requires the proposed amendment to have a short ballot title and summary that inform the voter of the chief purpose of the amendment and that is not misleading.

This statutory requirement is plainly met. The proposition's title and summary contain no more words than are allowed and they inform the voter in clear and unambiguous language that the proposed amendment mandates the Legislature to periodically review all exemptions to the sales tax except those expressly excluded. After such review, the Legislature shall reenact and continue only those exemptions that advance or serve a legislatively determined public purpose. Sales tax exemptions not reenacted or continued by the Legislature shall be eliminated.

A review of all Florida case law construing the initiative process demonstrates that the proposed amendment complies with the principles announced by the Court in its review of initiative amendments. The proposed amendment in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose satisfies the requirements of the Florida Constitution, the Florida Statutes and rulings of the Court. It should be placed on the ballot as a proposed constitutional amendment.

ARGUMENT

I. STANDARD OF REVIEW.

The Court's respect for the right of Floridians to amend their Constitution has led to a general reluctance to interfere with the initiative process. See Weber v. Smathers, 338 So. 2d 819, 821 (Fla. 1976); League of Women Voters, Inc. v. Smith (Advisory Op. to the Att'y Gen. re Tax Limitation), 644 So. 2d 486, 489 (Fla. 1994). Specifically, when reviewing a proposed constitutional amendment for the ballot, the Court has noted that each proposition is to be reviewed with "extreme care, caution and restraint." Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). "[S]uch amendments are reviewed under a forgiving standard and will be submitted to the voters if at all possible" Advisory Op. to the Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002). Still, as there is no factual inquiry, and as the analysis requires only the application of law, the standard of review is *de novo*. See Fine v. Firestone, 448 So. 2d 984, 987 (Fla. 1984). However, the Court's review is deferential due to the great respect afforded to the initiative process. See Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956).

A petition for a proposed amendment will be upheld by the Court unless it is "clearly and conclusively defective." Weber, 338 So. 2d at 822. The Court lacks the authority to pass on the merits and wisdom of the proposed amendment, see League of

Women Voters, 644 So. 2d at 489; nor may the Court be concerned with the draftsmanship quality, Weber, 338 So. 2d at 822; or even the constitutionality of the proposal, In re Advisory Op. to the Att'y Gen.--Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019 n.1 (Fla. 1994). Rather, the Court's review is limited to determining whether the Petition violates the single subject requirement of Article XI, section 3, Florida Constitution, and whether the ballot title and summary violate the clarity requirement of section 101.161, Florida Statutes (2004). The proposed amendment at issue clearly satisfies both criteria, and it should be submitted to the people.

II. THE PROPOSED AMENDMENT COMPLIES WITH THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION.

The limitation on the people's right to amend their Constitution is embodied in the single subject rule of Article XI, section 3, Florida Constitution. The only type of initiative amendments that are exempt from the single subject rule are those amendments limiting the government's power to raise revenue. Id. This rule requires the amendment to embrace only a single subject and matter. Id. Limiting proposed constitutional amendments to those that contain a single subject has been termed a "rule of restraint," Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984), requiring the subject encompassed by the amendment to be singular in function, not location. League of Women Voters v.

Smith (Advisory Op. to the Att'y Gen. re Tax Limitation), 644 So. 2d 486, 490 (Fla. 1994).

There are three primary justifications for the single subject rule. The first justification is to prevent "logrolling." In re Advisory Op. to the Att'y Gen.-- Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994). Logrolling occurs when a single initiative embraces several separate issues, some of which may be attractive to voters, and some of which may be disfavored. Id. The consequence of this practice is that voters must offer their "approval" of disfavored provisions in order to secure passage of an issue they favor. Id. (quoting Adams v. Gunter, 238 So. 2d 824, 831 (Fla. 1970)). The second justification for the rule is that it is more likely "to prevent a single constitutional amendment from substantially altering or performing the functions of multiple aspects of government." 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 third justification is that it is "designed to insulate Florida's organic law from precipitous and cataclysmic change." Save Our Everglades, 636 So. 2d at 1339.

The court utilizes a "oneness of purpose" standard in applying the single subject rule. Fine, 448 So. 2d at 990. This test is satisfied when the amendment concerns a single subject, Advisory Op. to the Att'y Gen. re Stop Early Release of Prisoners, 661 So. 2d 1204, 1206 (Fla. 1995); when the amendment does not substantially affect multiple

provisions of the Constitution, Weber v. Smathers, 338 So. 2d 819, 822 (Fla. 1976); and when the amendment does not "substantially alter or perform the functions of multiple branches of government," Monorail, 769 So. 2d at 369-70. See also Advisory Op. to the Att'y Gen. re Funding For Criminal Justice, 639 So. 2d 972, 973 (Fla. 1994) .

The constitutional amendment proposed in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose contains the single subject of exemptions to the sales tax. The Court has determined that a scheme for the Legislature to review existing exemptions to the sales tax is a disparate subject. Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Public Purpose, 800 So. 2d 630, 634 (Fla. 2004). The amendment directs 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. The proposed amendment has a logical and oneness of purpose of directing the Legislature to periodically review the sales tax to ensure that exemptions advance or serve a public purpose. The amendment does not impact the functions of multiple branches of government nor does it impact multiple provisions of the Florida Constitution. The constitutional appropriation power of the Legislature remains unfettered. The discretion of the Legislature to reduce sales tax rates or appropriate sales tax proceeds as a consequence of the mandated review remains

intact. The amendment is straightforward and clear and does not affect any collateral powers of the Legislature.

The proposed amendment in the Initiative Requiring Legislative Determination that Sales Tax Exemptions Serve a Public Purpose complies with the single subject requirement of Article XI in a manner similar to Stop Early Release of Prisoners, which addressed the single subject of limiting sentence reduction methods, 661 So. 2d at 1206; and Monorail, which only addressed whether the government should provide a high speed transit system throughout Florida, 769 So. 2d at 369-71. The proposed amendment addresses the single subject of requiring sales tax exemptions to serve a public purpose and thus does not constitute logrolling. See also Advisory Op. to the Att'y Gen. re Ltd. Political Terms in Certain Elected Offices, 592 So. 2d 225, 227 (Fla. 1991) (addressing the subject of limiting the number of consecutive terms that certain elected officials may serve); Advisory Op. to the Att'y Gen. re Ltd. Casinos, 644 So. 2d 71, 73 (Fla. 1994) (addressing only the authorization of privately-owned casinos in Florida).

The proposed amendment also meets the single subject rule in that it does not substantially affect multiple provisions of the Constitution. Section 20 will be added to Article III and it will simply provide a mandate for the Legislature to periodically review sales tax exemptions to determine if each advances or serves a public purpose. After such review, those exemptions not reenacted and continued shall lapse and end effective

January 1 subsequent to the July 1 deadline outlined for the periodic review of sales tax exemptions. There are no substantial incidental effects on other provisions of the Constitution. The addition of this single section to Article III, which does not adversely affect other constitutional provisions, conforms with the case law interpretation of the single subject requirement.

Finally, the proposed constitutional amendment does not substantially alter or perform the functions of multiple branches of government since it merely directs the legislative branch to periodically review sales tax exemptions and provides that those exemptions not reenacted or continued shall lapse and be eliminated.

The thrust of the proposed amendment before the Court was clearly stated by the Court in Fairness Initiative, 880 So. 2d 630, see also App. B¹, in its description of the "first of three disparate subjects" as follows:

The first of these three subjects creates a scheme for review of legislative exemptions to the sales tax in chapter 212, Florida Statutes. Chapter 212 generally imposes the sales and use tax on goods, but also includes enumerated exemptions for goods that are not to be taxed. The proposed amendment would create a scheme by which the Legislature would review

¹In fact, the proposed amendment before the Court is a more narrow subject than that recognized by the Court in Fairness Initiative in that the following qualifications of public purpose considered by the Court in reversing the initial FAIR proposal have been eliminated: (1) encouraging economic development and competitiveness; (2) supporting educational, governmental, literary, scientific, religious, or charitable initiatives or institutions; or (3) securing tax fairness.

these exemptions listed in chapter 212 and determine which exemptions should be continued because they serve the public purpose of (1) encouraging economic development and competitiveness; (2) supporting educational, governmental, literary, scientific, religious, or charitable initiatives or institutions; or (3) securing tax fairness. If the Legislature does not reenact the exemption, the exemption expires.

880 So. 2d at 634 (footnote omitted).

There is no reason for the Court to place a hand of restraint on the proposed amendment as separately proposed. The citizens of Florida retain the inherent political power to direct the Legislature to periodically review sales tax exemptions to ensure that the special privilege granted serves a public purpose. Any cataclysmic change resulting from the approval by the people of the proposed amendment would not be to the Florida Constitution but would be to focus legislative labor on this essential element of sales tax reform. The direction to the Legislature by the people in the proposed amendment if adopted is precisely the exercise of political power that is reserved to the people in Article IX, section 3, Florida Constitution.

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

Section 101.161(1), Florida Statutes (2004), provides that whenever a proposed constitutional amendment is submitted to the vote of the people, a summary of the amendment shall appear on the ballot, which shall not exceed seventy-five words and

must set forth the chief purpose of the amendment. It also requires a title for the ballot of fifteen words or less that represents the name by which the amendment is commonly known. Id. 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)). However, if a material fact is omitted so that the primary purpose of the amendment is unclear, ambiguous, or misleading, the proposal will be struck for failure to comply with section 101.161(1), Florida Statutes. See Advisory Op. to the Att'y Gen. re Term Limits Pledge, 718 So. 2d 798, 803 (Fla. 1998).

The ballot summary provides fair notice of the content and chief purpose of the amendment and is not misleading. An intelligent vote can be cast on the ballot question since the voter is informed in clear and unambiguous language that the proposed amendment mandates the Legislature to periodically review sales tax exemptions except those provided for: food; prescription drugs; health services; and residential rent, electricity, and heating fuel and reenact or continue only those exemptions or exclusions

serving a legislatively determined public purpose. The ballot summary clearly provides, "Sales tax exemptions not reenacted and continued by the legislature shall be eliminated."

The Court has removed proposals from the ballot for violating this statutory requirement when the summary failed to address the true scope of the amendment, Term Limits Pledge, 718 So. 2d at 804; when the proposal was deceptive, and "fly[ing] under false colors," Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982); when the proposal is misleading and appealing to voters' emotional vulnerabilities, In re Advisory Op. to the Att'y Gen.-- Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994); and when the summary failed to define certain terms necessary for an informed vote, Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 897 (Fla. 2000).

The current Petition does not violate any of these principles. The title of this Petition is "Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose." The title does not exceed fifteen words, and it provides a common reference for the proposed amendment.

The ballot summary also falls within the word limitation and explains the chief purpose of the amendment, accurately reflecting the text of the proposed amendment. There are no material omissions from the ballot summary which prevent a voter from casting an informed vote. In addition, there are no undefined words that would make the

summary unclear or ambiguous. Every vital aspect of the amendment is adequately represented in the ballot summary. It satisfies the governing legal requirement of section 101.161(1), Florida Statutes. The Attorney General does not challenge this point. See App. A.

The ballot title and summary inform the voter of the amendment's primary purpose, which is to direct the Legislature to periodically review of all tax exemptions except for those that fall within certain designated categories, which generally relate to basic needs for sustenance (e.g., food and health services). In order for the Legislature to reenact or continue to authorize exemptions from the sales tax, the Legislature must find that the exemption serves a public purpose, which will ensure fairness in our tax system.

As the title and summary inform the voter of the chief purpose and scope of the amendment, and are not misleading, the Court should approve the ballot title and summary.

CONCLUSION

It is submitted that the Petition 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 and appendix has been furnished by United States Mail to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, this 12th day of September, 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

INDEX TO APPENDIX

Tab

Florida Attorney General Request For An Advisory Opinion On
The Validity Of The FAIR Amendment Proposed Through
The Initiative Petition Process Of Article XI, Section 3, Florida Constitution.....A

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).....B

Ballot Title, Ballot Summary And Ballot Text Of Proposed
Amendment In The Initiative Directing Manner By Which
Sales Tax Exemptions Are Granted By The Legislature.....C

Ballot Title, Ballot Summary And Ballot Text Of Proposed
Amendment In Extending Existing Sales Tax To Non-Taxed
Services Where Exclusion Fails To Serve Public Purpose..... D

F:\Tally Data\General Data\WPDATA\rln\Arcadia\2005\Fair brief_amendment 2_final_DGT Changes.doc