IN THE SUPREME COURT OF FLORIDA

Case No. SC02-449

Upon Request From the Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

ADVISORY OPINION
TO THE ATTORNEY GENERAL

RE: LOCAL TRUSTEES AND STATEWIDE GOVERNING BOARD TO MANAGE FLORIDA'S UNIVERSITY SYSTEM

ANSWER BRIEF AND APPENDIX OF THE SPONSOR, EDUCATION EXCELLENCE FOR FLORIDA

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STATEMENT OF THE CASE AND FACTS

Education Excellence for Florida submitted a Statement of the Case and Facts in its Initial Brief and no further elaboration on that statement is necessary.

For ease of reference, the title, ballot summary, and amendment text under consideration are included as Appendix 1 to this brief.

Floridians for Education Reform filed an initial brief in this proceeding in opposition to the proposed initiative and will hereafter be referred to as "FER."

In order to avoid the use of confusing acronyms, Education Excellence for Florida will hereafter be referenced as "Sponsor," with the hope that changing its designation from "EEF" in the Initial Brief to "Sponsor" in this brief will better facilitate understanding, rather than introducing an element of confusion.

SUMMARY OF THE ARGUMENT

Floridians for Education Reform ("FER") opposes the initiative by peppering the proposal with nineteen objections, challenging the amendment's ballot summary compliance with section 101.161, Fla. Stat., the constitutional requirements laid down by Article XI, Section 3, Fla. Const. and this Court's criteria in *Advisory Op. to the Att'y Gen. Re Amendment to Bar Gov't From Treating People Differently Based on*

Race in Public Educ., 778 So. 2d 888, 899-900 (Fla. 2000).

Twelve of the nineteen objections are aimed at the ballot summary. Contrary to FER's contentions, the proposed amendment to place a university governance system in the constitution does not conflict with other provisions in the constitution. In fact, the constitution does not specify a governance system for universities. The initiative fills this void and fits nicely into Article IX devoted to education. The ballot summary is straightforward and forthright about the amendment's chief purpose to replace the present system with a different constitution-based system. The invalidation of current statutory law is part and parcel of the amendment's clearly stated chief purpose. The ballot summary uses the same commonly understood terms as appear in the text of the amendment to fairly communicate the amendment's most important features. Within the allowed seventy-five words, the mentioned features include: the power of the statewide board to govern the system; the responsibility of each local board to administer the affairs of its particular constituent university; the diversity of board membership; the senate confirmation of appointed members; the accountability to the legislature for the operation of the system; and several other important features to which FER does not object.

The initiative's proposed governance system functions entirely within the executive branch of government. The system performs no legislative function, is specifically "subject to" the legislative power to appropriate funds, contains no

judicial powers, and easily meets the constitution's single-subject test. The amendment's proposed system is not a "logrolling" trap for the voter, since the two tiers – statewide board and local boards – are inseparable parts of the same governmental unit consisting of one body corporate. The initiative meets the required statutory and constitutional tests and should be placed on the ballot for consideration by the voters.

ARGUMENT

I. INTRODUCTION

Those drafting petitions to amend the Florida Constitution know from the beginning that their efforts will be reviewed by this Court while the initiative process is in midstream. This timing results in a high degree of concern and provides strong incentive for caution. Fortunately, the controlling statute and this Court's decisions provide sufficient guidelines for drafting proposed amendments.

As for ballot summaries, the polestar is section 101.161, Fla. Stat., stating that the one thing the summary must do is clearly and unambiguously state the chief purpose of the measure. This Court has provided helpful standards for drafters in *Advisory Op. to the Att'y Gen. Re Amendment to Bar Gov't From Treating People Differently Based on Race in Public Educ.,* 778 So. 2d 888, 899-900 (Fla. 2000), stating that summaries should 1) adequately define terms, 2) use consistent

terminology, 3) mention constitutional provisions affected by the amendment, and 4) adequately describe the general operation of the proposed amendment. The amendment proposed here meets all of these criteria.

As explained in the Initial Brief, the Sponsor has taken the best constitutional principles from the best university systems in the country, and seeks to make such a governance system part of Florida's constitution for the lasting benefit of the state and its citizens. As will be seen below, every effort was made to accurately convey to the voter in straightforward, no-nonsense language the chief purpose of the amendment and the way the proposed system would work.

The issues raised by the Attorney General[1] were sufficiently addressed in the Sponsor's Initial Brief and no further elaboration will be made here. FER filed an initial brief in opposition to the proposed amendment. FER's brief takes a scattershot approach and advances nineteen objections to the proposed amendment. Twelve of the objections attack the ballot summary. This brief will respond to each of FER's objections in the order they were raised.

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1 The Attorney General's Request for Opinion will be referenced as "AG's Request"

II. THE BALLOT TITLE AND SUMMARY CLEARLY AND UNAMBIGUOUSLY DESCRIBE THE CHIEF PURPOSE OF THE AMENDMENT.

A. The Proposed Amendment Would Not Change or Substantially Affect Other Provisions of the Constitution; The Amendment's Clearly Stated Chief Purpose is to Replace the Existing Statutory System With a New Constitutional System.

FER contends that the proposed amendment would substantially affect five other provisions in the constitution and would also substantially alter statutory language presently on the books. This brief addresses first the constitutional questions and then the statutory issues.

1. The proposed amendment would not change other sections of the constitution.

Before addressing each specific objection raised by FER and the particular section of the constitution it concerns, an overall view of how the proposed amendment would fit in the constitution will provide a useful perspective. The amendment would appear as a new Section 7 in Article IX. (Appendix 1). For ease of reference, Article IX has been included as Appendix 2 to this brief. The article's title shows that it is devoted to "Education." It is the smallest article in the constitution, containing only six short sections. The first three sections concern education in general.[2] The last three sections concern local school boards and their

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2 For a review of how the changes to Article IX, Section 2, effective January 7, 2003, will affect the issues at hand, see pp. 9 and 10 of this Brief.

jurisdiction over kindergarten through the twelfth grade. As can be seen by simply scanning the article, there is a noticeable void in the constitution for community colleges and universities. (Appendix 1). This amendment would fit nicely into Article IX, fill the void for universities, and achieve the desired "harmony of purpose both internally and within the broader context of the American federal system and Florida law itself." *In re Advisory Op. to the Att'y Gen. Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1022 (Fla. 1994) (Kogan, J., concurring).

FER contends that the adoption of the amendment would substantially affect Article II, Section 3 (Separation of Powers), Article IV, Section 1 (Governor's Responsibility for Planning and Budgeting), Article IX, Section 1 (Adequate Provision for Institutions of Higher Learning), Article IX, Section 2 (Supervision of the State Board of Education), and Article IX, Section 3 (Terms for Appointive Boards Dealing with Education) and that the voters should be so notified.

The issues raised by these objections are mixed. They involve both ballot summary, notice-to-voter issues (§ 101.161, Fla. Stat. (2000)), and constitutional single-subject issues (Art. IX, § 3, Fla. Const.). In the interest of brevity, at this point the brief will address both the statutory and the constitutional aspects of FER's contentions concerning these five enumerated sections. As a result, it will not be necessary to revisit these sections in the single-subject portion of this brief.

Arguments concerning purported impacts on other portions of the constitution

take three forms. First, whether a proposed amendment would result in "identifiable changes in the functions of different levels and branches of government [is] sufficient to warrant invalidating the amendments." *Advisory Op. to the Att'y Gen. Re Amendment to Bar Gov't From Treating People Differently Based on Race in Public Educ.,* 778 So. 2d 888, 896 (Fla. 2000). In this instance, the question is controlled by Article IX, Section 3. Violation of this section would result in invalidation by this Court before the matter went to the voters. Thus, it would not be a ballot summary, section 101.161 issue.

Second, an amendment "may amend multiple sections of the constitution as long as the proposal contains a single subject . . . ." *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984). In this instance, the amendment would not only have to satisfy the Article IV, Section 3 single-subject requirement, it would also have to satisfy the section 101.161 requirements for its ballot summary before it would be allowed by this Court to go to the voters.

Third, if an examination of an amendment text and ballot summary shows that the amendment would not alter the functions of different levels and branches of government (the first instance) and would not substantially affect other provisions of the constitution (the second instance), then logically no notice to the voter in the ballot summary is required – or even possible. The following review of the five constitutional provisions identified by FER should serve to conclusively demonstrate

that this amendment falls in the third category. There is neither a change to the functions of government nor a substantial affect to other provisions of the constitution. No notice to the voter in the ballot summary is required – or even possible.

Art. II, Section 3. FER contends that the adoption of the proposal would create an autonomous fourth branch of government for state universities. FER made this same contention when discussing constitutional issues in general. The fourth branch discussion occurs in this brief in one place and is found below in Section III devoted to constitutional issues.

Art. IV, Section 1. FER contends that the adoption of the proposed amendment would "presumably" impact the Governor's responsibility for the planning and budgeting for the state. This assertion is difficult to understand. The proposed amendment would establish a governing board for the purpose of managing the work of the university system. From 1905 (Board of Control) to 1965 (Board of Regents) through 2001 (Board of Regents abolished), Florida's State University System was managed by a statutory governing board with the specifically enumerated powers to plan[3] and prepare legislative budget requests[4] for the university system. For ninety-six years, governors successfully proposed budgets to the legislature while the university governing board exercised their statutory authority to plan and recommend

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3 § 240.209(3)(a), Fla. Stat. (1999).
4 § 240.209(3)(d), Fla. Stat. (1999).

budgets for the system. The procedure would be no different if the same authority were granted by the constitution rather than by statute.

Art. IX, Section 1. With regard to this section, FER simply restates the position originally advanced by the Attorney General and adds nothing to the Attorney General's previous observations. As pointed out in the Sponsor's Initial Brief, adopting the amendment would leave Section 1 of Article IX unchanged. The section imposes upon the legislature the obligation to make "adequate provision" for the "establishment, maintenance, and operation of *institutions of higher learning*" – not just universities. (emphasis added). The obligation to adequately fund <u>all</u> institutions of higher learning would fully remain. To the extent the obligation to make "adequate provision" extends to other aspects of adequacy beyond funding, the legislature would continue to have full responsibility for community colleges and would also have responsibility for universities in all aspects not inconsistent with the new amendment.

Art. IX, Section 2. FER admits to uncertainty as to the impact that the new Article IX, Section 2 will have on education, but nonetheless states that the ballot summary should be required to explain the impact – whatever it is. Article IX, Section 2, providing for the State Board of Education, was amended by the electorate in 1998 pursuant to the recommendation of the Constitution Revision Commission. The amendment takes effect January 7, 2003. (Appendix 2). On that date, the membership of the State Board of Education will change. The elected governor and

cabinet will be replaced by governor-appointed citizen members. Most importantly, the board will no longer have the general jurisdiction to *supervise the system of public education*, but will have the more focused jurisdiction to *supervise the system of free public education*. The "system of free public education" is quite obviously the "uniform system of free public schools" referenced in Article IX, Section 1, which this Court has traditionally distinguished from the "institutions of higher learning" and "other public education programs." *See Board of Public Instruction of Brevard County v. State Treasurer*, 231 So. 2d 1, 2 (Fla. 1970) (system of free public education is the K-12 system that all Florida residents have the right to attend for free). On January 7, 2003, Section 2 of Article IX will join Sections 4, 5, and 6 of the Article with concern only for education through the twelfth grade.

The proposed amendment, if adopted, would take effect at the same time that the changes will occur to Section 2 of Article IX – January 7, 2003.[5] On that date, Section 2 will pertain to K-12 and the new Section 7 would pertain to universities.

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5 Art. XI, § 5(c), Fla. Const. Following this year's general election, constitutional amendments adopted by the people will take effect on the first Tuesday after the first Monday in January. That date is January 7, 2003.

There would be no conflict or overlap between the two sections.

Art. IX, Section 3. FER once again restates the position previously taken by the Attorney General. Nothing additional is advanced. The section authorizes the Legislature to set terms of office in excess of four years for members of *any appointive boards dealing with education* – not just universities. As pointed out in the Sponsor's Initial Brief, this amendment would result in no change to Section 3 of Article IX. The legislature will retain its authorization to set terms of office exceeding four years for members of appointive boards of community colleges and any other appointive boards in the state's education establishment.

2. There is Nothing Misleading or Confusing About the Proposal's Chief Purpose: Replace the Existing Statutory System With a New Constitutional System.

The ballot summary for the proposed amendment could not be more clear or straightforward: the chief purpose is to create a system of governance for the State University System in place of the present system. The Attorney General readily understood the concept, stating that the amendment would "create[s] a system of governance for the State University System located within the executive branch of government," and concluding that "the ballot title and summary appear to express this chief purpose." AG's Request, pp. 5, 3. A sponsor's principle task is to clearly and unambiguously state the amendment's chief purpose:

> We have previously determined that this section "requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982). Nevertheless, the title and summary need not explain every detail or ramification of the proposed amendment. *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986). Our responsibility is to determine whether the language of the title and summary, as written, misleads the public.

Advisory Op. to the Att'y Gen. Re: Prohibiting Public Funding of Political Candidates' Campaigns, 693 So. 2d 972, 975 (Fla. 1997).

FER contends that the ballot summary should indicate that the amendment would serve to invalidate existing statutory law. This Court has consistently stated that its review of proposed initiatives is narrowly confined to two issues: clear and unambiguous notice of the chief purpose of the amendment to voters, and compliance with the single-subject restriction. Once the chief purpose has been clearly and unambiguously stated, the summary passes muster, statutory invalidation notwithstanding:

> *The opponents argue that the language is misleading to the public, asserting that, in addition to prohibiting public funding of campaigns, the amendment effectively invalidates existing statutory law* permitting the public financing of the campaigns for some of the offices at issue. The opponents argue that the amendment is misleading because it puts voters in the position of voting on something that has a significant collateral effect, of which many voters may be unaware.

> *We reject this contention*. We agree with the Attorney General's conclusion that the ballot title and summary satisfy the requirements of section 101.161. The language is not misleading, vague, or ambiguous. The language expresses the chief purpose of the amendment.

Id. at 975-76. (Emphasis added). This Court has rejected arguments that invalidation of statutory law is a collateral issue that must be addressed in the ballot summary.

Even if it were necessary to use some of the seventy-five ballot-summary words to discuss how the existing statutory system would be altered, the task would be impossible. The Florida Education Governance Reorganization Implementation Act contains 217,019 words. At least nineteen of the forty-four sections in the Act pertain in some way to the University System. These nineteen sections contain 19,173 words.[6] Merely identifying these nineteen sections in the ballot summary by their section titles would require 116 words – forty-one words beyond the limit.

Almost any aspect of state government and law that might be addressed by an initiative amendment would necessarily affect a significant body of statutory law.

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6 Each of the forty-four legislative sections became a numbered section of the Florida Statutes. The following nineteen sections pertain in some way to the State University System. The number before the slash mark represents the number of words in each section title. The number after the slash mark represents the number of words in the text of the particular section: § 229.001 – 2/22; § 229.002 – 6/247; § 229.003 – 4/673; § 229.0031 – 7/784; § 229.004 – 4/636; § 229.005 – 4/598; § 229.0061 – 13/1352; § 229.007 – 15/706; § 229.0072 – 3/830; § 229.0073 – 6/900; § 229.008 – 7/710; § 229.0081 – 8/1130; § 229.0082 – 5/622; § 240.2011 – 4/302; § 240.527 – 7/1025; § 240.5275 – 7/919; § 240.4015 – 6/582; § 240.551 – 4/6,884.

This would be true whether the subject matter concerned the environment, taxes, property rights, elections, basic rights, or local government. A case law requirement that statutory implications be addressed in a seventy-five-word summary would eviscerate citizen initiatives on these subjects and frustrate the purpose of putting an initiative provision in the constitution in the first place. Fortunately, the requirements are very clear: the chief purpose of the proposal must be clearly and unambiguously stated. § 101.161, Fla. Stat. (2000). In this case, the summary complies with those requirements and should appear on November's ballot.

FER also makes various arguments to the Court based on what it perceives to be the comparative merit of the present statutory scheme of university governance. For example, the merit argument that "we should give the present system a chance to work" appears in the Initial Brief as a contention that the proposed amendment "will alter the newly structured system of university management, which has not yet even taken full effect." FER's Initial Brief, p. 8. This Court has consistently made it clear to proponents and opponents alike that it will not pass judgment upon the wisdom or merit of a proposed initiative. The Court's only role is to determine whether a proposed amendment is "clearly and conclusively defective . . . for the purpose of remaining on the ballot so that the voters of this State may exercise *their* judgment as to its merit." *Floridians Against Casino Takeover v. Let's Help Florida,* 363 So. 2d 337, 342 (Fla. 1978) (emphasis added).

B. The Title and Summary Clearly Show That the Board of Governors is Responsible For the Operation of the Whole University System, of Which the Local Universities are Parts.

FER contends that the title and summary fail to indicate that the statewide board of governors has any authority over the local boards of trustees. A simple reading of the title and summary demonstrates to the contrary.

The title clearly states that the statewide board is the governing board. The ballot summary elaborates on the statewide board's greater authority by identifying it as a "*governing board . . . [that] shall be responsible for* the coordinated and accountable operation of *the whole university system."* (Emphasis added). The ballot summary shows that each *local board's* responsibility is limited to administering its particular university, while the *statewide board's* power to govern spans the whole system. "Govern" and "administer" are commonly understood terms. "Govern" is defined as "to rule over by right of authority: *to govern a nation*." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987). "Administer" is defined as "to manage (affairs, a government, etc.); have executive charge of: *to administer the law." Id.* An objective reading of the summary's commonly understood terms shows that a given local board of trustees only "manages" one of the eleven universities in the system, while the board of governors "rules" over the whole system. In this way the ballot summary complies with this Court's criteria calling for an adequate description of the general operation of the proposed amendment within

the seventy-five-word limitation. *Advisory Op. to the Att'y Gen. Re Amendment to Bar Gov't From Treating People Differently Based on Race in Public Educ.,* 778 So. 2d 888, 899-900 (Fla. 2000).

C. The Summary Accurately Informs as to the Appointment and Election of Board Members.

FER complains that not enough detail is provided in the ballot summary about the selection of board members for the statewide board of governors and the local boards of trustees. The summary uses fifty-seven of its allowed seventy-five words in meeting the required objective for describing the chief purpose of the amendment. With the remaining eighteen words, the summary alerts the voter that the text of the amendment "provides procedures for" selection and confirmation of board members, including one student and one faculty representative per board." FER points out in its brief that the selection process for board membership is really more complicated than would appear from reading the summary. FER is correct – it is more complicated. The careful system of checks and balances appearing in the amendment text is described by FER in its brief as follows:

> The governor appoints and the senate must confirm fourteen citizens to serve on the statewide board. The remaining three members are the commissioner of education, the chair of the advisory council faculty senates, or the equivalent, and the president of the Florida student association, or the equivalent. The governor appoints and the senate confirms only six citizen members of the thirteen-member board, and the five additional members are

> selected by the board of governors. The chair of the faculty senate and the president of the student body at the university make up the final members of the local boards.[7]

FER's Initial Brief pp. 8, 9.

FER's brief effectively demonstrates why it was impossible for this level of detail to appear in the summary. FER's explanation set forth above uses ninety-nine words (counting "thirteen-member" as one word). The Sponsor is restricted to only seventy-five words, which must first contain a description of the chief purpose of the amendment.

The method for selecting board members is important information, but it is not the chief purpose of the amendment. The Sponsor used some of its last eighteen words to alert interested voters that these procedures existed in the text. By using the bulk of its allowed words to describe the amendment's chief purpose – rather than every ramification of board membership – the Sponsor met the necessary requirement for drafting a valid ballot summary. This Court has previously stated that the necessary part of the ballot summary is the statement of the chief purpose of the amendment and that it is not necessary to explain every ramification or all details.

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7 FER's summary inaccurately states that the senate confirms only the six governor-appointed citizen members of the thirteen-member boards of trustees. The five citizen members appointed by the board of governors are identified as appointed members. The amendment states: "The appointed members shall be confirmed by the senate . . . ." No distinction exists between those appointed by the governor and those appointed by the board of governors.

Advisory Op. to the Att'y Gen. Re Prohibiting Public Funding of Political Candidates' Campaigns, 693 So. 2d 972, 975 (Fla. 1997) (citing Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986)).

D. The Title and Ballot Summary Refer Exclusively to Universities and Say Nothing About Community Colleges.

FER contends that the average voter, upon reading the title and ballot summary, would likely understand that the proposed system would govern community colleges as well as universities.

Neither the title nor the summary contains the word "college." Florida had a state university system for ninety-six years. Junior colleges and now state community colleges have been in Florida for decades. The State University System never contained a junior college or a community college. This Court has traditionally distinguished junior colleges from the universities. *Board of Public Instruction of Brevard County v. State Treasurer*, 231 So. 2d 1, 2-3 (Fla. 1970). "University" is a commonly understood term and is defined as "an institution of learning of the highest level, having a college of liberal arts and a program of graduate studies together with several professional schools, as of theology, law, medicine, and engineering, and authorized to confer both undergraduate and graduate degrees." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987). A "junior college" is defined as "a collegiate institution offering courses only through the first one or two years of

college instruction and granting a certificate of title instead of a degree." *Id.* A "community college" is defined as "a nonresidential junior college established to serve a specific community and typically supported in part by local government funds." *Id.* Neither Florida's history, its institutions, nor the commonly understood definitions of the terms involved could create anything like what FER suggests in its brief.

E. The Summary Properly Avoids the Need for Definitions of Words by Using Commonly Understood Terms Instead of Specialized Language.

FER objects to three terms used in the ballot summary and correctly states that the ballot summary contains no definitions for these terms. The text of the proposed amendment uses commonly understood terms. As a result, no definitions are included in the ballot summary because none are needed. This Court has stated that sponsors may presume that voters have "a certain amount of common sense and knowledge" when drafting their summary. *Advisory Op. to the Att'y Gen. Re Tax Limitation,* 673 So. 2d 864, 868 (Fla. 1996).

In fact, the seventy-five-word limitation for the ballot summary virtually prohibits the luxury of a definitions section. The amendment text has no limit on the number of words that can be used and would permit a section for definition of technical or specialized terms. To use and define specialized terms in the amendment text without also defining the same specialized terms in the ballot summary would run the risk of creating a situation where the summary was an inadequate reflection of the

text. To avoid this potential pitfall, the drafters chose to use commonly understood terms in the amendment text so that those same terms (no synonyms) could be transported to the summary, be understood by the voter, and the use of the same terms would avoid inconsistent terminology. *Advisory Op. to the Att'y Gen. Re Amendment to Bar Gov't From Treating People Differently Based on Race in Public Educ.,* 778 So. 2d 888, 899 (Fla. 2000). FER objects to the following terms: "local," "accountable operation," and "procedures for selection."

1. "Local" clearly distinguishes the responsibility of the local boards from the responsibility of the statewide boards.

FER joins the Attorney General in questioning the use of the term "local" as implying that the members of the boards of trustees would be residents of, or affiliated with, a particular region of the state.

As explained in the Sponsor's Initial Brief, the proposed governance system is a two-tier system. The amendment itself devotes a separate paragraph to each of the tiers. A run-in heading is provided for each paragraph. The run-in heading for the "boards of trustees" paragraph shows that those boards have responsibility for each local university. That heading is juxtaposed with the run-in heading for the "board of governors" paragraph showing that board as having statewide responsibility for the whole system.

The ballot summary accurately reflects the amendment's juxtaposition of the

local boards with the statewide board. A separate sentence is devoted to each tier of the system. The first sentence of the summary speaks to the administration of each state university by a "local" board of trustees. A separate sentence explains that the statewide governing board is responsible for "the whole university system." The membership for the local boards is addressed in yet another separate sentence that contains no residency limitation for board members. After raising the issue for review, the Attorney General nonetheless correctly conveyed his understanding that the term "local" pertains to the responsibility of the university board and not to its membership: "the term 'local' as used in the amendment does not require that members of the board be residents of, or affiliated with, a particular locale or region of the state." AG's Request, p. 4.

2. "Accountable operation" accurately reflects an extremely important provision found in the amendment text.

FER argues that the term "accountable" in the ballot summary conveys a different meaning than it does in the amendment text, contending that the text refers to fiscal accountability while the summary gives the impression that the accountability is for management in general.

The starting point for the universities' accountability to the legislature is indeed fiscal. As explained in the Sponsor's Initial Brief, the text of the amendment proposed

here adopted portions of the language proposed for a 1978 amendment to Florida's constitution by that year's Florida Constitution Revision Committee on Education. In addition to solving the separation of powers issue, the language contains an important accountability clause, stating that the governing board "shall operate, regulate, control and be fully responsible for the management of the state university system subject to the powers of the legislature to authorize the expenditure of monies *and the board shall account for such expenditures as provided by law*." REPORT ON THE COMMITTEE ON EDUCATION, CONSTITUTIONAL REVISION COMMISSION, p. 1 (February 9, 1978) (emphasis added). The Committee on Education explained the significance of the accountability clause in its report to the 1978 Florida Constitutional Revision Commission:

> related to this concept of legislative control over appropriations is the concomitant and implied power of the legislature to require the state university system to account for the expenditure of funds *vis-à-vis* the post audit process. The proposed language is explicit in this point. Thus, the important legislative function of *public accountability* is maintained.

Id. at 7 (emphasis added).

The Sponsor used a few of the remaining seventy-five words in the ballot summary to mention this important "public accountability" feature when stating that the statewide governing board "shall be responsible for the coordinated and *accountable operation* of the whole university system." (emphasis added). In the

event of the system-wide mismanagement mentioned by FER at page 10 of its brief, there is nothing in this amendment that would keep the legislature from questioning the continued investment of public funds in a failing system. For that matter, the legislature would be free to express its displeasure with the university system for any reason – fiscal or otherwise – and use its power of appropriation (specifically reserved in the amendment) accordingly. This provides a healthy check on the board of governors and its staff. The power of the purse provides strong incentive to universities for productive performance so that the legislature can be annually assured that the public's money is being well spent. The ballot summary accurately reflects the important "public accountability" feature of the amendment text.

3. "Procedures for selection" accurately embodies both the appointment and election procedures that lead to membership on the local boards of trustees and the statewide board of governors.

FER contends that the term "selection" encompasses a different and broader process than the term "appointment," and incorrectly concludes that the summary uses terminology that is divergent from the amendment text.

The text of the proposed amendment explains that the membership of both the local boards of trustees and the statewide board of governors comes about by both appointment and election. Six of the thirteen members of each board of trustees are appointed by the governor, five are appointed by the board of governors, and the

remaining two (the student body president and the faculty senate chair) are elected.[8] The appointed members are confirmed by the Florida senate. The elected members are not.

The seventeen-member statewide board of governors is similarly comprised of both appointed and elected members. Fourteen members are appointed by the governor. Two members (the chair of the Advisory Council of Faculty Senates and the president of the Florida Student Association) are elected.[9] The Commissioner of Education will hold office by virtue of appointment from the new State Board of Education.[10]

The ballot summary uses commonly understood terms to accurately reflect the text of the amendment that places both appointed and elected members on both the statewide board and the local boards. Working within the seventy-five-word limit, the summary first states the chief purpose of the amendment, then states that the

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The president of the student body of the university is elected to that position by the students. The chair of the faculty senate is elected to that position by the faculty.

The president of the statewide Florida Student Association is presently elected by that association and the Chair of the statewide Advisory Council of Faculty Senates is presently elected by that council.

10 The amended Section 2, Article IX of the Florida Constitution taking effect January 7, 2003 shows that the Commissioner of Education's appointment by the State Board of Education is not subject to senate confirmation. (Appendix 2). This proposed amendment follows suit and does not identify the Commissioner as among the appointed members to the board of governors requiring senate confirmation.

amendment "provides procedures for *selection* and *confirmation* of board members, including one student and one faculty representative per board." (Emphasis added). "Selection" encompasses both appointment and election. To use only the word "appointment" would be inaccurate.

F. Conclusion to Ballot Summary Issues

Following this tedious review of FER's numerous ballot summary objections, there appears no impediment to this Court's stated preference to respect the right of the people to express themselves through the initiative process they chose to place in their constitution. Only "clearly and conclusively defective" summaries overcome the "extreme care, caution, and restraint [that the court exercises] before it removes a constitutional amendment from the vote of the people." *Askew v. Firestone,* 421 So. 2d 151, 156 (Fla. 1982). In contrast to the summaries that have flirted with the edge of propriety, the summary presented here is a seventy-five-word, straightforward, no-nonsense statement of the amendment's chief purpose and most important features, comfortably complying with the requirements of § 101.161, Fla. Stat.

III. THE AMENDMENT EASILY MEETS THE SINGLE-SUBJECT TEST.

FER's brief concentrates the bulk of its opposition on title and ballot summary issues. With regard to single-subject issues, FER advances three challenges.

A. The Amendment Establishes a Different Kind of Governing Board for

Universities. The System Governed by the Board is Located Exclusively in the Executive Branch.

FER struggles to argue that the proposed amendment would create a fourth branch of government. Fourth-branch status has rarely been conferred by this Court and is reserved for only the most ambitious amendments. FER cites *In re Advisory Op. to the Att'y Gen. – Save Our Everglades,* 636 So. 2d 1336, 1337 (Fla. 1994), involving such an amendment. In *Save our Everglades*, the proponents sought this Court's approval for an amendment that altered or performed the functions of all three branches. *Id.* at 1340. The amendment 1) embodied legislative powers by creating a trust with the authority to levy a fee or tax for funding the operation of the trust, 2) contained executive powers with the authority to manage the work of the trust, and 3) performed a judicial function when it rendered a judgment of wrongdoing and imposed *de facto* liability on the sugar cane industry. *Id.*

The proposed amendment cannot be said to create a fourth branch of government. The only powers conferred by the amendment are those enabling the board of governors to control the management and operation of the university system. As for any legislative ambition the board of governors might have, the amendment clearly states that the board's managerial authority is "subject to the powers of the legislature to appropriate for the expenditure of funds." Similarly, as for any judicial aspiration of the board of governors, the language of the amendment makes no

adjudication of guilt and confers no authority to hear cases and render judgment. As the Attorney General recognized, the initiative would serve to create "a system of governance for the State University System [that is] located within the executive branch of government." AG's Request, p. 5.

Constitution-based state university governance systems are common across the country. Sponsor's Initial Brief, p. 20. Some have more extensive powers than appear

in the proposed amendment,[11] but all are located in the executive branch of state governments. The Sponsor is not aware of any claim from any state that these systems constitute a fourth branch of government or do any violence to the doctrine of separation of powers.

The interaction between a university governance system and the rest of its state's government is the same whether the governance system is created legislatively

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11 *E.g*. GA. CONST. ART. 8, § IV ("All appropriations made for the use of any or all institutions in the university system shall be paid to the board of regents in a lump sum, with the power and authority in said board to allocate and distribute the same among the institutions under its control in such way and manner and in such amounts as will further an efficient and economical administration of the university system.").

by statute or created by the people for inclusion in their constitution.[12] Florida already has the benefit of a ninety-six year experience with such interaction. *See* HENDRIX CHANDLER, DREAMS AND POLITICAL REALITIES: A 20TH CENTURY HISTORY OF FLORIDA'S UNIVERSITY SYSTEM (1983). During this time, the university governance system functioned within the executive branch and lawfully interacted with the other two branches of government.

The language of the proposed amendment, the practical effects of similar systems throughout the country, and Florida's own extensive experience with the operation of a university governance system serve to demonstrate conclusively that the proposed governance system would work within the confines of the executive branch, without substantial effect on the functions of other branches of government, and in compliance with the single-subject limitation in Florida's constitution.

B. The Proposed Amendment Would Not Change Other Sections of the Constitution or Change the Functions of Different Levels and Branches of Government.

In the interest of brevity, the constitutional issues concerning the identified five sections of the constitution were combined with the ballot summary issues on those

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12 For a review of the practical effects of the working relationship between the various systems of governance for higher education and their respective state governments, *see generally* THE NORTH CAROLINA CENTER FOR PUBLIC POLICY RESEARCH, INC., GOVERNANCE AND COORDINATION OF PUBLIC HIGHER EDUCATION IN ALL 50 STATES (2000).

same five sections and addressed at pages 5 and 6 of this brief.

C. The Proposed Amendment Asks One Question Capable of a Simple Yes or No Answer.

FER contends that the proposed amendment presents two separate questions and is guilty of "logrolling." FER argues that the first question concerns the desirability of local boards and a second question concerns the desirability of a statewide board of governors.

As stated at page 21 of the Sponsor's Initial Brief, the sole purpose of the proposed amendment is to define one governmental unit – in this case, a governing system for Florida's universities – and nothing else. The system is complete within itself, consists of one body corporate, and involves two inextricable levels of management. One level could not function without the other. A local board of trustees, with its limited authority to *administer* a constituent university, would not have authority over any of the other ten universities, much less the power to *govern* the whole system. Conversely, the board of governors is not designed to administer any of the local campuses.

Constitution-based governance systems for universities include one-tier systems and two-tier systems. For example, California's constitution calls for a one-tier system. CAL. CONST. ART. 9, § 9 (Florida's old Board of Regents is an example of a statutory one-tier system). Louisiana's constitution is an example of a two-tier

system. LA CONST. ART VII, § 5. In the two-tier system, the local campus board is an inseparable subsidiary of the central board and comprises an essential aspect of the overall governance scheme.

FER contends that a "voter who wants local trustees to govern universities must vote 'yes' for the proposal even though the voter does not favor statewide board control. Likewise, a voter who wants only a statewide board must vote 'yes' to the local boards." FER Initial Brief, p. 22. To the contrary, the voters' single choice is clear. If a voter only wants local trustees to govern universities, the vote is "no." If the voter only wants a statewide board, the vote is also "no." On the other hand, if the voter agrees that Florida's universities would be benefited by a constitution-based two-tier system allowing local boards to administer each university and providing for a statewide governing board responsible for the coordinated and accountable operation of the whole university system, then the vote is "yes."

CONCLUSION

The title and ballot summary accurately and understandably explain the chief purpose of the amendment to establish a system of governance for Florida's universities. The amendment consists of one governmental unit located in the executive branch of government that complies with the single-subject limitation. The amendment meets the legal requirements and should be approved by this Court for placement on the ballot.

Respectfully submitted,

GIBSON, VALENTI & ASHLEY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Answer Brief have been furnished by Federal Express overnight mail to the Clerk of the Supreme Court, with copy to the Hon. Robert A. Butterworth, Attorney General of the State of Florida, The Capitol, Tallahassee, FL 32399-1050; and copy to M. Stephen Turner, Esq. and Kelly A. O'Keefe, Esq., Broad & Cassel, P.O. Drawer 11300, Tallahassee, FL 32302, on this 4th day of April, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced, in accordance with Fla. R. App. P. 9.210(a)(2).

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Robin Gibson, Esq.

INDEX TO APPENDIX