SUPREME COURT OF FLORIDA

JIM SMITH, SECRETARY OF STATE,
ETC., ET AL.

Petitioner(s)

vs.

CASE NO. SC02-1624
Lower Tribunal Nos:
02-CA-1490
1D02-2939

COALITION TO REDUCE CLASS SIZE
AND PRE-K COMMITTEE, ETC.

Respondent(s)
_____/

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a non-final order the Circuit Court for the Second Judicial Circuit, Leon County, granting a preliminary injunction. The District Court of Appeal, First District, has certified, pursuant to article V, section 3(b)(5) of the Florida Constitution, that the trial court passes upon a question of great public importance requiring immediate resolution by this Court. This Court accepted jurisdiction. As the issues presented herein are pure questions of law, the standard of review is de novo. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

Pursuant to Fla. R. App. Pro. 9.220, an Appendix has been filed simultaneously with the Appellant's brief. Cites to the appendix will be designated as (Appendix -____).

STATEMENT OF THE CASE AND FACTS

Appellees are political committees formed to sponsor and advocate the adoption of proposed constitutional amendments, entitled "Florida's Amendment to Reduce Class Size" and "Voluntary Universal Pre Kindergarten Education." The Legislature enacted HB 65-E, which became

law on May 24, 2002 (Chapter 02-390, Laws of Florida), requiring, inter alia, the Revenue Estimating Conference to complete an analysis and fiscal impact statement of the estimated increase or decrease in any revenue or costs to state or local government as a result of any initiative or revision proposed pursuant to Article XI of the Florida Constitution. The law requires a "clear and unambiguous" fiscal impact statement of no more than 50 words to be placed on the ballot for all initiatives not certified for ballot position as of the effective date of the act. In the Court below, Appellees sought and obtained a temporary injunction enjoining Appellants from placing the fiscal impact statements on the November 2002 ballot.[1] The Circuit Court held that requiring the placement of the fiscal impact statement on the ballot was not necessary to ensure ballot integrity and was therefore unconstitutional and that the legislation abrogated Appellees' vested rights.

[1] The county supervisors of elections actually design, prepare, and arrange for printing of ballots for their respective counties so that, in fact, neither the Secretary of State nor the Department of state *places* any matter on the ballot. The Department does provide the ballot number, title and summary of proposed amendments to the supervisors. *See*, § 101.161(2), Fla. Stat. (2001). In contrast, Chapter 02-390 of the Laws of Florida does not direct the Secretary or the Department to provide the fiscal impact statement to the supervisors. As a practical matter, however, we are certain that in transmitting the designating number, title and summary to the supervisors, should the law be upheld, the Department would also include the fiscal impact statement in order to assist the supervisors in their responsibility to place the statement on the ballot.

SUMMARY OF THE ARGUMENT

Article XI, section 3 of the Florida constitution provides that the "power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people." Article XI, section 3, further provides that in order to invoke this power, a proponent of an initiative must file with the secretary of state a copy of the proposed revision or amendment signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts and in the state as a whole in the last preceding presidential election.

This Court has long recognized that this provision of the constitution is self-executing. That is, the provision does not require any legislative enactment to become operative. This Court has also recognized circumstances where legislative and administrative regulations placed on the initiative process were constitutionally permissible. Specifically, this Court has approved of legislation that requires a sponsor of an amendment to provide a ballot title of no more than fifteen words, a ballot summary that states the chief purpose of the amendment in clear and unambiguous language, and to require the sponsor of the amendment to register as a political committee and report periodically the contributions received or the expenditures made by that committee. These and other requirements that the sponsors of initiative petitions must meet are not enumerated in the constitution. They are permitted because they "assure that the electorate is advised of the true meaning and ramifications of an amendment." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

Chapter 02-390 of the Laws of Florida is just such a provision. Chapter 02-390 requires a "clear and unambiguous fiscal-impact statement, no more than 50 words in length." This statement is permissible under the precedents of this Court and serves the important public purpose of informing the voters.

Chapter 02-390 does not in any way limit the opportunity of initiative sponsors to place their measures before the people of the State of Florida. The rights of the sponsors under this provision are fully realized. Thus, the new law does not impair vested rights of sponsors. The elected representatives of the people of this state have determined that the voters should know the cost ramifications of proposed constitutional amendments. This is a legitimate and proper purpose of the legislation and Chapter 02-390 of the Florida Laws should be found constitutional as a valid regulation of the initiative process.

I. THERE IS NOT A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THE MERITS.

A. Chapter 02-390, Laws of Florida, is a measure reasonably designed to ensure ballot integrity and the integrity of the initiative process.

1. The fact that Article XI, section 3 of the Florida Constitution is self-executing does not preclude the Legislature from making reasonable regulations.

2. A fiscal impact statement is not a comment, but rather is a legitimate means of informing the public of the ramifications of a proposed amendment.

B. Chapter 02-390, Laws of Florida does not impair any vested rights the Appellees may have.

1. Nothing in the new law changes affects Appellees' right to ballot placement. If the Appellees submit verified signatures of 488,722 electors, the measures at issue here will appear on the ballot.

2. The changes made by Chapter 02-390 are procedural and do not impair any vested rights the Appellees may have.

II. THE PUBLIC INTEREST REQUIRES SUSTAINING THE VALIDITY OF CHAPTER 02-390, LAWS OF FLORIDA.

A. The public's right to a full understanding of proposed amendments outweighs the interests of the sponsors to present their amendment without government "interference."

B. Providing a fiscal impact statement allows voters to more fully understand the ramifications of a proposed amendment and is therefore a valid regulation.

ARGUMENT

I. THERE IS NOT A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THE MERITS.

A. Chapter 02-390 of the Laws of Florida is a measure reasonably designed to ensure ballot integrity and the integrity of the initiative process.

1. The fact that Article XI, section 3 of the Florida Constitution is self-executing does not preclude the Legislature from making reasonable regulations.

While Article XI, section 3 is self-executing in the sense that "it clearly establishes a right to propose by initiative petition a constitutional amendment which may be implemented without the aid of any legislative enactment" *Citizens Proposition For Tax Relief v. Firestone*, 386 So.2d 561, 566 (Fla. 1980), numerous statutory and regulatory requirements have been enacted to protect ballot integrity and the election process, and to inform the public. *See, e.g. The Initiative Petition Process,* Florida Department of State, Division of Elections, revised 5/29/02, at Appendix-Tab 3). The fact that the constitutional provision is self-executing has not precluded the legislature from enacting reasonable regulations to ensure ballot integrity and integrity of the election process generally. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000) and the cases preceding it are abundantly clear the legislature has the full power to enact measures such as Section 101.161, Florida Statutes, to regulate the form of the ballot, including the contents of summaries of proposed amendments.

Section 101.161 of the Florida Statutes requires that the ballot

summary and title state the chief purpose of the amendment in clear and unambiguous language. *Save Our Everglades*, 636 so. 2d 1336 (Fla. 1994)*; Askew v. Firestone*, 421 So.2d 151 (Fla. 1982). The ballot title and summary must be approved as to form by the Secretary of State. *See*, § 101.161(2), Fla. Stat. (2001).

Other constitutionally valid requirements of the legislature go far beyond the form of the ballot in regulating initiative proposals. Section 100. 371(3) of the Florida Statutes, states that the sponsor of an initiative proposal:

> . . . shall, prior to obtaining any signatures, register as a political committee pursuant to s. 106.03 and submit the text of the proposed amendment to the Secretary of State, with the form on which the signatures will be affixed, and shall obtain the approval of the Secretary of State of such form. The Secretary of State shall adopt rules pursuant to s. 120.54 prescribing the style and requirements of such form.

The Department of State, Division of Elections ("DOE") has promulgated rules setting forth specific criteria which a petition must satisfy to gain approval under Section 100.371, Florida Statutes. *See*, 1S-2.009, et seq., Florida Administrative Code.

To comply with Section 100.371(3), sponsors of an initiative amendment must register as a political committee pursuant to Section

106.03. Section 106.03 thus requires the sponsor to file a statement of organization with the DOE, which must disclose "[a]ny issue or issues such organization is supporting or opposing." §106.03(2)(g), Fla. Stat. (2001).

Section 99.097(1)(a) of the Florida Statutes requires signature verification for initiative petitions at a cost to the sponsor of ten cents per signature. Such a requirement is consistent with "exactitude and accuracy and is, therefore not unconstitutionally applied to Article XI, section 3, Florida Constitution, initiative proceedings." *Let's Help Florida v. Smathers*, 360 So.2d 494 (1st DCA 1978).

In each of these instances, the legislature or Division of Elections has required specific obligations to be performed and criteria to be met in order for a proponent of an initiative amendment to exercise his rights under a self-executing provision of the Constitution. None of these requirements are set forth in the Constitution. As shown in cases cited throughout this brief, it is well settled that a constitutional amendment is not required for the legislature or executive branch to place these requirements on those who use the initiative process to amend the constitution.

Many of these requirements, such as registering as a political committee, are not strictly derivative of "ballot integrity." Legislation regulating the initiative process addresses broader, more general interests of

the state such as disclosure, accuracy, responsibility for informing the public, protection of the political process, and generally regulating the conduct of elections. For instance, Section 106.03, Florida Statutes serves the compelling state interest of informing the public "as to who is involved in raising and spending money for elections." *Falzone v. State*, 500 So. 2d 1337, 1338 (Fla. 1987). The purpose of the section 101.161 of the Florida Statutes, is "to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." *Kainen v. Harris*, 769 So. 2d 1029 (Fla. 2000)(quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)).

All of these provisions address legitimate purposes for enacting legislation regulating elections and the initiative process. In fact, this Court has found that the legislature and the secretary of state "have the duty and obligation to ensure ballot integrity and a *valid election process*." *Citizens Proposition For Tax Relief v. Firestone*, 386 So.2d 561 at 566 (Fla. 1980) (emphasis added).

Chapter 02-390 of the Laws of Florida merely makes the ballot more informative by advising voters of the fiscal ramifications, if any, of the proposed amendment. A more informed voter is integral to the integrity of the process. If the provision at issue in this case constitutes government interference in the initiative process, then so must each of the other

provisions discussed above.

The court below nevertheless asserts that an enactment of the legislature that places no additional burdens on Appellees, but simply provides additional information to the voter, requires a constitutional amendment. The lower court's ruling is contrary to existing case law and the purpose underlying Chapter 02-390.

2. A fiscal impact statement is not a comment, but rather is a legitimate means of informing the public of the ramifications of a proposed amendment.

Chapter 02-390 of the Laws of Florida adds the following language to Section 101.161, Florida Statutes, "[i]n addition, the ballot shall include a separate fiscal-impact statement concerning the measure prepared by the Revenue Estimating Conference in accordance with s. 100.371(6) or s. 100.381." The purpose of section 101.161 is:

> . . . to assure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors. . . .The burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do this.

Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000)(citing *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982)).

The fiscal impact statement allows electors to be more fully informed of the ramifications and effect of a proposed amendment. Informing the public is a proper purpose of legislation affecting initiatives and Florida courts have long so held. Indeed, "[a] ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong v. Harris*, 773 So. 2d at 16 (Fla. 2000). Additional information regarding the fiscal impact of a proposed amendment is consistent with other statutory provisions which enhance the self-executing constitutional provision by informing the public

and protecting the political process.

A fiscal impact statement is not a comment on or value judgment of the proposed amendment; it is viewpoint neutral. When the electorate is presented with the information, the electorate then determines what conclusions to draw from the fiscal impact statement. In fact, the conclusion drawn from the information could be very different for each voter based on the value the voter places on the proposed amendment. One voter may think the cost is insignificant in light of the purpose of the amendment. Another may view the cost exorbitant outweighing any desired effect of the amendment.

In any event, the information is not an expression of the opinion of the legislature as to the efficacy or wisdom of a proposed amendment. That determination is left to the electors. It is simply another piece of information for the electorate to use in making this determination. Cost goes to the very essence of understanding the most basic ramifications of a proposed amendment. Inclusion of cost information enhances public discourse and the public's understanding of the proposed amendment and is therefore a proper legislative purpose.

B. Chapter 02-390, Laws of Florida does not impair any vested rights the Appellees may have.

1. Nothing in the new law changes impairs Appellees' right to ballot placement. If the Appellees submit verified signature of 488,722 electors, the measures at issue here will appear on the ballot.

This case is simply not about vested rights. Substantive law

prescribes duties and rights, and procedural law addresses the means and methods to apply those rights. *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975). The right guaranteed to Appellees under Article XI, section 3 of the Florida Constitution is the right to propose the amendment or revision of the Constitution by meeting all of the constitutional and statutory prescriptions.

The procedural requirement that the Revenue Estimating Conference prepare a fiscal impact statement to appear on the ballot in no way impairs that right. What is required of Appellees in order to have their initiatives included on the ballot is the same before and after Chapter 02-390 became law. In fact, the law has no effect on Appellees' activities in seeking placement of the proposed amendment on the ballot. The legislation places no additional obligations on Appellees and does not in any way affect Appellees' right to participate in the initiative process.

Appellees assert that they have a right to place the amendment on the ballot without the fiscal impact statement. However, the Constitution does not guarantee a proponent of an initiative amendment a procedure of its choosing. The legislature has determined that ballot integrity and a valid election process will be served by inclusion of a short fiscal impact statement. As the First District Court of Appeal observed in this case, "[i]f allowed to stand, the trial court's order will thwart the legislature's intent to inform the electorate of the fiscal impact of revisions or amendments to the state constitution proposed by initiative. The result will, at least arguably, be a less informed electorate." *Harris v. Coalition to Reduce Class Size*, On Suggestion For Certification To The Supreme Court, Case No. 1D02-2939 (1st DCA 2002). In essence, Appellees take the position that they have a vested right in placement of their proposed

amendments on the ballot with the least information possible. Clearly this position is contrary to the purpose of the ballot title and summary and various other regulations of the initiative process—to inform the public.

2. The changes made by Chapter 02-390 are procedural and do not impair any vested rights the Appellees may have.

The general rule is that a substantive statute will not apply retrospectively, absent clear legislative intent to the contrary, but a procedural statute will apply retrospectively. *State Farm v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995). There is no prohibition against the legislature changing a procedural process mid-stream so long as the statute does not impair vested rights, create new obligations or impose new penalties. *Id.* Chapter 02-390 amends the initiative process procedure. It does not impair any vested rights of the Appellees to have their proposed amendments placed on the ballot.

The law does not affect the status quo of Appellees' proposed amendments. Assuming the required number of signatures is verified, the proposed amendments will appear on the ballot. Appellees are not deprived of vested rights because the legislature has decided that additional information is to be included on the ballot for the benefit of the voters. After all, it is the voters who are the real parties in interest when analyzing the effect of the law, not the sponsors of the proposed amendment.

If the Appellees are displeased with the language of the fiscal impact statement, the remedy is to challenge the language itself, not the authority of the legislature to require placement of fiscal information on the ballot. *See, e.g. Kainen v. Harris*, 769 So. 2d 1029 (Fla. 2000). Appellees have not challenged the language as inaccurate or misleading, instead they challenge the legislature's authority to require that the statement appear on the ballot. Contrary to the Appellees' assertion, the fiscal impact statement requirement is clearly within the legislature's authority and serves an important public purpose in informing the electors.

II. THE PUBLIC INTEREST REQUIRES SUSTAINING THE VALIDITY OF CHAPTER 02-390, LAWS OF FLORIDA.

A. The public's right to a full understanding of proposed amendments outweighs the interests of the sponsors to present their amendment without government "interference."

The fiscal impact statement requirement, like other statutory requirements governing placement of an initiative amendment on the ballot, is designed to ensure that the initiative process serves the will of the people rather than the desires of special interests.

> In the United States, the initiative, referendum, and recall movement came out of the populist and progressive eras of the late 19th and 20th centuries. State governments were perceived to be controlled by "special interests, such as railroads, bankers, land speculators, and robber barons…." Initiatives allow the public to bypass the Legislature….
>
> … Initiative provisions reserve direct lawmaking power to the voters of the state. Voters may propose new legislation and thereafter the general electorate may adopt or reject the initiative at the polls. Initiatives are best described as procedures which are instituted and controlled by the voters to make new laws via the constitution.

A Review of The Citizen Initiative Method of Proposing Amendments to the Florida Constitution, Senate Committee on Governmental Reform and Oversight, March 1995, at page 9. On file at the Legislative Library, room 701, The Capitol, Tallahassee, FL. (Appendix-Tab 5).

This underlying purpose of empowering the voters, not the special interests or, for that matter, political committees sponsoring amendments, is supported in the listing of the arguments for and arguments against direct democracy compiled in Gilbert Hahn III and Stephen C. Morton, *Initiative and Referendum—Do They Encourage or Impair Better State Government?*, 5 FLA. ST. U. L. REV. 925 (1977)(Appendix-Tab 6).

Hahn and Morton assert that initiatives are viewed as a check against the corruption of legislatures by special interest groups. *Id*. Further, initiatives work to reduce the sense of powerlessness of voters and

by involving the voters to this degree, a more highly educated electorate evolves. *Id*. On the other hand, the authors suggest that special interests will "oil the machinery just as they buy and barter in the representative system." *Id*. at 941. If the objective of initiatives is to check the power of special interests and to enhance the electorate's understanding of governmental affairs, the best way of accomplishing the purpose is to more fully explain the ramifications of the measures.

The point of initiatives is to bypass the legislature and empower the people to bring directly to the voters issues that they believe the legislature has not dealt with adequately. Nothing in Chapter 02-390 prevents any issue from coming before the people. Its only effect is to assist voters in more fully understanding the basic ramifications of a measure. The requirement to add a fiscal impact statement to the ballot is just another instance of the legislature ensuring that the amendment serves the will of the people. Whether or not the will of the sponsor is satisfied is not dispositive. Certainly, if the sponsoring committee determines that the fiscal impact statement is incorrect and misleading, the same remedies exist to challenge the language as exist with respect to any other ballot language.

Direct democracy through initiative is "the people's right, though subject to definite limitations based on sound public policy." *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, 632 So.2d 1018 (Fla. 1994), concurring opinion of Justice Kogan. The policy choices made by the Florida Legislature in chapter 02-390 are based on sound public policy and should be upheld.

B. Providing a fiscal impact statement allows voters to more fully understand the ramifications of a proposed amendment and is therefore a valid regulation.

"Simply put, the ballot must give the voter fair notice of the decision he must make." *Askew v. Firestone*, 421 So.2d 151 (Fla. 1982)(citing *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981 (Fla. 1981)). Fair notice of the decision requires a fair representation of the ramifications of the decision. *Askew*, 421 So.2d 151 at 156.

The cost of a proposal could well be among the most important considerations the voter is asked to make. If you asked people whether they would like a new house with 5000 square feet, a fully-equipped gym, a putting green and a hot tub, chances are they response would be favorable. If, on the other hand, you added a statement to the question that they would be responsible for a $1 million mortgage, the answer may well—or may not, be different. Certainly the person is provided with essential information to intelligently make a decision, is in a position to make a better decision, and has been treated more fairly. "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).

In *Askew*, the court reiterated that:

> Lawmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be.

Askew, 421 So. 2d 151, 155 (citing *Smathers v. Smith*, 388 So.2d 825, 829 (Fla. 1976).

It is entirely consistent with the longstanding policy of disclosure to the public of the ramifications of a proposed constitutional amendment to append a statement disclosing the fiscal impact of the change. Just as a

person needs to know the fact of the cost of a home, or a car, or sending their child to private school before he can intelligently make a decision, voters are entitled to know the costs of proposals that they are asked to weigh and determine.

CONCLUSION

For the reasons expressed herein, Appellants would urge this court to vacate the order of the lower court and find that Chapter 02-390 of the Laws of Florida is a valid regulation of the initiative process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the following by U. S. Mail and by facsimile on August 5, 2002 to: Mark Heron, Thomas M. Findley, Messer, Caparello & Self, P.A., P. O. Box 1876, Tallahassee, FL 32301, Charles Canady, General Counsel, Simone Marstiller, Assistant General Counsel, Office of the Governor, Room 209, The Capitol, Tallahassee, FL 32399-0250, Benjamin H. Hill, III, Lynn C. Hearn, Mark J. Criser, Hill, Ward & Henderson, P.A., P. O. Box 2231, Tampa, Florida 33601

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Respondent Jim Smith's Initial Brief is in compliance with the font requirements of Rules 9.100(1) and 9.210, Florida Rules of Appellate Procedure, in that it has been typed in the New Times roman 14-point font.