IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SAMUEL C. WADHAMS, WILLIAM HADLEY, ROBERT G. SIFF, RAMON J. SWEEZY, HONOR H. SANBORN, MAXINE B. HOLM, ROBERT G. McGREGOR, KAZIMIR ZIELONKA, JANET S. WILSON, CHARLES P. LEACH, SR., WALTER R. PIERSON and BESS KNOWLES,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA,

Appellee.

CASE NO. 70,078

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF

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I N D E X

TABLE OF CITATIONS

STATEMENT OF THE CASE

The following relevant points were omitted by the Appellants' Statement of the Case:

On November 6, 1984, the voters of Sarasota County approved the subject amendment to the Sarasota County Charter by a 70% favorable vote (63,691 votes for the amendment to 27,414 votes against) (R. 286).

The amendment, which set forth verbatim the authority of the Charter Review Board on the ballot, provided that the Review Board's sessions for meeting and proposing Charter amendments would occur in 1988, prior to the time of the general election, and every four years thereafter (R. 282-83). Prior to the adoption of the amendment, the Charter Review Board met in continuous session on a monthly or more frequent basis (Tr. 13-14). The voters brought a halt to the Charter Review Board's unique practice of remaining in constant session as a perpetual county "constitutional convention" and opted instead to authorize the Charter Review Board to meet and prepare Charter amendments only during presidential election years.

More than two months after the referendum, the Appellants (members of the Charter Review Board and others) filed suit to invalidate the referendum results (R. 193-196).

The Appellants admitted that the notice of the referendum election was properly published (R. **285,** para. 10), and the amended complaint (R. **208,** para. **8, 9,** and **10)** challenged only the form of the ballot.

The amended complaint (R. **208),** did not allege fraud or any intention on the part of the Board to mislead the voters in contrast to the innuendo that pervades the Appellants' Brief.

The Board asserted in its answer the affirmative defenses of waiver, estoppel and laches. (R. **220-21)**

The trial court, after receiving extensive testimony and documentary evidence, found that voters had ample opportunity to become informed on the issues raised by the referendum ballot before November *6,* 1984. This finding of fact was in addition to the factual findings that the ballot question, which spread the full text of the Charter amendment before the voters, was not misleading and that the Appellants had failed to carry their evidentiary burden of establishing that a substantial number of voters were misled by the language of the ballot question. (R. **530-531)**

Most importantly, the trial court also made a finding of fact that the Appellants had sufficient advance notice of the proposed ballot to bring an appropriate action to challenge

any legal defects in the form of the ballot prior to the election. (R. 530)

The Second District Court of Appeal affirmed the trial court's findings as being supported by competent substantial evidence.

Based on the foregoing findings of fact, the Second District Court of Appeal upheld the ruling of the trial court that the Appellants were prohibited from awaiting the outcome of the referendum and then attacking the result.

STATEMENT OF THE FACTS

The Board disagrees with the following specific portions of the Appellants' Statement of the Facts:

On page **8** of the Statement of the Facts, the Appellants assert that "the ballot was published for the first time in the Sarasota Herald Tribune on the Sunday preceding election day." This is one of several erroneous assertions which are central to the Appellants' effort to disregard the evidence before the trial court that the Appellants knew, or should have known, of the ballot format months before the election but waited until after the election to attack the form of the ballot in violation of the established case law of Florida.

The record on appeal demonstrates that the ballot question was first published in the Sarasota Herald-Tribune more than 30 days prior to the November 6 election, on October 1, **1984,** and again **on** October **15, 1984,** as part of the Notice of Special Election on the Charter amendment (DX 6, R. **409).**

Even more significantly, on pages **10** and **11** of the Appellants' Statement of the Facts, Appellants assert that the lead Plaintiff, SAM WADHAMS, first saw the ballot about a week before the election and that the record "does not contain any evidence" that WADHAMS or the other Appellants

knew or should have known the form of the ballot months earlier.

To the contrary, the record contains the following evidence that the Appellants had extensive notice of the proposed ballot such that they could have raised a legal challenge to the form of the ballot well in advance of the November 6, 1984, referendum:

1. On August 22, 1984, (86 days prior to the election) notice was published in the Sarasota Herald-Tribune for a public hearing on September 11, 1984, on Ordinance 84-72 to amend the Charter "to provide for the Charter Review Board to meet only in 1988 and each four (4) years thereafter". The notice (DX 2, R. 402) stated that a complete draft of the ordinance (DX 1, R. 399), which included the form of the ballot, was on file with the Clerk of the Board.

2. Appellant WADHAMS, as well as Appellants SWEEZY, McGREGOR and HOLM, appeared at the September 11, 1984, public hearing on the adoption of Ordinance 84-72 (56 days prior to the election) (R. 285; DX 3, R. 403; Tr. 25-27).

3. Following the adoption of Ordinance 84-72 on September 11, 1984, the Charter Review Board met on September 27, 1984 (40 days prior to the election). Appellants WADHAMS, SWEEZY, SIFF, HOLM, and SANBORN were present at the

meeting, and the Charter Amendment was discussed (DX 5, R. 407). Appellant WADHAMS testified as follows concerning the discussion (emphasis added):

> "...the comments were generally that we didn't think people would accept it. We had looked at the -- looked at the ballot that the County Commission had approved, the form of the ballot, and we didn't think it would be accepted."

(DX 12, R. 538)

The record on appeal, contrary to the Appellants' Statement of Facts, demonstrates that there was substantial competent evidence to support the finding of fact by the trial court that the "Plaintiffs had sufficient advance notice of the proposed ballot to bring appropriate action". (R. 530)

The Appellants assert on page 8 of their Statement of Facts that a voter could not tell from the ballot question "what was being proposed or changed".

To the contrary, the ballot question specifically states what sections of the Charter are proposed to be amended and then states the revised provisions in full (DX 9, R. 410):

> Shall Article 11, Sections 2.11.A and 2.11.B of the Sarasota County Charter be amended as proposed by Sarasota County Ordinance No. 84-72 to read:

"Section 2.11.A Composition, Election and Term of Members. There shall be a Charter Review Board which shall by 1984 be composed of ten (10) members who shall serve without compensation and who shall be elected in the following manner: five (5) members, one residing in each of the five County Commission districts, shall be elected by the voters of Sarasota County at the general election to be held in 1982, and every four (4) years thereafter; five (5) members, one residing in each of the five County Commission districts, shall be elected by the voters of Sarasota County at the general election to be held in 1984, and every four (4) years thereafter. Members shall take office on the second Tuesday following the general election."

"Section 2.11.B Purpose, Jurisdiction and Meetings of Review Board. The Charter Review Board shall hold meetings to organize, elect officers, and conduct business only during the year, and prior to the time, in which a general election is held in 1988, and each four (4) years thereafter. The Review Board shall review the operation of the County government, on behalf of the citizens and recommend changes for improvement of this Charter. Such recommendations shall be subject to referendum in accordance with the provisions of Section 6 herein. An affirmative vote of two-thirds (2/3) of the members elected or appointed to the Review Board shall be required to recommend amendments for referendum. The Board of County Commissioners shall pay reasonable expenses of the Charter Review Board."

Contrary to the statements in Appellants' brief insinuating an improper or illegal intent on the part of the Board (Brief pp. **8, 15-16,** 21, **22-23, 25),** the form of the ballot question was determined solely by the Sarasota County Director of Legal Services, Wallace Storey, who had drafted numerous bills enacted into law as a state legislator, served on the statutory revision committee, and is an experienced practitioner in the field of government law (Tr. **145-48).**

Mr. Storey testified that in his view the **75** word limit in Section **101.161,** Fla. Stat., was directory and that placing the actual language of the relatively short amended Charter provisions on the ballot would avoid legal attacks on the completeness of the ballot question similar to those experienced by recent Florida constitutional amendments (Tr. **148-50).** Commissioner Anderson testified that the Board did not question the drafting by its legal counsel whose recommendations on legal matters were given great weight. (Tr. **143-44).**

The Appellants assert on pages 9-10 of their Statement of Facts that the ballot language misled voters. The Appellants cite to the testimony of only two voters, Mrs. Fitshugh and Mrs. Webb (Tr. **52-74).**

Mrs. Fitshugh admitted on cross-examination that, after

reading the ballot, she understood that the Charter Review Board provisions of the Charter were being amended and that there was a limitation on the meetings of the Charter Review Board under the proposed provisions (Tr. **61-62).**

Mrs. Webb testified that she had not spent much time in Sarasota during the months prior to the election and that she had voted an absentee ballot (Tr. **72).** She understood that the ballot proposed to amend the Charter Review Board provisions, and admitted that she had little interest in the Charter Review Board meeting question, did not know how often the Review Board had met in the past, and took no local newspapers to be familiar with the issues (Tr. 70-73).

None of the Appellants testified that they were in any way misled by the ballot question, and there were no complaints by the Appellants or anyone else before the election that the ballot was in any way misleading. This fact was verified by the testimony of the Clerk to the Board of County Commissioners (Tr. **122),** the County Administrator (Tr. **125-27),** and Commissioner Anderson (Tr. **128-29),** as well as by the Supervisor of Elections, who was called by the Appellants (Tr. **83).**

The only other testimony offered by the Appellants in an

effort to show that the ballot was misleading was that of a non-resident attorney who was not offered as an expert, but only for the purpose of posing as an **"above-average"** voter with no prior knowledge of the Charter Review Board issue (Tr. **36-38).** Appellants state (Brief p. 10) that this witness, Mr. Namack, gave a "completely wrong" answer when asked to describe what the ballot would accomplish. The witness testified, however, that he understood the ballot question and that it proposed a change **"as** to the manner in which the Charter Review Board did business" (Tr. **76)** which is what the amendment in fact does.

Appellants further state on page 10 that the Board's witness, Gertrude Block, an expert in linguistics, agreed that one **"could** not ascertain the amendment's purpose from the official ballot". Mrs. Block's actual testimony, however, beginning at the page cited by Plaintiffs (Tr. 178), was that the ballot made it clear that the Charter Review Board sections of the Charter were being revised to read as shown on the ballot and that the language used in the amended provisions is "clear and plain" and "not misleading" (Tr. **178-84).**

POINT ON APPEAL

WHETHER THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL FOLLOWED THE **LAW** OF FLORIDA WHEN THEY UPHELD AN ELECTION RESULT, WHERE FRAUD WAS NOT ALLEGED AND WHERE THE TRIAL COURT FOUND THAT THE BALLOT, ALTHOUGH NOT LIMITED TO A 75 WORD SUMMARY, WAS NOT MISLEADING AND WHERE THE PLAINTIFFS, WHO HAD NOTICE OF THE BALLOT FORMAT MONTHS BEFORE THE ELECTION, WAITED UNTIL AFTER THE ELECTION TO FILE SUIT.

SUMMARY OF APPELLEE BOARD'S ARGUMENT

The trial court and the District Court of Appeal properly refused to invalidate a referendum, which adopted an amendment to the County Charter by a 70% favorable vote, where the ballot was found not to be misleading (although it was not limited to a 75 word summary) and where the plaintiffs knew or should have known of the ballot irregularities well in advance of the election but waited until after the vote to commence their lawsuit.

In a post-election lawsuit, even when the defenses of waiver, estoppel and laches are not raised as they were in this case, the Florida courts do not require strict compliance with a particular form of ballot in order to uphold an election where the actual ballot is not misleading. In the absence of fraud, the courts have a responsibility to uphold the decision of the voters against post-election challenges to the ballot. In this case, there was no allegation of fraud in the pleadings, and the trial court found that the ballot was not misleading. All that is required of a ballot is that it give fair notice of what is to be voted on. In this case, the voters were afforded the full text of the proposed Charter amendment on the ballot,

and there was competent substantial evidence that the ballot was not misleading. It is recognized by the courts that voters have many sources of pre-election information available to apprise them of the issues presented by the ballot, and the record in this case demonstrated that these sources as well as the ballot adequately advised the voters of the decision to be made.

Where those attacking the form of a ballot wait until after a favorable vote by the electorate to bring their lawsuit, they are estopped and barred by laches, and the asserted defects are deemed to be cured. There is ample evidence in the record that the Plaintiffs either knew or should have known of the ballot irregularities long before the election and that they awaited the outcome of the election before seeking judicial relief in an effort to frustrate the decision of the voters.

ARGUMENT

A.

THE DISTRICT COURT DECISION AFFIRMING THE TRIAL COURT JUDGMENT UPHOLDING THE ELECTION RESULT AGAINST A POST-ELECTION ATTACK IS CORRECT SINCE NO FRAUD WAS ALLEGED AND THE BALLOT WAS NOT MISLEADING.

Appellants assert in Section A of their Argument that "this case is more about preserving and protecting the integrity of the system of participatory democracy...than it is about whether or not Sarasota County's Charter Review Board can meet anytime during the four years between presidential elections." (Brief p. 15) Yet, when all the rhetoric is stripped away, the Appellants, most of whom are past or present members of the Charter Review Board, are seeking to maintain the prerogatives of the Charter Review Board by frustrating an overwhelming referendum vote through a technical, post-election attack on the ballot.

The trial court and the District Court of Appeal correctly followed the established law of Florida by refusing to allow persons charged with knowledge of pre-election irregularities to wait until after the election to raise the

issues in court in an effort to overturn a decision of the voters. Winterfield v. Town of Palm Beach, 455 So.2d 359 (Fla. 1984); Sylvester v. Tindall, 154 Fla. 663, 18 So.2d 892 (Fla. 1944); State ex rel Landis v. Thompson, 120 Fla. 860, 163 So.2d 270 (Fla. 1935).

In seeking to persuade the Supreme Court to depart from established precedent, the Appellants make two assertions which are not supported by the facts as determined by the trial court. First, the Appellants assert that the ballot was misleading. Second, the Appellants assert that they did not have sufficient notice of the ballot to challenge the ballot prior to the election. The trial court specifically ruled against the Appellants on both issues, and the Second District Court of Appeal ruled that the trial court's decision on both these issues was supported by competent substantial evidence.

With respect to the form of the ballot, the Appellants principal assertion is that, unless the ballot consists only of a summary of 75 words stating the chief purpose of a Charter amendment, the voter "cannot possibly be expected to make decisions which accurately reflect his or her disposition on that issue." (Brief p. 14) The trial court and the District Court of Appeal properly declined to adopt

this self-serving and condescending argument and, instead, followed the rule in Florida which gives more credit to the voters and more protection for the outcome of their labor. In Nelson v. Robinson, 301 So.2d 508 at 512 (Fla. 2d DCA), cert. den. 303 So.2d 21, Fla. 1974), which involved a post-election attack on a ballot, the District Court of Appeal emphasized that the plaintiffs had failed to bring suit prior to the election and stated the established rule as follows (301 So.2d at 511):

> We are compelled to hold that when qualified electors responsibly and in good faith lay aside their everyday affairs to execute the duties of their solemn office, they have the fundamental right to the confidence that their efforts will not thereafter be judicially rendered sterile absent fraud or other extraordinary circumstances which operate to deprive them of a full and efficacious vote.

The Florida Supreme Court in the leading case of Hill v. Milander, 72 So.2d 796 (Fla. 1954 en banc) ruled that the legal requirements for a ballot can be met by printing less than the full amendment on the ballot, and recognized that voters do not rely solely on the ballot to inform them of the issues. The Court stated at 72 So.2d at 798:

> All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. It is a matter of common

> knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and that in this day and age of radio, television, newspaper and the many other means of communicating and disseminating information, it is idle to argue that every proposition on a ballot must appear at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. It is a matter of common knowledge that one does not wait until he enters the election booth to decide how he is going to cast his ballot. What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot. We think the ballot under question amply complies with these requirements.

In the case at bar, the trial court's ruling that the ballot question was not misleading (R. **530)** is amply supported by the record and the case law. The ballot question (DX **9**, R. **410),** by spreading the actual wording of the relatively short Charter amendment in full before the voters, provided the electorate with both the "substance" and "chief purpose" of the referendum, even though the ballot was not limited to a **75** word summary. The voters could see for themselves exactly what the Charter Review Board's authority would be if the voters approved the proposed amendment.

The trial court's ruling that voters had ample opportunity to become informed on the issues raised by the ballot

question before the special election of November 6, 1984 (R. 531) is also consistent with the case law and supported by the record.

In Rowe v. Pinellas Sports Authority, 461 So.2d 72 at 77 (Fla. 1984) the Supreme Court, in upholding a ballot against attack, noted:

> Before this election, the full text of the ordinance had been advertised and debated at a public hearing called to debate it.

In the case at bar, the voters had the opportunity to become acquainted with the issues, the ballot itself, and the substance and chief purpose of the referendum by virtue of the August 22, 1984, public notice of Ordinance 84-72 proposing the Charter amendment "to provide for the Charter Review Board to meet only in 1988 and each four (4) years thereafter" (DX 2, R. 402); the September 11, 1984, public hearing on the ordinance (R. 285); and the numerous publications of the full ballot language on October 1, October 15, and November 4, 1984 (DX 6, R. 409, Tr. 11). Furthermore, the Appellants' witnesses admitted that they had read both newspaper articles and editorial comment on the subject Charter amendment. (Tr. 30-31; 57)

The Appellants' bald accusation (Brief p. 15) that the Board was trying to avoid disclosure to the voters by placing

the full text of the Charter amendment on the ballot is contradicted by the sworn testimony of Commissioner Anderson, who initiated the Charter amendment. (Tr. 132-33)

Wallace Storey, the Director of Legal Services, testified that he was solely responsible for the form of the ballot and that it was his purpose in spreading the actual text of the Charter amendment before the voters to avoid any contention that the ballot question was not a sufficient disclosure of the revised Charter sections. (Tr. 148-50)

The case at bar is fundamentally different from the facts in Askew v. Firestone, 421 So.2d 151 (Fla. 1982). In the Askew case, which dealt with a pre-election challenge to the ballot, the Legislature had proposed a constitutional amendment without prior public notice or public hearings (421 So.2d at 155, ft. note 2) and adopted a ballot summary that was so incomplete as to be misleading.

In the case at bar, the proposed Charter amendment was first adopted as an ordinance after the publishing of public notice stating the purpose of the amendment was "to provide for the Charter Review Board to meet only in 1988 and each four (4) years thereafter" (DX 2, R. 402). A public hearing was held on the issue with considerable public participation, including the presentation of formal statements by several of

the Appellants (DX 3 and 4, R., 404-406).

Furthermore, in contrast to the incomplete and out of context ballot summary in Askew (see 421 So.2d at 153), the ballot in the case at bar set out the new Charter provision in full and stated that the amendment was pursuant to the previously published and debated ordinance (DX 9, R. 410).

The Appellant's attempt in their Brief on pp. 16-20 to demonstrate that the ballot was misleading lacks substance. None of the Appellants came forward to testify at the trial that they were misled by the ballot in any way. Instead, the Appellants presented the testimony of only two voters, one of whom, Mrs. Fitshugh, admitted that she hadn't taken the opportunity to read the sample ballot before voting and instead "glanced over" the ballot for the first time when she entered the voting booth. (Tr. 53, 59)

This witness admitted that her reading of the ballot was so cursory that she didn't understand that an amendment of the Charter was being proposed by the wording "Shall Article 11, Sections 2.11.A and 2.11.B of the Sarasota County Charter be amended...." (Tr. 61)

Mrs. Fitshugh further admitted that, after reading the ballot question more carefully, she understood that it proposed an amendment of the Charter Review Board provisions

including a limitation on the meetings of the Charter Review Board. (Tr. 61-62)

The only other voter presented by the Appellants was Mrs. Webb, who testified that she had voted by absentee ballot (Tr. 67), had no familiarity with the issues because she had been out of the area for months and took no local newspapers (Tr. 67), and was not interested in the Charter Review Board question (Tr. 73). Although she testified on direct that by voting for the question she thought she was voting to "continue the charter review board as was" (Tr. 67) she admitted on cross that the ballot question clearly proposed an amendment to the Charter Review Board provisions. (Tr. 70)

The trial court, after considering the testimony, was certainly justified in being persuaded that the ballot question was not the source of confusion of these two voters.

The Appellants (Brief p. 17) assert that the provisions of Section 2.11.A on the ballot would lead voters, who did not wish the Charter Review Board provisions to be changed, to be misled because most of that subsection was unchanged except for the deletion of the review board's authority to call meetings at its discretion. Appellants never explain, however, why a voter wishing to vote for keeping the Charter

Review Board provisions of the Charter unchanged would be misled by a ballot question which begins, "Shall Article 11, Sections 2.11.A and 2.11.B of the Sarasota County Charter be amended.... "

Appellants (Brief pp. 18-20) also attack the following portion of Section 2.11.B as being misleading:

> The Charter Review Board shall hold meetings to organize, elect officers, and conduct business only during the year, and prior to the time, in which a general election is held in 1988, and each four (4) years thereafter.

Appellants (Brief p. 18) admit that, although lawyers and linguists could understand that the Review Board would be allowed to meet only in 1988 prior to the time the general election is held and every four (4) years thereafter, two voters "who knew their minds" were confused, and therefore the votes of over 91,000 people should be voided.

As the Board has noted earlier in this brief, the record showed that the confusion of the two voters produced by the Plaintiffs did not arise from the ballot but from their own lack of attention and interest. Furthermore, evidence of confusion on the part of a few voters is not sufficient to invalidate an election. Nelson v. Robinson, 301 So.2d 508 at 511 (Fla. 2d DCA 1974) As Justice Boyd noted in his

concurring opinion in Carroll v. Firestone, 497 So.2d 1204 at 1207 (Fla. 1986):

> The fact that people might not inform themselves about what they are voting for... is immaterial so long as they have an opportunity to inform themselves.

The Appellants (Brief pp. 14-20) assert that Mr. Namack, a non-resident who had not followed the referendum issue, couldn't tell exactly what was being changed by the amendment. The essential point, however, is that Mr. Namack could easily discern that the provisions of the Charter relating to the Charter Review Board were being amended, including, as he correctly noted, "the manner which the charter review board did business". (Tr. 76) Mr. Namack's testimony does not support a conclusion that voters who wished to vote to keep the Charter Review Board provisions of the Charter unchanged could reasonably be misled into voting for the amendment.

Furthermore, the trial court was, without objection, presented with expert testimony by Mrs. Block, that the wording of the ballot question, including the limitation on the meetings of the Review Board, was "clear and plain" and "not misleading". (Tr. 178-84)

The trial court had ample competent substantial evidence

to support its findings that the voters had ample opportunity to become informed on the issues raised by the ballot question and that the ballot question was not misleading and gave the voters fair notice of the decision that must be made by the electorate. (R. 530-31) Accordingly, under the cases cited above, the trial court and the District Court of Appeal did not err by refusing to invalidate the referendum.

B. & C.

THE APPELLANTS, WHO KNEW OR SHOULD HAVE KNOWN OF THE BALLOT IRREGULARITIES WELL IN ADVANCE OF THE ELECTION AND FAILED TO INITIATE TIMELY LEGAL ACTION, ARE PROPERLY PRECLUDED FROM CHALLENGING THE OUTCOME OF THE ELECTION AND THE IRREGULARITIES ARE DEEMED CURED BY THE DECISION OF THE VOTERS.

Points B and C of the Appellants' Brief (pp. **21-31)** seek to excuse the Appellants' failure to raise their objections to the ballot prior to the election and to avoid the legal consequences of that failure. In order to avoid repetition, these related points will be dealt with together.

The Appellants begin by exalting the form of the ballot over the substance of the ballot in an effort to denigrate the decision of the voters and make the Appellants' delayed attack on the ballot appear more palatable.

Essentially, the Plaintiffs entreat the Court to automatically invalidate the decision of the voters, because the ballot was not limited to a 75 word summary pursuant to Section **101.161,** Fla. Stat., even though the ballot was not,

in fact, misleading and the voters had fair notice of the decision they were making. The policy in Florida is to the contrary because

> electors... have a fundamental right to the confidence that their efforts will not be judicially rendered sterile absent fraud or other extraordinary circumstances which operate to deprive them of a full and efficacious vote.

Nelson v. Robinson, 301 So.2d 508, 511 (Fla. 2d DCA), cert. den. 303 So.2d 21 (Fla. 1974).

The Appellants assert (Brief p. 22) that "by the Legislature's standards, the notice [provided by the ballot] was misleading and **garbled."** In fact, however, the voters had the actual text of the proposed amendment before them on the ballot which as a practical matter, provided them with the **"substance"** and "chief purpose" of the measure. The Appellants fail to recognize that a departure from Section 101.161, Fla. Stat., does not automatically result in a misleading ballot. In this case, the Appellants failed to prove that the ballot was misleading.

"Simply put, the ballot must give the voter fair notice of the decision he must make." Askew v. Firestone, 421 So.2d 151 at 155 (Fla. 1982), citing Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981). Here

the substance and the chief purpose of the measure were laid out in full. Nothing was withheld; the voters could see for themselves exactly what the Charter Review Board's authority would be if the voters approved the proposed amendment. (DX 9, R. 410)

The ballot question, unlike the incomplete summary in Askew v. Firestone, 421 So.2d 151 (Fla. 1982) does not imply that it is doing one thing when it is doing another. It states clearly that the Charter Review Board provisions of the Charter are proposed to be amended and then sets forth the proposed provisions in full. Although not in the form of a summary, the ballot says just what the amendment purports to do by disclosing the amendment to the voters in full.

In addition to finding on the basis of the evidence and testimony that the ballot, itself, was not misleading, the trial court also determined as a matter of fact that the voters had ample opportunity to become informed of the issues raised by the ballot before the November election (R. 531).

The trial court's finding that the voters had ample opportunity to become informed of the issues is supported by competent substantial evidence. The record shows that the voters had notice of the issues prior to the election through advertising of the ordinance proposing the amendment of the

Charter "to provide for the Charter Review Board to meet only in 1988 and each four (4) years thereafter" (DX 2, R. 402), the public hearing on the ordinance, the publication of the full text of the amendment (DX 6, R. 409) and media coverage. (Tr. 30-31, 57) Under such circumstances, this Court has recognized that there is no justification for the courts to disenfranchise the voters. Hill v. Milander, 72 So.2d 796 at 798 (Fla. 1954) ("It is a matter of common knowledge that one does not wait until he enters the election booth to decide how he is going to cast his ballot."); Rowe v. Pinellas Sports Authority, 461 So.2d 72 (Fla. 1984) (noting that before the election the full text of the ordinance which was the subject of the referendum had been advertised and debated at a public hearing called to consider it).

In Winterfield v. Town of Palm Beach, 455 So.2d 359 (Fla. 1984), where the ballot failed to comply with legal requirements, the Court refused to invalidate the election, citing the following rule from Carn v. Moore, 74 Fla. 77, 88-89, 76 So. 337, 340 (Fla. 1917):

> "Republics regard the elective franchise as sacred, and the courts should not set aside an election because some official has not complied with the law governing elections, where the voter has done all in his power to cast his ballot honestly and intelligently, unless fraud has been

> **perpetrated or corruption or coercion practiced to a degree to have affected the result".** (Emphasis added.)

The Appellants, who alleged no fraud on the part of the Board and who failed to present credible evidence that the ballot was misleading, would achieve a cynical manipulation of the electoral process if the Court were to allow the Appellants to overturn a referendum decision on technical grounds after the voters, with the amendment spread out before them, have spoken so clearly by a 70% favorable vote.[1)]

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1) Having failed to allege or prove fraud in the trial court, the Appellants, with a notable lack of citation to the record, assert that **"the** Board was fully apprised of the legal requirements" of Section **101.161,** Fla. Stat., by the attorney for the Charter Review Board and that the Board intentionally chose to violate the requirements because "the Board did not want to take the political chance of having such a clear-cut question submitted to the voters". (Appellants' Brief, p. **25)**

There is no evidence in the record that Mr. Joy, the Charter Review Board attorney, ever "apprised the Board" prior to the election that the provisions of Section **101.161, Fla.** Stat., were mandatory. To the contrary, Mr. Storey, the attorney for the Board, testified that he met with Mr. Joy and expressed the view to Mr. Joy that Section **101.161** was directory rather than mandatory. When Mr. Joy submitted ballot questions for the Charter Review Board sponsored amendments which exceeded **75** words, Mr. Storey assumed that Mr. Joy accepted that view as well. (Tr. **152-154)** Mr. Storey also testified that he was solely responsible for drafting the amendment concerning the Charter Review Board's authority and included the entire text on the ballot because **"the** entire language of the amendment would be the clearest form of presentation to the voters". (Tr. **147-50)**

Those who are charged with knowledge of alleged irregularities in the ballot have an obligation to raise their complaints as soon as possible so that judicial intervention to enforce the election laws will not interfere with the overriding objective of enabling the electorate to cast their votes. An untimely legal challenge will be precluded by the courts on equitable principles of estoppel, waiver and laches.

One of the most recent references to the principle that an election will not be frustrated based upon infirmities which might have been cured if they had been raised sufficiently in advance of the election by appropriate suit or complaint is the case of Gross v. Firestone, **422 So.2d** 303 (Fla. **1982).** Justice Adkins in a concurring opinion joined by Justice Overton noted that the late challenge to the ballot could have been dismissed on the grounds of laches. As in the case at bar, the ballot question in Gross was a matter of public record months before the election, but the appellants in Gross waited until the eve of the election to bring legal action. Judge Adkins stated, **922** So. at **306:**

> The record of the legislation has been public and there has been no fraud or concealment of any facts by the appellees. The case of the appellants is barred by laches.

The Florida courts have long held, in accordance with the equitable principles of estoppel, waiver and laches, that where those attacking the form of the ballot wait until after a favorable vote by the electorate to bring their lawsuit, such attacks are precluded and the asserted defects are deemed to be cured. Sylvester v. Tindall, 154 Fla. 663, 18 So.2d 892 at 895 (Fla. 1944); State v. Thompson, 120 Fla. 860, 163 So. 270 at 277 (Fla. 1935). See, Winterfield v. Town of Palm Beach, 455 So.2d 359 at 361-62 (Fla. 1984).

The Appellants try to avoid the legal consequences of their failure to bring suit prior to the election by asserting in their Brief (p. 23-24) that there is no evidence that the Appellants had notice of the ballot until the Sunday immediately prior to election Tuesday, November 6, 1984. This is a serious misstatement of the record by the Appellants.

Beginning on August 22, 1984, (86 days prior to the election) the Appellants, by notice published in the Sarasota Herald-Tribune (DX 2, R. 402), were informed that they could obtain the form of the ballot as part of Ordinance 84-72 (DX 1, R. 399) to amend the Charter "to provide for the Charter Review Board to meet only in 1988 and each four (4) years thereafter".

Appellants WADHAMS, SWEEZY, McGREGOR and HOLM appeared at the public hearing on this ordinance on September 11, 1984 (56 days prior to the election). (R. 285; DX 3, R. 403; Tr. 25-27) The Appellants erroneously state in their Brief (p. 24) that the ordinance was not in existence at the time of the public hearing in September. The drafting of the ordinance was authorized in July (Tr. 129-130), and copies were available in the Clerk's office as early as August 22, 1984 pursuant to the notice for the public hearing (DX 2, R. 402). The ordinance contained the form of the ballot (DX 1, R. 398-401).

On September 27, 1984, (40 days prior to the election) Plaintiffs WADHAMS, SWEEZY, SIFF, HOLM and SANBORN attended a meeting of the Charter Review Board and discussed the Charter amendment proposed by Ordinance 84-72. (DX 5, R. 407). Plaintiff WADHAMS testified about the discussion (emphasis added):

> "...the comments were generally that we didn't think the people would accept it. We had looked at the -- looked at the ballot that the County Commission had approved, the form of the ballot, and we didn't think it would be accepted."

(DX 12, R. 538)

The ballot question was published in full in the Herald-

Tribune on October 1 and October 15, 1984 (36 days and 22 days prior to the election. (DX 6, R. 409)

Contrary to the assertions in Appellants' Brief, it is clear that the trial court had before it more than adequate evidence to support its finding that "Plaintiffs had sufficient advance notice of the proposed ballot to bring appropriate action". (R. 530)

The Appellants knew or should have known the form of the ballot months prior to the election and cannot credibly argue that they only learned of the ballot question on the eve of the referendum.

Sylvester v. Tindall, 154 So. 663, 18 So.2d 892 (Fla. 1944) is directly on point. In that case, as here, there was no question that the required pre-election notice had been published, and the issue before the Court was whether "the form of the ballot was not sufficient to put the electorate on notice as to just what they were voting upon". Sylvester v. Tindall, 18 So.2d at 895.

A unanimous Florida Supreme Court ruled, 18 So.2d at 895 (emphasis added):

> While it is true that the procedure set forth in Section 1 of Article XVII is mandatory and should be followed... this court has recognized the almost universal rule that once an amendment is

> duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission.

The case of State ex rel Landis v. Thompson, **120** Fla. **860, 163** So. **270** (Fla. **1935)** is also controlling. Again, one of the issues before the Court, **163** So. at **273** was whether

> the amendment as appearing upon the ballot used contained incorrect and misleadiing statements of the substance of the amendment.

The Supreme Court ruled, **163** So. at **277,** that the amendment:

> duly advertised, voted upon, and ratified by the votes of a majority of the electors cast thereon, has now validly become a part of the Constitution of Florida and that respondent's several objections [specifically referring to the form of the ballot] **....** must accordingly be severally overruled.

Particularly relevant to the facts of this case, the Court further observed, **163** So. at **278:**

> Complaints as to the proposed form of the ballots prepared for **"submission"** were available to be asserted by interested parties prior to the election. At that time, in appropriate legal proceedings brought and maintained with the object in view of compelling the submission of the proposed amendment in legal form, any and

> all statutory or constitutional requirements as to form of balloting could have been duly asserted and thereupon judicially enforced in advance of the voting.

The trial judge in the case at bar, concisely summed up the rationale of the Supreme Court as follows (Tr. 95-96):

> (T)hese cases say...they really don't want the people who are involved in the controversy to...wait, sit back, watch the election, bet on the outcome of the election.
>
> If they're happy with the outcome, they don't raise anything. If they don't like the way it comes out they say, well, now I'd like to talk to you about the procedural defects that you had going into the election.

The trial judge had before him Appellant WADHAMS deposition (DX 12, R. 537) where he testified as to the discussion of the ballot by many of the Appellants on September 27, 1984, (40 days prior to the election):

> I think there was a little more discussion on the 27th. But not -- not -- keep in mind, the election wasn't over yet, you know. It makes a difference if you know what your situation is.

It is unfortunate that the Appellants have failed to address either Sylvester v. Tindall or State v. Thompson in their Main Brief. By declining to join issue on these key cases in their Main Brief, arguments by the Appellants

concerning these controlling precedents will now only be presented in a reply brief which will deprive the Court of the opportunity of having the Appellants' arguments subjected to the rigors of an advocate's analysis. The appellate process is ill-served in such situations.

The cases cited by the Appellants in Point C of their Brief do not support a departure from the sound precedent of Sylvester v. Tindall and State v. Thompson. Askew v. Firestone, 421 So.2d 151 (Fla. 1982) was a pre-election suite that dealt with a ballot summary that was so incomplete as to be clearly and conclusively defective, deceptive and misleading. Hill v. Milander; Miami Dolphins, Ltd. v. Metropolitan Dade County: and Rowe v. Pinellas Sports Authority, all stand for the proposition that a ballot is not required to contain each and every provision of a measure as long as it contains the chief purpose. These cases provide no support for the Appellants' contention that a ballot which discloses the full text of an amendment is deceptive or misleading.

The Appellants cite the two cases of Special Tax School District #1 of Duval County v. State, 123 So.2d 316 (Fla. 1960) (hereinafter Duval) and State ex rel Pope v. Shields, (hereinafter Shields) 140 So.2d 144 (Fla. 1st DCA) cert. den.

146 So.2d 754 (Fla. 1962) which deal with the question of compliance with the statutory requirement to publish the notice of certain elections once each week for four consecutive weeks before the date of the election.

First, these cases deal with publication of notice of the election and are not germane to a post-election attack on the adequacy of the form of the ballot, the issue which is before the Court in this case. The Appellants have admitted the Board's compliance with all election notice publication requirements. (R. 285, para. 10) The controlling precedents on post-election attacks on the form of the ballot, Sylvester v. Tindall, supra and State v. Thompson, supra, both assume that the pre-election advertising requirements have been met (see quotes on pp. 33-35 above).

Secondly, the Duval and Shields cases apply the strict compliance doctrine with respect to the number of publications of notice for the election. Both of these decisions are rendered suspect by the subsequent decision in State v. Sarasota County, 155 So.2d 543 (Fla. 1963) which determined that the test to be applied was one of substantial compliance rather than strict compliance. See also, Marler v. Board of Public Instruction of Okaloosa County, 197 So.2d 506 (Fla. 1967) recognizing the sufficiency of substantial

compliance with pre-election requirements. In the context of the case at bar, the ballot meets the substantial compliance test since it was not misleading. Hill v. Milander, 72 So.2d 796 (Fla. 1954); Askew v. Firestone, 421 So.2d 151 (Fla. 1982).

Thirdly, the Duval and Shields cases involved statutory bond validation proceedings which contemplate the raising of all deficiencies, and there is no indication that estoppel, waiver or laches were raised as defenses.

The Appellants (Brief p. 29) cite Frink v. State ex rel Turk, 35 So.2d 10 (Fla. 1948) where the strict compliance doctrine was made applicable to ballot defects. The rule in this case has been specifically receded from by the Florida Supreme Court in Boardman v. Esteva, 323 So.2d 259 (Fla. 1976), cert den. 425 U.S. 967, 96, S. Ct. 2162, 48 L.Ed 2d 791 (1976), where the Court stated, 323 So.2d at 264:

> Without further analysis of the case law and realizing as we do that strict compliance has been recognized by this court in other cases, we now recede from that rule.

Justice Overton, concurring noted that the majority had receded from Frink. 323 So.2d at 270.

It is clear that Frink v. State ex rel Turk, 35 So.2d 10 (Fla. 1948) cited by the Appellants is not the law in

Florida. Furthermore, there is no indication that estoppel, waiver or laches were raised as defenses.

Finally, Nelson v. Robinson, 301 So.2d 508 (Fla. 2d DCA) cert. den. 303 So.2d 21 (Fla. 1974) cited by the Appellants (Brief p. 30) supports affirmance of the trial court in this case. As in Nelson, no fraud was shown in this case, and the Appellants produced insubstantial evidence of confusion on the part of one or two voters in the face of evidence that no one complained about the form of the ballot prior to the election and that a substantial majority of 70% voted for the amendment. (Tr. 83; 122; 125-29; R. 286) Furthermore, in Nelson, 301 So.2d at 512, the court, although it chose to decide the case on the equal protection issue raised in the case rather than the companion issues of waiver and estoppel, cited with approval the doctrine applied by the trial court in this case:

> (I)t has often been held that one who does not avail himself of the opportunity to object to irregularities in the ballot prior to the election may not object to them after.

CONCLUSION

Although the ballot in this case was not limited to a 75 word summary, there was competent substantial evidence that the ballot was not misleading. The chief purpose of the amendment, to amend the authority of the Charter Review Board to provide that the Charter Review Board would meet only in 1988, prior to the time of the general election, and each four years thereafter, was clearly stated on the ballot in the same form that it would appear in the Charter. Under such circumstances the judiciary properly refuses to disenfranchise the voters.

Where there is competent substantial evidence that those attacking the form of the ballot have notice of the irregularities well in advance of the election but await the outcome of the election before filing suit, the action is barred and the irregularities are deemed cured.

Accordingly, the decision of the Second District Court

of Appeal should be affirmed.

Respectfully submitted,

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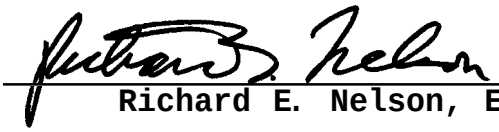
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to DANIEL JOY, ESQ.; 2055 Wood Street, Suite 200; Sarasota, Florida 34237 this 27th day of August, 1987.

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