OA 9-25-92

FILED
SID J. WHITE
SEP 16 1992
CLERK, SUPREME COURT.
By _____
Chief Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JIM SMITH, as Secretary of State of the State of Florida,

Appellant,

vs.

AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.: FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.; UNITED AIRLINES, INC.; USAIR, INC.; FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY; PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION; and, HVIDE SHIPPING INCORPORATED,

Appellees,

and

TERENCE M. BROWN,

Intervenor/Amicus Curiae.

CASE NO. 80,438

INITIAL BRIEF OF INTERVENOR/AMICUS CURIAE TERENCE M. BROWN

Appeal from Final Order of the Honorable L. Ralph Smith, Second Judicial Circuit, In and For Leon County, Florida - Certified as a Matter of Great Public Importance by the First District Court of Appeal

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PREFACE TO PARTY AND **RECORD** REFERENCES

Throughout this brief, Appellant/Defendant JIM SMITH will be referred to as "Appellant", Appellees/Plaintiffs AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; FLAGSHIP AIRLINES, INC.; NORTHWEST **AIRLINES,** INC.; UNITED AIRLINES, INC.; **USAIR, INC.;** FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY; PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION; and, HVIDE SHIPPING INCORPORATED, will be referred to as "Appellees and Intervenor/Amicus Curiae TERENCE M. **BROWN** will be referred to as "Intervenor BROWN".

As neither a record on appeal nor an index to record on appeal have *yet* been prepared by the lower court, the relevant portions of the record are filed herewith as a corresponding appendix. When items in the appendix are cited, reference will be made to the appropriate appendix item followed, if necessary, by the applicable page number to that appendix item.

STATEMENT OF THE CASE AND FACTS

In 1988, the Florida Constitution was amended to add Article XI, § 6. This new constitutional section created the Taxation and Budget Reform Commission ("the Commission"), comprised of twenty-five (25) voting members, eleven (11) selected by the governor, seven (7) selected by the President of the Senate, and seven (7) selected by the Speaker of the House of Representatives. [Appendix A, p. 4; Appendix C, p. 2; Appendix D, p. 21. Under Art. XI, §6, Fla. Const., the Commission was authorized to recommend statutory changes to the legislature and to propose revisions to the Florida Constitution, to be placed directly on the ballot, dealing with taxation or the State budgetary process. Pursuant to Art. XI, §6(e), Fla. Const., the Commission is required to submit its constitutional revision proposals to the Secretary of State at least one hundred eighty (180) days prior to the general election. [Appendix A, p. 4; Appendix C, p. 2; Appendix D, p. 21.

On April 22, 1992, under the authority provided it under Art. XI, $6, Fla. Const., the Cornmission considered and voted in favor of the following proposed constitutional amendment:

> SECTION 3. Taxes; Exemptions --
> (e) Effective January 1, 1993, leaseholds and other possessory interests created after November 5, 1968, in property of the United States, of the state or any of its political subdivisions, municipalities, authorities, districts, agencies or other public bodies corporate of the state, shall be taxed as real property for ad valorem tax purposes.

> All such leasehold interests created prior *to* November 5, 1968, including renewal options and extensions thereof provided in the initial lease, shall be taxed as intangible personal property.

On May 7, 1992, the proposed amendment, designated as Proposition 7, was submitted to the Secretary of State as the department responsible for furnishing to the Supervisor of Elections of each county the designated number, ballot title and substance of each proposed constitutional amendment which is to appear on the ballot. The ballot summary submitted to the Secretary of State by the Commission with Proposition 7 states:

> Subjects Leaseholds in Government Owned Property entered into since 1968 to ad valorem taxation. All leaseholds in government owned property entered into prior to 1968, and subsequent renewal options and extensions provided in the initial lease, shall be taxed as intangible personal property.

[Appendix A, pp. 4-5; Appendix C, p. 2; Appendix D, pp. 2-31.

On July 22, 1992, Appellees filed suit in the Circuit Court, Second Judicial Circuit, In and For Leon County, Florida, challenging Proposition 7 and seeking a final judgment declaring the ballot summary for Proposition 7 defective; declaring Proposition 7 unconstitutional; declaring that Proposition 7 is a violation of 49 U.S.C. § 1513, and enjoining Appellant from submitting Proposition 7 to the Supervisor of Elections for inclusion on the November, 1992 ballot. [Appendix A]. In response, Appellant filed a motion to dismiss and an answer to the complaint on August 12, 1992. [Appendix B; Appendix C]. Opposition to the complaint was also filed by Intervenor BROWN

through a Petition for Leave to Intervene, ox Alternatively, to File Amicus Curiae Brief, Memorandum of Law in Support, Motion to Dismiss, and Memorandum of Law in Opposition to Petition for Declaratory and Injunctive Relief, all dated August 17, 1992.

A final hearing in this case was held before the Honorable L. Ralph Smith on Tuesday, August 25, 1992. On August 31, 1992, the trial court entered Final Judgment in favor of Appellees, holding, inter alia, that the ballot summary for Proposition 7 failed to meet the statutory requirements of § 101.161(1), Fla. Stat. (1991), by failing to clearly and unambiguously summarize the contents and effect of the proposed constitutional amendment and enjoining Appellant from placing Proposition 7 on the November, 1992 general election ballot. [Appendix D]. Appeal to the First Distict Court of Appeal was instituted by Appellant by Notice of Appeal, dated August 31, 1992. On September 4, 1992, the First District Court of Appeal transferred this appeal to this Court certifying the issues raised herein to be great public importance and requiring immediate resolution by this Court.

Since the Final Judgment entered by the lower court enjoins Appellant from placing the subject constitutional amendment on the November, 1992 general election ballot, Intervenor BROWN requests that this Court review and consider this appeal on an emergency basis so that a ruling in this case can be obtained prior to the subject election in time sufficient to allow Appellant to place the subject constitutional amendment on the November, 1992 general election ballot.

SUMMARY OF ARGUMENT

The lower court's entry of the Final Judgment enjoining Appellant from placing the proposed constitutional amendment designated as Proposition 7 on the November, 1992 general election ballot violated the long standing principle that courts should not interfere with the public's right to vote on proposed constitutional amendments. The ballot summary for Proposition 7 is not clearly and conclusively defective. Rather, it provides the public with the substance of the amendment and notice of the chief purpose of the measure as required by § 101.161(1), Fla. Stat. (1991). Since the deficiencies in the ballot summary raised by Appellees and the lower court are matters which are either not required to be addressed in the "summary" mandated by § 101.161(1), Fla. Stat. (1991) or are items which do not destroy the total required effect of the summary, there has been no clear and convincing showing of a constitutional or statutory violation mandating the action taken by the trial court.

ARGUMENT

THE LOWER COURT ERRED IN THE ENTRY OF ITS FINAL JUDGMENT SINCE THE PROPOSITION 7 BALLOT SUMMARY COMPLIES WITH THE REQUIREMENTS OF § 101.161, FLA. STAT. (1991), AND APPLICABLE LAW.

The constitutional amendment, designated as Proposition 7, submitted by the Commission to Appellant provides:

> SECTION 3. Taxes; Exemptions --
> (e) Effective January 1, 1993, leaseholds and other possessory interests created after November 5, 1968, in property of the United States, of the state or any of its political subdivisions, municipalities, authorities, districts, agencies or other public bodies corporate of the state, shall be taxed as real property for ad valorem tax purposes. All such leasehold interests created prior to November 5, 1968, including renewal options and extensions thereof provided in the initial lease, shall be taxed as intangible personal property.

The ballot summary for Proposition 7 which is the focus of the lower court's Final Judgment states that the proposed amendment:

> Subjects leaseholds in government owned property entered into since 1968 to ad valorem taxation. All leaseholds in government owned property entered into prior to 1968, and subsequent renewal options and extensions provided in the initial lease, shall be taxed as intangible personal property.

In its Final Judgment, the lower court held that the ballot summary failed to meet the statutory requirements of § 101.161(1), Fla. Stat. (1991), in several material respects. The trial court found that the ballot summary's use of the term

"ad valorem taxation" without making reference to "real property" fails to provide the voter with notice that the tax rate for such leaseholds will be shifted from the intangible rate to a much higher real property tax rate and fails to alert the public to the fact that the taxing power with respect to these leaseholds would be shifted from the state to local governments. The lower court also held that the ballot summary inaccurately creates the impression that the subject leaseholds are taxed as intangible personal property for the first time, and fails to disclose the real purpose of the amendment, i.e., to exempt a select class of taxpayers from the newly imposed and substantially higher real property rate. The trial court additionally found that the ballot summary fails to accurately reflect the date on which the line will be drawn for taxation of the subject leaseholds at the intangible tax rate or the ad valorem tax rate. Lastly, the lower court held that the summary fails to clearly indicate if historic exemptions for property used for educational, literary, scientific, religious and charitable purposes, for public purpose uses by private lessees, and for government-to-government leases will remain exempt from taxation or not. After detailing these listed deficiencies, the trial court held that the ballot summary fails to explain the real purpose and principal ramifications of the amendment and thus, fails to inform the voters of its true effect. [Appendix D].

§ 101.161, Fla. Stat. (1991), sets out the prerequisites for submission of a constitutional amendment or other public

measure to the vote of the people by specifying the form and contents of the summary of the amendment to be provided to the voters. § 101.161(1), Fla. Stat. (1991), provides in pertinent part:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot ....The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the...taxation and budget reform commission proposal....The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. [Emphasis supplied].

The lower court's finding "that the real purpose of the provision is to exempt a select class of taxpayers from the newly imposed and substantially higher real property rate" is inaccurate and without support. Contrary to the lower court's ruling, the subject ballot summary complies with § 101.161(1), Fla. Stat. (1991), because it clearly states the "chief purpose" of the proposed amendment. That purpose is to tax leaseholds on government owned property entered into since 1968 at an ad valorem tax rate whereas leaseholds entered into prior to 1968 will be taxed at the intangible personal property tax rate. The chief purpose and the substance of the amendment are explained: Leaseholds created in government property since

1968 will be taxed as real property; those before 1968 will be taxed as intangible personal property.

The provisions of § 101.161(1), Fla. Stat. contemplate providing the public with a "summary" of the substance of the amendment and its chief purpose. The statute does not require or contemplate addressing, in specific detail, each facet or ramification of a proposal. In fact, attempting to analyze every facet of the proposed amendment as apparently mandated by the lower court in its Final Judgment would make it virtually impossible to ever comply with the 75 word limit of § 101.161(1), Fla. Stat. (1991). In City of Boca Raton v. Palm Beach County, 546 So. 2d 116 (Fla. 4th DCA 1989), the court reviewed an order denying a petition to enjoin a referendum on a proposed amendment to the county charter and noted the trial court's discussion of the 75 word limit of § 101.161(1), Fla. Stat. (1987):

> The question for the Court *to* decide is whether it sufficiently informs the voters of what they are to decide so that they may intelligently cast their ballots. One must agree that most ordinances could not be written in 75 words or less without criticism. Considering the fact that the proposal must be submitted to the voters in 75 words or less, interpretations, analyzations, prognostications, and sources of disinformation are inevitable to follow.

Id. at 117.

The requirements of § 101.161, Fla. Stat., were addressed by this Court in Grose v. Firestone, 422 So. 2d 303 (Fla. 1982). In that case, this Court reviewed the judgment of a circuit court on a proposed amendment to Art. I, § 12, Fla.

Const., relating to the right to be free from unreasonable searches and seizures. The plaintiffs sought an injunction to prevent the placement of the proposed amendment on the ballot alleging that the proposed language was misleading and did not fully advise the electors of the effect of the amendment. Finding the ballot summary to comply with the requirements of § 101.161, Fla. Stat., this Court stated:

> Appellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. To satisfy their request would require a lengthy history and analysis of the law of search and seizure and the exclusionary rule. Inclusion of all possible effects, however, is not required in the ballot summary. Smathers V. Smith, 338 *So.* 2d 825 (Fla. 1976).

Ld. at 305. Quoting language from its prior decision in Askew V. Firestone, 421 So. 2d 151, at 155 (Fla. 1982):

> The requirement for proposed constitutional amendment ballots is the same as for all ballots, i.e.,
>
> > that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote....All that the Constitution requires or that the law compels is that the voter have notice of that which he must decide....What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.
>
> Hill V. Milander, 72 So. 2d 796, 798 (Fla. 1954) [emphasis supplied].
>
> Simply put, the ballot must give the voter fair notice of the decision he must make. Miami Dolphins, Ltd. V. Metropolitan Dade County, **394** *So.* 2d 981 (Fla. 1981). ...

Grose V. Firestone, supra, at 305.

The discrepancies noted by the lower court simply do not rise to the level of failing to advise the public of the substance of the amendment and its chief purpose as required by § 101.161(1), Fla. Stat. (1991). For example, the court's semantic analysis of the ballot summary's reference to "ad valorem taxation" without reference to "real property" is an argument which places form over substance. The term "ad valorem" is defined in Black's Law Dictionary, Fifth Edition, as follows:

> AD VALOREM ...According to value. A tax imposed on the value of property. The more common ad valorem tax is that imposed by states, counties, and cities on real estate....[Emphasis supplied].

The use of this term when looked at in the form of its most common usage, by its very definition, corresponds with the concept of real property. Moreover, the use of the phrase "ad valorem taxation" in the ballot summary when read in conjunction with the use of the phrase "taxed as intangible personal property" provides the public with direct notice that the "ad valorem taxation" reference applies to real property as opposed to personal property. When faced with similar non-substantive semantic attacks on ballot summary language, this Court has repeatedly rejected those arguments. People Against Tax Revenue Mismanagement, Inc. V. County of Leon, 583 So. 2d 1373 (Fla. 1991); In Re Advisory Opinion to the Attorney General, English - The Official Language of Florida, 520 So. 2d 11 (Fla. 1988); In Re Advisory Opinion to the Attorney General,

Limitation of Non-Economic Damaaes in Civil Actions. 520 So. 2d 284 (Fla. 1988); and, Miami Dolphins, Ltd. v. Metropolitan Dade County, supra.

In addition, the lower court's finding that the use of the terms "since 1968" and "prior to 1968" renders the language of the ballot summary fatally defective is also a misconception of the requirements of § 101.161, Fla. Stat. (1991). The primary intent of § 101.161, Fla. Stat. (1991) is to provide the public with a "summary" of the substance of the amendment and its chief purpose. That is precisely what the language of the subject ballot summary does: it summarizes, in general terms, the dates in which the differing tax rates are to be applied to the subject leaseholds. Here, the failure to note the specific day and month in 1968 at which the line is drawn does not render the ballot summary misleading. Rather, the summary provides the public with a general overview of the "chief purpose" of the amendment which is all the statute requires. Carroll v. Firestone, 497 So. 2d 1204, at 1206 (Fla. 1986).

Lastly, the analysis of the trial court's finding that the ballot summary fails to alert the voters that the taxing power with respect to such leaseholds are to be shifted from the state to local governments or whether or not the proposed amendment eliminates the historic exemptions for property used for educational, literary, scientific, religious and charitable organizations, fox public purpose used by private lessees, and for government-to-government leases should be directed to the inquiry of whether or not § 101.161(1), Fla. Stat. (1991)

requires providing the public with every facet or ramification of a proposed amendment. In Carroll v. Firestone, id., this Court rejected the Appellant's argument that the ballot summary failed to comply with the requirements of § 101.161(1), Fla. stat., and stated:

> Appellants/petitioners argue that this summary does not adequately inform the voter of the substance of the amendment as required by section 101.161. We disagree. It is not necessary to explain every ramification of a proposed amendment, only the chief purpose. Miami Dolphins v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981). The summary makes clear that the amendment authorizes state lotteries and that the revenues from such lotteries, subject to legislative overide, will go to the State Education Lotteries Trust Fund. That is the chief purpose of the amendment and is all that the statute requires. It is true, as appellants/petitioners urge, that the legislature may choose not to authorize lotteries, not appropriate the proceeds to educational uses, and even to divert the proceeds to other uses. However, those questions go to the wisdom of adopting the amendment and it is for the proponents and opponents to make the case for adopting or rejecting the amendment in the public forum.

Id. at 1206.

As distinctly stated by this Court in In Re Advisory Opinion to the Attorney General, English - The Official Language of Florida, supra, in upholding the language of the ballot summary under review:

> We cannot accept the contention that the seventy-five word ballot summary required by the statute must explain, in detail, what the proponents hope to accomplish by the passage of the amendment.

Id. at 13.

Moreover, in rejecting the amendment opponents argument that the ballot summary was invalid because it did not advise the voters that there were presently no limits on the terms of affected offices or failed to reveal that the proposed amendment contained a severability clause in Advisory Opinion to the Attornev General - Limited Political Terms In Certain Elective Offices, 592 So. 2d 225 (Fla. 1991), this Court held:

> We have construed section 101.161 to require that "the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982) (emphasis omitted) (quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954)). The ballot title and summary must state "in clear and unambiguous language the chief purpose of the measure." Askew v. Firestone, 421 So. 2d at 155 (Fla. 1982). However, it need not explain every detail or ramification of the proposed amendment. Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986); Grose v. Firestone, 422 So. 2d at 305; Miami Dolphins Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 987 (Fla. 1981).
>
> * * *
>
> ...A ballot summary may be defective if it omits material facts necessary to make the summary not misleading. see Askew v. Firestone, 421 So. 2d at 158 (Ehrlich, J., concurring). However, we do not find the failure to indicate the current lack of term limits to be misleading..

Id. at 228.

Approving the ballot summary in Miami Dolphins, Ltd. v. Metropolitan Dade County, supra, and citing language from its decision in Hill v. Milander, supra, at 798, this Court stated:

> ... While there certainly are many details of the plan not explained on the ballot, we

do not require that every aspect of a proposal be explained in the voting booth:

> 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 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. [Emphasis added].

Id. at 987. *See* also Rowe V. Pinellas Sports Authority, 461 So. 2d 72 (Fla. 1984); and, In Re Advisory Opinion to the Attorney General - Homestead Valuation Limitation, 581 *So.* 2d 586 (Fla. 1991).

A review of the proposed constitutional amendment in connection with the language of the subject ballot summary, in its entirety and taken as a whole, indicates that the summary complies with the requirements of § 101.161(1), Fla. Stat. (1991). It clearly and unambiguously advises the public of the substance of the amendment and the chief purpose, i.e., to impose "ad valorem" tax rates to government leaseholds entered into since 1968 and intangible personal property tax rates to those entered into prior to such time. No rational interpretation of the language of the ballot summary could result in a finding that the language misleads the public on the purpose of this amendment.

The decision of the lower court in the case sub judice is one which requires a close and strict review by this Court.

As stated by this Court in Askew v. Pirestone, supra, at 154:

> In order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly and conclusively defective.

Moreover, as aptly explained by the court in City of Boca Raton v. Palm Beach County, supra, at 116,

> Removing the amendment from the voters' right to be heard should require clear and convincing evidence of almost unassailable constitutional or statuatory violation.

Here, there is simply no clear and convincing evidence of a violation of § 101.161, Fla. Stat. (1991). Rather, as required by law, the ballot summary for Proposition 7 clearly and unambiguously states the amendment's chief purpose and constitutes a fair ballot which sufficiently advises the voters to enable them to intelligently cast their ballots. Hill v. Milander, supra, at 798 (Fla. 1954).

CONCLUSION

Based on the reasons and authorities set forth above, the lower court erred in the entry of its Final Judgment by holding that the subject ballot summary failed to comply with the provisions of § 101.161(1), Fla. Stat. (1991). Since the ballot summary clearly complies with the requirements of law and since the courts should not interfere with the public's right to vote on a constitutional amendment unless there is a clear, convincing and unassailable showing of a constitutional or statuatory violation, Intervenor **BROWN** requests that this Court reverse the Final Judgment of the lower court and allow Appellant to **place** the ballot summary on the November, 1992 general election ballot.

KINSEY VINCENT PYLE,
PROFESSIONAL ASSOCIATION

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by UPS - Next Day Air Service, to the addressees on the attached Service List, this 15th day of September, 1992.

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14358/1301

APPENDIX

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APPENDIX

APPENDIX A

APPENDIX B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.; UNITED AIRLINES, INC.; USAIR, INC.; FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY; PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION, and HVIDE SHIPPING, INCORPORATED,

Plaintiffs,

vs.

JIM SMITH, as Secretary of State of Florida,

Defendant.
_____/

FILED
92 AUG 12 PM 3:02
PAUL F. HARTSFIELD
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

CASE NO, 92-3097
Florida Bar No. 0140084

DEFENDANT'S MOTION TO DISMISS

Defendant, Jim Smith, as Secretary of State of Florida, moves for entry of an order dismissing counts II, III, IV and V of the complaint. In support of this motion, defendant states:

1. Counts II and III allege that the Tax and Budget Reform Commission violated the Sunshine Law (Chapter 286, Fla.Stat.) and its own rules of procedure and that for these reasons, among others, Proposition 7 should be taken off the ballot.

The Commission is a constitutional body created by Article XI, Section 6, Florida Constitution. The Sunshine law does not apply *to* constitutional bodies. The Commission is *not* a "board or commission of any state agency *or* authority." *See* section 286.011(1), Fla.Stat. ~~See also In~~ re Advisory Opinion to the Governor, 276 So.2d 25 (Fla. 1973) (mandate for the [judicial nominating] commissions comes from the people and the constitution and the Governor has no power to establish rules governing the operation of the nominating commissions); Judicial Nominating Comm'n v. Graham, 424 So.2d 10 (Fla. 1982) (same). In contrast, an executive commission which the state constitution provides "'may be created by law' may be created on conditions of obedience to laws not inconsistent with the constitution" -- such as the Sunshine Law. Turner v. Wainwright, 379 So.2d 148, 154 (Fla. 1st DCA 1980), affirmed ~~and~~ remanded. 389 So.2d 1181 (Fla. 1980). The Sunshine Law was intended to apply to those boards and commissions "over which [the Legislature] has dominion and control." Times Publishing Co. v. Williams, 222 So.2d 470, 473 (Fla. 2d DCA 1969). The Tax and Budget Reform Commission is created by the state constitution, not general law, and hence is not subject Lo the Sunshine Law.

Moreover, nothing in the state constitution makes the rules *of* the Cornmission binding, prescribes their content or imposes a penalty *for* any failure to observe

them. There is no basis, therefore, for this court to enjoin their submission to the voters.

2. Proposition 7 has not been voted on and it may or may not be approved. Counts IV and V clearly raise issues that are not justiciable at this time. Grose v. Firestone, 422 So.2d 303, 306 (Fla. 1982) (argument that substance of proposed amendment; was unconstitutional was not justiciable issue!). See also Advisory Opinion to the Attorney Ge'neral, 592 So.2d 225, 227 (Fla. 1991) (quoting Grose).

Furthermore, even if, as alleged in Count V, that portion of the proposed amendment applying to "air carrier transportation property" were preempted by federal law, that would not be a basis for invalidating Proposition 7. As stated in Gray v. Winthrop, 115 Fla. 721, 156 so. 270 (1934):

> But if a duly proposed amendment to the Constitution may if adopted conceivably be valid in part or as applied to some conditions, its submission to the voters should not be enjoined, because in such a case the State has a right to the submission and, if it is adopted, to the operation of the amendment as far as it may legally be made effective.

156 So. at 272. Under Gray, the proposed amendment must be "wholly void on its face." Id. The allegations of Count V, even if true, do not present such a claim.

3. Because Proposition 7 has not been approved by the electorate and is not law, there is no ~~bona fide~~ need for a declaratory judgment based on present ascertainable facts. This Court therefore lacks jurisdiction over Counts II, III, IV and V. Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). Courts may not render declaratory judgments based on the possibility of legal injury caused by facts which may or may not occur in the future. Williams v. Howard, 329 So.2d 277, 232 (Fla. 1976); LaBella v. Food Fair, Inc., 406 So.2d 1216, 1217 (Fla. 3rd DCA 1981).

WHEREFORE, it is respectfully requested that this Court enter its order dismissing Counts II, III, IV and V of the complaint.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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Assistant Attorney General
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing MOTION TO DISMISS has been furnished by Hand Delivery to BARRY RICHARD, Esquire, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32301 and CASS D. VICKERS, Esquire, Post Office Box 1876, Tallahassee, Florida 32302; and by U.S. Mail to JOHN R. LaCAPRA, Esquire, 2702 Ponce de Leon Boulevard, Coral Gables, Florida 33134 this 12th day of August, 1992.

Assistant Attorney General

APPENDIX *C*

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.; UNITED AIRLINES, INC.; USAIR, INC.; FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY; PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION, and HVIDE SHIPPING, INCORPORATED,

Plaintiffs,

vs.

JIM SMITH, as Secretary of State of Florida,

Defendant.

FILED
92 AUG 12 PM 3:02
PAUL F. HARTSFIELD
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

CASE NO. 92-3097
Florida Bar No., 0140084

ANSWER TO COMPLAINT

Subject to determination of his motion to dismiss, defendant, Jim Smith, as Secretary of State of Florida, answers the complaint and each numbered paragraph thereof as follows:

1. Admitted for purposes of jurisdiction only.
2. Without knowledge.
3. Without knowledge.
4. Without knowledge.
5. Without knowledge.
6. Without knowledge,
7. Without knowledge.
8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

COUNT I

14. Defendant re-adopts and reavers the answers to paragraphs 1-13 of the complaint.

15. Admitted that section 101.161, Fla.Stat., contains the terminology "clear and unambiguous language;" however, section 101.161 speaks for itself and must be read in its entirety.

16. Denied.

17. Admitted.

18. Defendant denies paragraph 18 and each subparagraph thereof.

COUNT II

19. Defendant re-adopts and reavers the answers given above *to* paragraphs 1-13 of the complaint.

20. Denied; section 286.011, Fla.Stat., does not apply to constitutional commissions.

21. Denied; the Sunshine Law does not apply *to* constitutional commissions.

22. Denied; whatever rules the Commission adopted were not mandated by the Sunshine Law.

23. The first sentence of paragraph 23 is admitted; it is admitted the Commission adopted a Rule 2.004(2), but it is denied that this rule is quoted accurately.

24. Denied.

25. Without; knowledge.

26. Denied.

27. Denied.

COUNT III

28. Defendant readopts and reavers the answers given above to paragraphs 1-27 of the complaint.

29. Without knowledge.

30. Denied.

31. without knowledge.

32. without knowledge.

33. Denied.

34. Denied.

COUNT IV

35. Defendant readopts and reavers the answers given above. to paragraphs 1-13 of the complaint.

36. Without knowledge.

37. Without knowledge.

38. Without knowledge.

39. Proposition 7 speaks for itself and defendant neither admits not denies plaintiffs' legal conclusions.

40. The proposed revision speaks for itself and defendant neither admits nor denies plaintiffs' legal conclusions.

41. Denied.

42. Denied.

COUNT V

43. Dafendant readopts and reavers the answers given above to paragraphs 1-13 of the complaint.

44. Denied; paragraph 44 accurately quotes 49 U.S.C. § 1513(d)(1) but omits (d)(2).

45. Without knowledge.

46. Denied.

47. Denied.

48. Denied.

DEFENSES

49. Counts 11 and III fail to state a cause of action. As to Count 11, the Tax and Budget Reform Commission is a constitutional body not subject to the Sunshine Law. As to Count 111, nothing in Article XI, § 6(c), Florida Constitution, prescribes the content of the Commission's rules or makes the rules binding or imposes a penalty for any failure to observe them. Moreover, the rules on their face do not require a "continued concurrence" in order for them to be submitted to the Secretary of State.

50. This court lacks jurisdiction over Counts II, III, IV and V. Count IV raises a constitutional issue that cannot be heard in this proceeding. Grose v. Firestone, 422 So.2d 303, 306 (Fla. 1982). The issue raised by Count V (federal preemption) is likewise not justiciable. *Grose*, supra. Moreover, this Court lacks jurisdiction under Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). On their face Counts 11 through V fail to show that there is a bona fide need for a declaratory judgment based on present ascertainable facts. Id. at 1170. Proposition 7 has not been approved by the electorate and may *not* become law.

51. This action is barred by laches. To the extent the issues raised by the complaint: can be raised prior to a vote of the electorate, plaintiffs seek their resolution on an extremely short time frame that is wholly inadequate. Plaintiffs could have and should have brought this action at an earlier date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing ANSWER TO COMPLAINT has been furnished by Hand Delivery to HARRY RICHARD, Esquire, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32301 and CASS D. VICKERS, Esquire, Post Office Box 1876, Tallahassee, Florida 32302; and by U.S. Mail to JOHN R. LaCAPRA, Esquire, 2701 Ponce de Leon Boulevard, Coral Gables, Florida 33134 this 12th day of August, 1992.

Louis F. Hubener
Assistant Attorney General

AmericanAns/lh/ds

APPENDIX D

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA.

AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.; UNITED AIR LINES, INC.; USAIR, INC.; FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY; PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION, and HVIDE SHIPPING, INCORPORATED,

Plaintiffs,

vs.

JIM SMITH, as Secretary of State of the State of Florida,

Defendant.

Case No. 92-3097

FINAL JUDGMENT

This cause came on for final hearing on the merits on a challenge to a proposed amendment to the Florida Constitution which has been designated Proposition 7. The Court first entertained the motion to intervene of Terence M. Brown and Defendant's motion to dismiss Counts 11, 111, IV and V of the Complaint. Prior to argument, the plaintiffs voluntarily dismissed Counts II (Sunshine Law) and V (Federal Preemption). Having reviewed the motions to intervene and to dismiss, considered the memoranda filed with the Court and having heard the arguments of counsel, the Court finds and it is hereby ORDERED THAT:

1. The motion to intervene is **DENIED** on the ground that the movant has failed to make a showing of standing. The movant was permitted, however, to file a memorandum of law and present oral argument as amicus curiae.

2. The motion to dismiss Count III (Non-compliance with Article XI, Section 6) is **GRANTED**. The motion to dismiss Count IV (Equal Protection) is DENIED, the Court finding that the Complaint states a **cause** of action for the facial **invalidity** of Proposition 7 under the Equal Protection clause of the U.S. Constitution. While plaintiffs presented evidence concerning Count IV **and** reserved the right to argue **the** equal protection claim, the **Court** finds it unnecessary to reach this issue in **view** of its disposition of this **case** on Count I (Defective Ballot Summary).

3. With respect to the merits, the Court, having considered the pleadings, memoranda **and** stipulations of the parties, heard the testimony, heard the arguments of counsel, and being otherwise fully advised, finds and decides **as** follows:

A. The Florida Taxation and Budget Reform Commission (the Commission) was created in 1990 pursuant to Article XI, Section 6 of the Florida Constitution.

B. The Commission has proposed various amendments to the Florida Constitution, including Proposition 7, and submitted them to Defendant Smith for inclusion on the November 3, 1992 ballot.

C. Section 101.161(1), Florida Statutes, requires a ballot summary which must inform the voter, in clear and unambi-

guous language, of the chief purposes of the proposed constitutional amendment. The summary of Proposition 7 states in its entirety:

> Subjects leaseholds in government owned property entered into since 1968 to ad valorem taxation. All leaseholds in government owned property entered into prior to 1968, and subsequent renewal options and extensions provided in the initial lease, shall be taxed as intangible personal property.

The ballot summary fails to meet this statutory requirement in the following respects.

(1) Proposition 7 provides that leaseholds in government owned property entered into after November 5, 1968, "shall be taxed as real property for ad valorem tax purposes." [E.S.] Such leaseholds used for residential and commercial purposes are currently subject to ad valorem taxation as intangible personal property. Effective January 1, 1993, the intangible tax rate will be 2 mills, the constitutional maximum. Art. VII, §2, Fla. Const. Proposition 7 would subject such leaseholds to ad valorem taxation as real property at a rate of up to 30 mills, resulting in a potential increase of up to 15 times the current rate. Art. VII, §9(b), Fla. Const. The ballot summary, however, makes no reference to "real property". It states only that the proposed amendment "subjects leaseholds in government owned property entered into since 1968 to ad valorem taxation. [E.S.] "Ad valorem" is defined by Florida statute as "a tax based upon assessed value of property" and applies to real and personal, tangible and intangible property. S192.001, Fla. Stat. The simple reference to ad valorem taxation

does not give the voter notice of the fact that the tax rate will be shifted from the intangible rate to the much higher real property rate. Nor does it alert the voter to the fact that the taxing power with respect to such leaseholds is shifted by the amendment from the state to local governments. The fact that a ballot summary is technically correct is insufficient if it fails to inform the voter of the real changes which the amendment would bring about. Wadhams v. Bd. of County Comm'rs, 567 So. 2d 414 (Fla. 1990).

(2) The ballot summary states in part that:

> All leaseholds in government owned property entered into prior to 1968, and subsequent renewal options and extensions provided in the initial lease, shall be taxed as intangible personal property.

The statement is misleading because it creates the inaccurate impression that such leaseholds are to be taxed as intangible personal property for the first time, and because it fails to disclose the real purpose of the provision. In fact, all such leaseholds used for residential and commercial purposes are already taxed and at the intangible personal property rate. The summary fails to inform the voter that the real purpose of the provision is to exempt a select class of taxpayers from the newly imposed and substantially higher real property rate. In this respect, the summary is equivalent to the summary found to be inadequate in Askew v. Firestone, 421 So.2d 151 (Fla. 1982). Again, the technical accuracy of the summary is not sufficient if it fails to inform the voter of the actual changes that would be made. The ballot summary of Proposition 7 tells the voter nothing about the real changes.

(3) In addition to its failure to disclose material facts necessary for the voter to appreciate the changes, the ballot summary is affirmatively deceptive in some respects. Proposition 7 states that leaseholds and other possessory interests in government property "created after November 5, 1968 * * * shall be taxed as real property for ad valorem tax purposes" and that such leasehold interests "created prior to November 5, 1968 * * * shall be taxed as intangible personal property." The ballot summary, on the other hand, states that all such leaseholds "entered into since 1968" would be subject "to ad valorem taxation" and all such leaseholds "entered into prior to 1968" would be taxed as intangible personal property. By referring to leaseholds created "since 1968" and those created "prior to 1968", the summary excludes the entire year 1968. It fails to inform the voter that such leaseholds created during the first ten months of 1968 are granted the exemption from real property taxes and that leaseholds created during the last two months of 1968 would be subjected to real property taxes. Read literally, the summary indicates that leases created during the entire year 1968 are not taxed at all. At best, however, the language falls far short of the statutory requirement that it be "clear and unambiguous" in stating the purpose of the proposed amendment.

(4) The proposed amendment itself is unclear as to whether or not it eliminates the historic exemptions for property used for educational, literary, scientific, religious and charitable purposes, for public purpose uses by private lessees, and for government-to-government leases. If it is intended to do so, then

the ballot summary should more clearly alert the voter to this major change. If, on the other hand, it is not intended to eliminate such exemptions, then the ballot summary is clearly misleading when it states that the proposed amendment "subjects leaseholds in government owned property" entered into since 1968 to taxation and that "all leaseholds in government owned property" entered into prior to 1968 "shall be taxed". Whatever construction the amendment itself might receive, the ballot summary surely does not clearly and unambiguously inform the voter of the impact of the amendment on these important and long standing public policies.

D. The Court is mindful that a ballot summary need not detail every effect or consequence of a proposed constitutional amendment. Grose v. Firestone, 422 So.2d 303 (Fla. 1982) and Advisory Opinion to the Attorney General, 592 So.2d 225 (Fla. 1991). It must, however, fairly explain the real purposes and the principal ramifications or changes which the underlying amendment would make so that voters are informed of its true effect. See Askew and Wadhams, supra, and Evans v. Firestone, 457 So.2d 1351 (Fla. 1984). The ballot summary for Proposition 7 plainly fails to meet those vital requirements.

In consideration of the premises, FINAL JUDGMENT IS HEREBY ENTERED FOR PLAINTIFFS and it is ORDERED, ADJUDGED and DECREED that the Defendant Secretary of State is permanently enjoined from placing on the November, 1992 general election ballot the proposed constitutional amendment or ballot summary concerning ad valorem taxation of government leaseholds designated Proposition 7.

DONE and ORDERED this 31st day of August, 1992 in Leon County, Florida.

L. Ralph Smith Jr.

L. RALPH SMITH
Circuit Judge