IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE FLORIDA SENATE

***Petitioners*,**

v.

FLORIDA ASSOCIATION OF REALTORS, INC., ET AL.,

***Respondents*.**

BRIEF ON JURISDICTION OF THE FLORIDA SENATE

ON PETITION INVOKING DISCRETIONARY JURISDICTION TO REVIEW DECISION OF THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA

Barry Richard, Esq.
Florida Bar No. 105599
Greenberg Traurig, P.A.,
101 East College Avenue
Tallahassee, Florida 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
Counsel for The Florida Senate

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATEMENT OF THE FACTS

On May 22, 2002, the Florida Legislature duly passed House Joint Resolution 833. The resolution provided for the amendment of Article VII, Section 3, Florida Constitution, to add the following as Subsection (f):

> Legislative review of the tax on sales, use, and other transactions.—There is hereby created a joint committee consisting of six senators appointed by the President of the Senate and six representatives appointed by the Speaker of the House of Representatives, which committee shall conduct a review of all exemptions from the tax on sales, use, and other transactions imposed by law and all exclusions of sales of services from such taxation. The committee shall be governed by joint rules adopted by the legislature no later than the 2003 regular session pursuant to the authority to adopt rules under section 4 of Article III. Such rules shall establish a schedule for review of such exemptions and exclusions over a three-year period and shall provide criteria to be considered by the committee in conducting its review. No later than March 1 of 2004, 2005,and 2006, the committee shall submit its findings and recommendations to the presiding officers of each house of the legislature. Any decision to deauthorize an exemption or exclusion must be approved by seven members of the committee and shall be in the form of a resolution adopted by the committee, which shall be submitted to the legislature. The resolution shall set forth the specific changes to the statutes necessary to effectuate the deauthorization, which resolution shall have the force of law and shall become effective July 1 following the second regular session occurring after submission to the legislature, except for those exemptions or exclusions expressly rescinded by joint resolution of the legislature prior to that date. This section does not operate to deauthorize any exemption or exclusion not expressly deauthorized in such resolution, nor does it prohibit subsequent reenactment by law of any exemption or exclusion that was deauthorized. The joint committee is dissolved July 1, 2006.

The joint resolution provided for the following ballot summary:

> REVIEW OF EXEMPTIONS AND EXCLUSIONS FROM THE TAX ON SALES, USE, AND OTHER TRANSACTIONS.—Proposes to amend the State Constitution to create a joint legislative committee to conduct a review of exemptions from the tax on sales, use, and other transactions imposed by law and exclusions of sales of services from such taxation. Provides for submission of the committee's findings and recommendations to the presiding officers of the Legislature not later than March 1, 2004, 2005, and 2006. Requires committee decisions to deauthorize any exemption or exclusion which are approved by a majority of the committee membership to be presented to the Legislature as a resolution, not subject to gubernatorial veto. Authorizes the Legislature to rescind decisions of the committee by joint resolution. Provides that deauthorization of exemptions or exclusions shall take effect on July 1 of the calendar year following the second regular session following adoption of the committee's resolution. Retains the Legislature's authority to adopt or reauthorize exemptions or exclusions from such tax.

On August 20, 2002, the circuit court entered summary judgment for the defendants. The District Court reversed, ordering the measure removed from the ballot. The mandate was issued on September 19, 2002.

SUMMARY OF ARGUMENT

The lower court found that the language of the amendment and of the ballot summary differed as to the authority of the Legislature to rescind decisions of the committee. Since the two statements were part of the same legislative enactment, they should have been read in *pari materia* to determine legislative intent. Instead, the lower court concluded that the

language of the amendment was controlling and gave no consideration to the ballot language. The decision thus conflicted with the decisions of this court in *Major v. State*, 180 So. 2d 335 (Fla. 1965); *Johnson v. State*, 27 So. 2d 276 (Fla. 1946); and *Sharer v. Hotel Corp. of America*, 144 So. 2d 813 (Fla. 1962).

Despite the fact that language in the summary correctly described the functions of the committee and the Legislature, the lower court found that terminology in the summary could leave such an "impression" with the voter as to cause the voter to misconstrue the authority of the two bodies. Such a standard is far less objective than what this Court has consistently required to justify removing a measure form the ballot and is in express and direct conflict with *Tax Limitation*, 673 So. 2d 864 (Fla. 1996) and *Right to Treatment and Rehabilitation*, 818 So. 2d 491 (Fla. 2002).

ARGUMENT

I. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *Major v. State*, 180 So. 2d 335 (Fla. 1965); *Johnson v. State*, 27 So. 2d 276 (Fla. 1946); and *Sharer v. Hotel Corp. of America*, 144 So. 2d 813 (Fla. 1962), BY FAILING TO CONSTRUE THE PROPOSED AMENDMENT LANGUAGE AND THE BALLOT SUMMARY LANGUAGE IN *PARI MATERIA*.

The lower court found that language in the amendment and the the summary are in conflict with respect to the Legislature's authority to override decisions of the committee. The summary states that the amendment, "authorizes the Legislature to rescind decisions of the committee by joint resolution." The language of the proposed amendment states that committee decisions to deauthorize shall become on a date certain "except for those *exemptions or exclusions* expressly rescinded by joint resolution of the legislature prior to that date." (emphasis added)

The court expressly declined to consider the language of the summary. In particular, the court stated:

> Third, the appellees argue that we should read the above-quoted language as meaning that the legislature may rescind committee action because the ballot summary contemporaneously adopted by the legislature indicates that the proposed amendment would give the legislature this power. But the appellees offer no authority for the proposition that a ballot summary may be used to trump the clear and unambiguous language of a proposed constitutional amendment. Because the above-quoted language from the proposed amendment is clear and unambiguous, it must be read to mean exactly what it says.

[App. p. 16] The court concluded that the summary fails to clearly and unambiguously describe the purpose of the amendment and is unconstitutional. The court's refusal to read the amendment and summary language in *pari materia* conflicted with this Court's decisions in *Major v.*

State, 180 So. 2d 335 (Fla. 1965); *State v. Department of Education*, 317 So. 2d 68 (Fla. 1975); *Johnson v. State*, 27 So. 2d 276 (Fla. 1946); *Sharer v. Hotel Corp. of America*, 144 So. 2d 813 (Fla. 1962) among other cases.

The proposed amendment and the ballot summary were both part of the same joint resolution. In determining legislative intent, there is no reason why the language of the amendment should be given any greater weight than the language of the summary. The precedent of this Court is directly to the contrary:

> Statutes relating to the same subject matter must be read in pari materia, and this rule is applicable with special force where the statutes in question were enacted by the same legislature as part of a single act.

Major v. State, 180 So. 2d at 337 ftn. 1 (internal citations omitted).

This Court has also adhered to the general rule that when contradictory language appears in the same legislative package, the later in either time or placement prevails:

> [I]t is well settled rule of construction that the last expression of the legislative will is the law. In cases of conflicting provisions in the same statute or in different statutes the last in point of time *or order of arrangement* prevails.

Johnson v. State, 27 So. 2d at 282; *Accord: Sharer v. Hotel Corp. of America*, 144 So. 2d 813 (Fla. 1962).

In the court below, the plaintiffs argued that the voter cannot read the two statements in *pari materia* because the amendment language does not appear on the ballot. It is not the voter that must read the provisions in *pari materia*, but the court in the process of determining legislative intent. If the lower court had determined that the ballot summary was the more accurate reflection of legislative intent, and construed the amendment accordingly, the ballot summary would be accurate.

> II. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *Tax Limitation*, 673 So. 2d 864 (Fla. 1996) and *Right to Treatment and Rehabilitation*, 818 So. 2d 491 (Fla. 2002), SIGNIFICANTLY LOWERING THE STANDARD BY WHICH PROPOSED CONSTITUTIONAL AMENDMENTS ARE TO BE REMOVED FROM THE BALLOT.

The relative functions of the committee and the Legislature are summarized in the following excerpt from the ballot summary:

> Requires committee decisions to deauthorize any exemption or exclusion which are approved by a majority of the committee membership to be presented to the Legislature as a resolution, not subject to gubernatorial veto. Authorizes the Legislature to rescind decisions of the committee by joint resolution.

Nothing in the amendment states that the Legislature must approve, endorse, adopt, confirm, or ratify the decisions of the committee in order for them to take effect. The sole reference to Legislative action with reference to the committee decisions is that it is authorized to rescind those decisions.

Nonetheless, the lower court concluded that a voter could reach the conclusion that the committee's only function would be advisory because the summary, taken as a whole, would, in the opinion of the court, leave such an "impression." [App. p. 11, 12]

This Court has never removed a proposed amendment from the ballot simply because the summary could give a careless voter an incorrect "impression" of the amendment's effect. Such a criterion would amount to practically no standard and leads to a 'most ideally worded' test. This Court has expressly rejected such a test. In *Right to Treatment and Rehabilitation*, the Court refused to strike a proposed amendment simply because the wording of the summary was less than ideal and could have been misconstrued by a voter:

> Opponents also contend that the phrase "Legislative implementation" is misleading because it is a sentence fragment that voters could construe as meaning that legislative implementation would be required before the amendment would become effective; the amendment, however, in subsection (f) gives the amendment's effective date and only in subsection (g) are voters made aware that the Legislature is involved with this amendment because it "shall enact such laws as necessary to implement this section." We disagree.
>
> The phrase "Legislative implementation" in fact is true. Subsection (g) of the text of the amendment states: "The Legislature shall enact such laws as necessary to implement this section." What the summary fails to say is that the framework established in the amendment is self-effectuating. Subsection

> (f) of the amendment states: "This section shall become effective on July 1 of the year following passage by the voters, and shall apply prospectively only to qualifying drug offenses occurring on or after that date." Although a "perfectly" drafted summary might mention this self-effectuating provision, imperfection is not necessarily fatal given the seventy-five word statutory maximum. The sponsors reasonably may have determined that it would have been misleading to fail to mention the legislative implementation provision--and they would have been correct.

Id., 818 So. 2d at 497. The complaint by the opponents in *Right to Treatment* was analogous to the findings of the lower court. The opponents argued that the summary was misleading because use of the phrase "legislative implementation" and failure of the summary to expressly state that the provision was self-effectuating could give the voter the impression that legislative action was necessary before the provision took effect. Similarly, the lower court found the current summary to be misleading because of use of the words "review" and "findings and recommendations" and because the summary does not expressly state that the committee's decisions are self-effectuating unless rescinded by the Legislature.

In *Right to Treatment*, this Court rejected such argument stating:

> It is true … that certain of the details of the [text] as well as some of its ramifications were either omitted from the ballot question or could have been better explained therein. That, however, is not the test.

Id., 818 So. 2d at 498 (ellipses and brackets by court) (quoting *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978).

In every instance in which this Court has removed a provision from the ballot because of a defective ballot summary, it has been because the summary failed to inform the voter of a substantial modification to existing laws, *e.g., Restrict Laws Related to Discrimination,* 632 So. 2d 1018 (Fla. 1994), because it used material terms that were either erroneous or so ambiguous as to leave the voter unable to determine the true effect of the measure, *e.g.*, *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992), or the summary, while accurate, deceived the voter as to the true purpose of the amendment by failing to inform the voter of information only available from sources outside the summary, *e.g.*, *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000). Those were far more objective criteria than was used by the lower court.

Underlying the objective standards set by this Court is the overarching rule of judicial restraint announced in *Right to Treatment and Rehabilitation, supra* and *Tax Limitation*, *supra*:

> The right of Floridians to decide whether to accept or reject a change of their *own* making in their *own* organic law is paramount. This Court has no authority to inject itself in the process, unless the laws governing the process have been 'clearly and conclusively' violated.

Right to Treatment and Rehabilitation, 818 So. 2d at 498 (emphasis by court.)

> When reviewing a proposed constitutional amendment for the ballot, we have noted that each proposed amendment is to be reviewed with 'extreme care, caution and restraint.'

Tax Limitation, 673 So. 2d at 866.

CONCLUSION

The Court is respectfully requested to accept jurisdiction.

BARRY RICHARD
Florida Bar No. 0105599
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1828
Tallahassee, Florida 32302
Phone (850) 222-6891
Fax; (850) 681-0207

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Hand-Delivery or Facsimile Transmission to Dan R. Stengle, Victoria L. Weber, David L. Powell, Jennifer A. Tschetter, Hopping Green & Sams, P.A., Post Office Box 6526, Tallahassee, Florida 32314, Stephen H. Grimes, Holland & Knight, Post Office Drawer 810, Tallahassee, Florida 32302, Samual J. Ard, Ard, Shirley & Hartman, P.A., 820 East Park Avenue, Suite F200 Tallahassee FL 32301, Michael L. Rosen, Bricklemyer Smolker & Bolves, P.A., P.O. Box 10228, Deborah Kearney, General Counsel, Gerard T. York, Assistant General Counsel, Department of State, PL-02, The Capitol, Tallahassee FL 32399-0250, Tallahassee FL 32302 this 20th day of September , 2002.

_____

BARRY RICHARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

APPENDIX

- Opinion of the District Court of Appeal for the First District of Florida, rendered September 18, 2002