

**HOUSE BILL 61 TESTIMONY FROM RAY ROBINSON LAW CO., L.P.A.
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The above firms submit this testimony in accordance with consideration of House Bill 61.

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I. Introduction

Ohio has a regressive and discriminatory tax on menstrual products, primarily tampons and pads, which are necessary and indispensable for the health and safety of half of the state's population. While Ohio statutory law and implementing administrative actions exempt a broad range of "durable medical equipment," drugs" and "prosthetic devices" from the state's generally applicable sales tax, tampons and pads inexplicably remain taxable. This tax unfairly, indeed unconstitutionally, affects Ohio's women, particularly poor women by levying a monthly excise tax on a medical necessity. This tax on tampons and pads violates the equal protection clauses of

the United States and Ohio constitutions, is preempted by the federal Food and Drug Administration's (FDA's) classification of tampons and pads and "medical devices" and is contrary to the General Assembly's own definitions in the statute authorizing the sales tax, ORC § 5739.01.

II. Factual Background

The sales tax statute enacted by the General Assembly contains relatively broad definitions of "drugs," "durable medical devices" and "prosthetic devices." In turn, the Department of Taxation and Commissioner Testa exercise their discretion to classify individual products as "taxable" and "not taxable" for purposes of the sales tax.

The tax commissioner has created a list, that systematically classifies products used equally by men and women ("[a]ny item that is implanted in the nose and throat", "ostomey catheters") and products used exclusively by men ("penile pumps" and "suspensories") as exempt drugs, medical or prosthetic devices. In contrast, tampons and pads, products used exclusively by women are classified as taxable. Such classification violates both Ohio statutory law and the Equal Protection and Due Process Clauses of the Ohio and U.S. Constitutions. The taxing authorities' classification "forms the basis of whether sales tax is typically charged at cash registers throughout Ohio for particular transactions, without regard for whether a particular product is sold pursuant to a prescription." Moreover, and notwithstanding the Commissioner's classification, ORC 5739.01 and 5739.02 are unconstitutional on their face because they do not include tampons and pads on the long list of products explicitly exempt from the sales tax by statute.

III. Law and Argument

This case presents primarily issues of law. There can be no reasonable dispute about what is, and is not, taxed. Ohio Revised Code § 5739.01 *et seq.* and accompanying administrative regulations provide a clear answer to this question. Tampons and pads are taxed. Other items used by men exclusively for similar purposes are not taxed. This tax has to go for three reasons: 1) that the tax on tampons and pads is unconstitutional on equal protection grounds; 2) that the tax is preempted by the FDA's classifications; and 3) in any case, that Defendants' classifications are contrary to ORC 5739.01.

A. The taxation of feminine products used in menstruation is unlawful because it violates the equal protection clauses of the United States and Ohio Constitutions as discriminatory against women.

Ohio's taxation of feminine hygiene products violates the core equal protection principals contained in the United States and Ohio Constitutions.

1. The taxation of feminine products used in menstruation violates principles of equal protection.

The tax on tampons and pads violates of the Equal Protection Clauses of the U.S and Ohio Constitutions, and Ohio courts have opined that “[t]he limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same.” *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1. The Equal Protection Clauses require that all similarly situated individuals be treated in a similar manner. This tax assessed against tampons and pads is applied to discriminate against one gender.

Simply stated, the test is that unequal treatment of classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality, unless the discrimination impairs the exercise of a fundamental right or establishes a suspect classification. See, e.g., *McGowan v. Maryland* (1961), 366 U.S. 420, for the traditional scrutiny test; see, e.g., *Shapiro v.*

Thompson (1969), 394 U.S. 618; *Harper v. Virginia Bd. of Elections* (1966), 383 U.S. 663; *Griswold v. Connecticut* (1965), 381 U.S. 479, for a discussion of “fundamental interest”; and see, e.g., *Graham v. Richardson* (1971), 403 U.S. 365; *Loving v. Virginia* (1967), 388 U.S. 1; *Oyama v. California* (1948), 322 U.S. 633.

If the State’s action, as here, infringes upon a fundamental right, it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. That is, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional. See, e.g., *Eisenstadt v. Baird* (1972), 405 U.S. 438, 447, f.n. 7; *Dunn v. Blumstein* (1972), 405 U.S. 330, 342; *Memphis Am. Fed. of Teachers, Local 2032 v. Bd. of Edn.* (C.A.6, 1976), 534 F.2d 699; *Tanner v. Weinberger* (C.A.6, 1975), 525 F.2d 51, 54. The preeminent consideration is that “equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right.” *Massachusetts Board of Retirement v. Murgia* (1976), 427 U.S. 307, 312. See, also:, *Carey v. Population Services Int.* (1977), 431 U.S. 678; *Maher v. Roe* (1977), 432 U.S. 464; *Zablocki v. Redhail* (1978), 434 U.S. 374. “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Id.*, at page 388.

Here, the statute taxes medically necessary items that women require, but does not tax similar items used by men or both sexes. This tax amounts to the unequal treatment of women in the collection of tax dollars. Further, the harm is greater against poor women who must spend a greater proportion of their income to pay this discriminatory and illegal sales tax. It visits a disparate impact on poor women and is illegal in both the inception and collection.

The taxing authorities in related litigation do not offer, nor can they offer, a legitimate justification for their excise tax on tampons and pads while exempting items such as catheters and penile pumps from the same tax. Such treatment violates the equal protection provisions of the United States and Ohio Constitutions.

The Tax Commissioner's failure to exempt feminine products used in menstruation from Ohio sales tax is preempted by the federal Food and Drug Administration's identification of these products as medical devices.

While both the FDA and Defendants classify products as “medical devices” and/or drugs, Ohio inexplicably fails to follow the federal classifications. Legal principles of preemption require the tax commissioner and taxing authorities to defer the FDA.

The FDA through its Obstetrics & Gynecology Devices Branch, Division of Reproductive, Adominal, Radiological Devices, Office of Device Evaluation published Menstrual Tampons and Pads: Information for Premarket Notification Submissions (510(k)s), which publishes regulations on the manufacture and marketing of these defined devices. www.fda.gov/cdrh/ode/guidance/166.pdf

Further, at 21 CFR 801.430 the FDA published special requirements for Specific Devices, which demonstrates the federal preemption as to licensing, labeling etc. of these products. The classification of these products as anything other than medical devices should not control in this regard. Instead deference to the FDA's position that tampons and menstrual pads are medical devices should control.

Despite this preemption, the taxing authorities have published Addendum to App Health Care Item List Appendix M, revised January 29, 2007. Tampons and sanitary napkins are not classified under the list to be includable under the exemptions found in ORC § 5739.01. Moreover, Ohio has been a limited member of the Streamlined Sales Tax Governing Board, Inc.

whose stated purpose is to add clarity and to simplify across many states the governance of sales tax since 2007. Commissioner Testa has been a full member since 2014 along with Laura Stanley and Senator Bob Peterson,¹ which has a white paper drafted for its members regarding this precise issue. (Exhibit 1)

The taxing authorities know how to follow uniform and federal guidelines when they so desire, but in this instance have ignored the Federal agency's classification in favor of their discriminatory one. Ohio cannot define the products in a different manner merely to collect sales tax on them. In fact, almost half of the United States does not tax these products with many of them overturning sales tax schemes that previously taxed these medically necessary products.

Refunds should also be granted since the FDA has mandated that tampons and pads are medical devices, the taxing commission and state of Ohio must abide by these preempted definitions by the FDA of these products. The commissioner by failing to take notice of this definition and exempting the products under an exception to the sales tax statute discriminates against primarily females or anyone who purchases menstrual products such as tampons, pads and or cups which are medically necessary to prevent disease (by containing blood byproducts) and affects a condition of the body. This is precisely the definition under the sales statute that would allow exemption of these products. Males that utilize vasectomy dressings for instance, are not taxed on them, but a device that only women use on a much more constant basis, does. Clearly this is a division based on gender and on its face is discriminatory.

The Tax Commissioner's failure to exempt feminine hygiene products is unlawful because they are "drugs" as defined by ORC 5739.01(FFF), "durable medical equipment" as defined by ORC 5739.01(HHH) and/or "prosthetic devices" as defined by ORC 5739.01(JJJ).

¹ See: www.streamlinedsalestax.org/index.php?page=governing-board-delegates.

The taxing authorities failure to exempt tampons and pads from the sales tax is also contrary to the General Assembly's own enactment. These products fall into three separate categories of items explicitly exempted by statute.

First, O.R.C. § 5739.01(FFF) defines "drug" to include "****substance that is intended to affect the structure or any function of the body."

Second, O.R.C. §5739.01(HHH) defines "durable medical equipment" as "equipment that can withstand repeated use."

Third, O.R.C. §5739.01(JJJ) defines "prosthetic device" as "replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body."

Based upon the plain language of the General Assembly's enactment, tampons and pads can easily be placed in any one of these three statutory categories. Even a cursory review of the list of exempt items published in 2007, shows that Defendants routinely place similar items used by both men and women or exclusively by men in these exempt categories: "[a]ny item that is implanted in the nose and throat"; "ostomy catheters"; "penile pumps"; and "suspensories". Based on these classifications, as well as the definitions contained in O.R.C. §5739.01, tampons and pads must properly be classified in one of the three tax-exempt categories: drugs, durable medical equipment or prosthetic devices.

In addition to the constitutional violations and federal preemption described above, tampons and pads are exempt from sales tax based upon the statutory language used by the General Assembly.

The taxing authorities failure to classify these products as medical devices is preempted by the FDA's contrary classification. Moreover, as set forth above, tampons and pads fall into at least one of three categories of products exempted by statute from the sales tax: drugs, durable medical equipment and prostatic devices.

Respectfully submitted,

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Feminine Hygiene Products Whitepaper - March 10, 2017

Disclaimer: *This paper only addresses the issue of how the Agreement should be amended to uniformly allow the member states to exempt certain feminine hygiene products. It is not an endorsement in support of (or opposition to) a member state providing an exemption for certain feminine hygiene products.*

Issue: The last couple of years there has been an active movement by some members of the public and some state legislators in several states to exempt certain menstrual products. The policy rationale typically centers around how these products are a necessity and that it is unjust to impose a sales/use tax on those products when it only impacts women.¹ Most of the focus has centered around menstrual products, not products related to cleansing or deodorizing.

Agreement's Terms: The Agreement's Library of Definitions, Appendix C, Part II, has definitions for "Clothing" and "Grooming and Hygiene Products." While diapers (adult and children) are defined as part of "clothing," menstrual products do not fit in that category because it is not "human wearing apparel suitable for general use." Menstrual products also do not fit in the definition of "grooming and hygiene products" because that definition is limited to soaps, cleaning solutions, shampoo, toothpaste, mouthwash, antiperspirants, and sun tan lotions and screens. While menstrual products do not fit in the definition of "Grooming and Hygiene Products," cleansing and deodorant products such as douches and feminine wipes that are sold over-the counter (without a prescription) fit into that definition.

Proactive Approach: Several representatives from the Business Advisory Council (BAC), along with the Governing Board's executive director, presented this issue to the State and Local Advisory Council (SLAC) and then to the Governing Board. They requested member states to proactively address this issue by providing a uniform definition of feminine hygiene products to states seeking to exempt such products. At the Governing Board's fall 2016 meeting, it agreed SLAC should conduct some research to determine whether a uniform definition should be placed in the Agreement. Given that some states have already started to exempt these products, to act proactively (and prevent member states from having to amend their laws later to comply with the Agreement), SLAC was

¹ Several articles have been written covering this issue. See New York Times Editorial Board, "End the Tampon Tax," available at: <https://www.nytimes.com/2016/02/08/opinion/end-the-tampon-tax.html>; Washington Post, Danielle Paquette, "The Sudden Controversy Around the COST of Tampons," available at: https://www.washingtonpost.com/news/wonk/wp/2016/03/15/the-sudden-controversy-around-the-cost-of-the-tampons/?utm_term=.fd01f803d98f; and NPR, Jordan Gass-Poore, "Citing Gender Bias, State Lawmakers Move to Eliminate 'Tampon Tax'," available at: <http://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax>.

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assigned the task of putting a whitepaper together on this issue and provide that report to the Governing Board at its May 2017 meeting.

States With Feminine Hygiene Product Exemptions – Enacted and Proposed

The following list identifies the states that have enacted a feminine hygiene product exemption as of February 1, 2017, along with a listing of some states that have introduced such legislation.

States That Have Enacted Policy/Legislation to Exempt Feminine Hygiene Products		
State	Reference	Language
Connecticut	SB 502	Sales of feminine hygiene products
Illinois	SB 2776	Menstrual pads, tampons, and menstrual cups
Maryland	Medical Equip. Guide	Sanitary napkins and tampons
Massachusetts	Sales Tax Guide	Sanitary napkins, belts and tampons
*Minnesota	297A.67	Sanitary napkins, tampons, or similar items used for feminine hygiene are exempt
*New Jersey	P.L. 2005, c.126	Feminine products such as tampons, sanitary napkins and panty liners
New York	A. 7555	Feminine hygiene products, including, but not limited to sanitary napkins, tampons and panty liners
Pennsylvania	PA Code 9.2	Household paper goods and soaps ... sanitary napkins, tampons or similar items used for feminine hygiene
Washington D.C.	Bill 21-696	Sanitary napkin, sanitary towel, tampon, menstrual cup, or sanitary pad
Sample of States with Proposed Legislation Exempting Feminine Hygiene Products		
State	Reference	Language
Federal Proposal	HR 3117 (114 th Ses.)	Tampons, pads, liners, cups, sponges, douches, wipes, sprays, and similar products used by women with respect to menstruation and other genital-tract secretions
California	AB 1561	Tampons, sanitary napkins, menstrual sponges, and menstrual cups.
*Michigan	HB 5234	Tampons, sanitary napkins, and other similar tangible personal property
Mississippi	SB 2053	Feminine hygiene products, including, but not limited to, sanitary napkins and tampons

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*Ohio	HB 484	Tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property the principal purpose of which is feminine hygiene in connection with the menstrual cycle
*Rhode Island	H 7714	Tampons, panty liners, menstrual cups, sanitary napkins, and other similar products the principal use of which is feminine hygiene in connection with the menstrual cycle
*Tennessee	Hb 2059	Product used by women with respect to menstruation or other genital-tract secretions; and includes tampons, pads lines, cups and douches
*Utah	HB 202	Pads or liners, underpads, tampons, sanitary napkins
Virginia	HB 952	Tampons and sanitary napkins
* = Streamlined Sales Tax State		

Proposed Menstrual Product Exemption Provision: It is proposed that a definition of “Feminine Hygiene Products”² be added to the Health-Care definitions in the Library of Definitions, Appendix C, Part II. It is suggested that this definition should only apply to “tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property designed for human feminine hygiene in connection with the menstrual cycle, excluding grooming and hygiene products.” “Other similar items” is needed to address new products.³ It should not include products such as douches and feminine wipes because those products already fall under the Agreement’s definition of “grooming and hygiene products.” The proposed exemption would read as follows:

“Feminine Hygiene Products” means tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal designed for feminine hygiene in connection with the human menstrual cycle, but does not include “grooming and hygiene products” as defined in this Agreement.

Existing Member States’ Compliance: The Agreement requires every state to be in substantial compliance with each requirement of the Agreement.⁴ While the wording used

² A better definition may be “Menstrual Products” to limit the breadth of products covered under that definition; however, given all the enacted and proposed legislation to date have used “Feminine Hygiene Products,” it is suggested that term continue to be used.

³ Other products such as liquid-catching latex discs are also being marketed; *see* Washington Post, Danielle Paquette, “Why Your Daughter May Never Need to Buy a Tampon,” available at:

https://www.washingtonpost.com/news/wonk/wp/2016/10/22/its-liberating-the-revolutionary-products-transforming-the-way-women-think-about-their-periods/?utm_term=.ea57d50e991a.

⁴ *See* Section 805 of the Agreement.

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for Minnesota's and New Jersey's exemption is not the same as the proposed language above, Minnesota and New Jersey would still be in substantial compliance using their current definition because those states' administration of that exemption is consistent with the proposed definition (*e.g.*, the words used by a state do not have to be exactly the same but the resulting interpretation is the same). The only state that could have a compliance issue if its version of the law was enacted is Tennessee (associate member state) because it also references douches. As indicated above, douches should be excluded from the feminine hygiene products definition because they are already included in the definition of "grooming and hygiene products" contained in the Agreement.

Impact to Sellers: While toggles can add another layer of complexity, there are benefits to sellers being able to rely on all Streamlined states using the same uniform definition when those states seek to exempt certain products. A uniform definition also minimizes sellers risk of class-action lawsuits on allegations by purchasers that a seller imposed tax on a product that should have been exempt.⁵

⁵ There are other class-action suits in states such as New York, Ohio and Florida that allege the state's tax on feminine hygiene products is discriminatory. If those states choose to exempt feminine hygiene products, the use of a uniform definition would benefit sellers in those states.