

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 OF
FLORIDIANS FOR EDUCATION REFORM
OPPOSING PROPOSED AMENDMENT**

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INTRODUCTION

Floridians for Education Reform is obliged to point out that Florida's universities, during a long period of continuous administration under the former Board of Regents, were consistently ranked lower academically than universities of other states. This is a matter of common knowledge. Opponents believe that the legislature properly enacted comprehensive educational reform legislation in 2000.

The proposed amendment would remove the legislature's higher education functions and confer them upon an independent constitutional governance system to control and manage state universities. This would substantially alter or perform multiple functions of government and cannot be done through the initiative process. Furthermore, the ballot summary fails to explain that substantial changes in the existing government structure will occur, and that other provisions of the constitution will be substantially affected. Voters are left to believe that the proposed amendment is needed to create a university governance system with local and state control, when in fact the legislature has

already established such a system in accord with constitutional directive.

Existing University Governance Structure

Article IX, section 1 of the Florida Constitution¹ provides that “adequate provision shall be made by law for . . . a high quality system of free public schools . . . and for the establishment, maintenance and operation of institutions of higher learning and other public education programs” (e.s.)

In 2000, the legislature provided for a seven-member Florida Board of Education to oversee all education in this state in accordance with statutory policies, guiding principles, missions and goals. §§229.003(1) and 229.004(1), Fla. Stat² The primary duty of the Florida Board of Education is to establish education objectives consistent with statutory policies, and to implement and enforce compliance with education policies established by the legislature. §§229.004(2), (3), Fla. Stat. The legislative guidelines for structure, function and organization set forth in section 229.061(2), Florida Statutes, provide that the legislature shall

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All constitutional references are to provisions that will be in effect in January 2003 when the proposed amendment takes effect.

² All statutory references are to Florida Statutes, 2001.

establish education policy, enact education laws and allocate education resources. They also recognize that the Florida Board of Education shall implement the coordinated vision of education provided by the legislature. *Id.*

Specifically, with respect to university governance, all powers, duties and functions of the former Board of Regents for the State University System set forth in sections 240.209-.223, Florida Statutes, are transferred to the Florida Board of Education. §229.003(5)(b), Fla. Stat. The Florida Board of Education must recommend a coordinated budget; adopt a coordinated 5-year plan for post-secondary enrollment for review by the legislature; adopt university plans designed to achieve continued student diversity; and recommend the mission of public colleges and universities to the legislature. §229.0061(2)(b), Fla. Stat.

The Florida Board of Education must appoint a Chancellor of Colleges and Universities to serve as a division vice-president of the K-20 education system. The Chancellor is charged with assuring university compliance with applicable statutory policies, guiding principles, mission and goals; enhancing the reputation and quality of university education and research; and working

directly with the president and board of trustees of each university in focusing on its education and research needs. §229.005(3), Fla. Stat. The Chancellor of Colleges and Universities is responsible to administer programs, resolve disputes, recommend action plans, provide technical assistance, and recommend strategic planning and budget development for the universities.

§229.0061(2)(d), Fla. Stat.

Each state university is governed by a 13-member board of trustees (12 appointed members and the student body president). §§229.003(4), 229.008(1), Fla. Stat. The university boards of trustees are responsible for policy decisions appropriate to the university's mission, and implementation and maintenance of high quality programs. §229.008(7), Fla. Stat. Each university board will govern and set policy for its university and perform duties assigned by law or by the Florida Board of Education.

§229.0081(1), Fla. Stat.

The members of the Florida Board of Education are residents of the State, who are appointed by the governor and can be reappointed for additional terms not to exceed eight years of consecutive service. §229.004(1)(a), Fla. Stat. The members of

the university boards of trustees are likewise appointed by the governor, but have no residency requirement, and are subject to removal for cause or upon recommendation of the Florida Board of Education. §§229.003(4) and 229.008(1)(3), Fla. Stat. Because the governor appoints board members for staggered four-year terms, one governor will not necessarily appoint all members as the Sponsor suggests.

The seven-member Florida Board of Education is consistent with Article IX, section 2, of the Florida Constitution, as amended in 1998, providing that a state board of education “as provided by law” shall consist of seven members appointed by the governor to staggered four-year terms. Article IX, section 2, was amended in 1998 through the constitutional revision commission process in order to place responsibilities for the public education system with a body whose sole focus was education, and to increase the governor’s accountability for education. *See* Commentary to 1998 Amendment, Commission Revision No. 8.

The establishment of the entire organizational structure for education is clearly within the legislature’s explicit constitutional

authority pursuant to Article IX, sections 1 and 2 of the Florida Constitution.³

I. THE BALLOT SUMMARY IS DEFECTIVE.

Floridians for Education Reform stands on the matters raised in its Initial Opposition Brief at pp. 4-12, but supplements those matters as follows:

A. The Summary Fails To Identify Constitutional And Statutory Provisions That Will Be Affected.

This Court recently decided *Advisory Opinion Re Protect People From the Health Hazards of Second Hand Smoke, by Prohibiting Workplace Smoking*, 27 Fla. L. Weekly S266, 267 (Fla. March 28, 2002), in which the Court stated: “We are most concerned with relationships and impact on other areas of the law when we

³

This organizational structure is also consistent with Article XII, section 9(a)(2) the Florida Constitution, directing that the capital outlay bond fund shall be administered by the instrumentality which succeeds to the powers of the former state board of education (governor and cabinet), and that state bonds may be issued by such board “pursuant to law.” The Florida Board of Education has such authority for university projects as successor of the authority delegated to the former Board of Regents. *See* §§229.003(5)(b) and 240.2093. Fla. Stat.

consider whether the ballot summary and title mislead the voter with regard to effect and impact on other constitutional provisions.” There the Court rejected the opponent’s argument that the summary failed to disclose the impact on statutes of which voters were likely aware. The Court further concluded that the ballot summary did not convey any particular impression with regard to the present status of smoking in Florida. *Id.*

Here, the summary fails to disclose that the legislature has recently created, pursuant to constitutional directive, an organizational structure for Florida’s education system. In fact, the summary clearly misleads the voter into believing that no similar university governance system exists. Thus the summary also fails to advise voters that the proposed amendment would substantially affect the current education governance system enacted in accordance with explicit constitutional provisions.

B. The Summary Fails To Explain That Legislative Power Will Be Transferred.

The ballot summary does not explain that existing legislative power, which has been exercised and delegated to local university boards and the Florida Board of Education, will be transferred to a

constitutionally independent university governance system.

Because the public is not sufficiently informed of the transfer of the legislature's exclusive powers in higher education, the proposal is defective. This same situation occurred in *Advisory Opinion to the Attorney General Re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351 (Fla. 1998). The Sponsor relies heavily on that case for its single-subject analysis, which is inapplicable because the proposed amendment in that case did not create a new constitutional governance structure. See discussion pp. 15-17 herein. But the Sponsor fails to discuss that case in relation to the misleading ballot summary, which is dispositive. *Fish and Wildlife Conservation Commission* invalidated an initiative petition proposing an amendment to the jurisdiction of an existing constitutional commission because the ballot summary was misleading. The Court succinctly stated its reasoning as follows:

The summary does not explain to the reader that the power to regulate marine life lies solely with the legislature, which has delegated the power to not only the Marine Fisheries Commission but also the Department of Environmental Protection and Department of Agriculture. * * * Thus the proposed amendment . . . strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity. The summary does not

sufficiently inform the public of this transfer of power.

705 So.2d at 1355.

The ballot summary for the proposed amendment here makes absolutely no mention that any transfer of power will occur. Yet clearly all of the legislature's power over state universities, now set in law and delegated to the Florida Board of Education and university boards of trustees, is being transferred to a new constitutional governance system involving multiple entities. The voters are entitled to be informed of this transfer of power, as recognized in the very case that the Sponsor relies on. For this reason also, the initiative is misleading and must be removed from the ballot.

C. The Summary Is Misleading About Whether The Statewide Board Is Accountable For Its Management Of The University System.

The ballot title reads "Statewide Governing Board to Manage Florida's University System." The ballot summary then says "A statewide governing board of seventeen members shall be responsible for the coordinated and accountable operation of the whole university system." (e.s.) The word "responsible" means

“answerable or accountable, as for something within one’s power, control or management.” Random House Webster’s Unabridged Dictionary (2nd Ed. 2001).

Voters may conclude from the ballot title and summary that the statewide governing board will be answerable or accountable for its management of the university system. In view of the 1998 amendment to Article IX, section 2 of the Florida Constitution which makes the governor more accountable for education, voters may mistakenly believe that the statewide board is part of an existing governmental structure responsible to the governor. However, the statewide board created by the proposed amendment appears to be the head of an independent constitutional governance system that is not answerable or accountable to anyone except with respect to the appropriation and expenditure of funds. *See In Re Advisory Opinion of the Attorney General - Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994) (ballot summary indicating purpose of amendment is “to help to pay” implies cost sharing when the amendment does not provide for this).

Alternatively, if the proposed amendment does provide for the governor’s supervision of the statewide and local boards, the

summary fails to so inform the voters, and is misleading for this reason. Article IV, section 6 of the Florida Constitution, prohibits more than twenty-five departments to carry out functions of the executive branch unless “specifically provided for or authorized in this constitution.” Voters cannot be expected to know that the proposed university governance system is a new executive department, where the proposed amendment and summary fail to specifically state that it is. Rather, the voters may conclude that the local boards and the statewide board are equally responsible for operation of each university and report only to each other. *See* discussion, Initial Opposition Brief, pp. 7-8.

II. THE PROPOSED AMENDMENT VIOLATES THE SINGLE-SUBJECT RULE.

A. The Initiative Alters Or Performs Multiple Functions Of Government.

The Sponsor concedes that the local and statewide boards provided by the proposed amendment perform executive functions. The Sponsor also concedes that legislative functions will be modified by the proposal which is intended to divest legislative control of the universities. Sponsor’s Brief, pp. 9-11. Indeed, the proposal effectively nullifies substantial legislative

action that has already occurred. Accordingly, this proposal both alters and performs multiple governmental functions in violation of the single-subject rule.

1. The Proposed Amendment Creates An Independent Governance System For The State University System Which Performs Functions Of The Executive And Legislative Branches.

Although the proposed amendment confers executive authority to administer and manage the state universities and the university system, it does not indicate that the proposed statewide and local boards constitute a new executive department. Nor is the proposed amendment placed within Article IV of the Constitution (the Executive Branch article), as was the proposed amendment in *Fish and Wildlife Conservation Commission*, the case relied on by the Sponsor. In that case, an amendment was proposed to Article IV, section 9, relating to the executive branch. The amendment also stated that the “Commission shall not be a sub-unit of any other state agency.” 705 So.2d at 1353. It further provided for the legislature to enact laws in aid of the Commission. *Id.* Consequently, the Commission fell within the

executive branch. Here, the reference in the proposed amendment to a “system of governance for the state university system” implies complete independence of that governance system rather than inclusion in any other branch of government. There is no language indicating agency status or supervision by the governor. Moreover, the legislature is not authorized to implement the governance system, or provide for operation of the universities, or control the university system in any way other than appropriation of funds.

The fact that the governor appoints the members of the boards does not necessarily render the governance system a part of the executive branch. The governor also appoints judges, but that does not render the judiciary part of the executive branch. If the body created by the proposed amendment actually fell within the executive branch, the governor would also likely have the authority to remove the board members for cause. *Cf.* §229.008, Fla. Stat. (governor may remove a state university trustee upon the recommendation of the Florida Board of Education or for cause). There is no indication in the proposed amendment that the governor has this authority.

Similarly, the fact that the university governance system in this case is subject to the power of the legislature to appropriate funds does not render it part of the executive branch. Branches of government are independent despite the fact that the legislature appropriates their funds. Accordingly, the governance system created by the proposed amendment is an independent branch of government with both executive and legislative powers to govern and control the university system. Creating this system through the initiative process violates the single subject rule. *See Save Our Everglades*, 636 So.2d at 1340.

2. The Proposed Amendment Alters And/Or Performs Multiple Governmental Functions.

Assuming that the proposed university governance system is a new executive department, the initiative still violates the single-subject rule requirement. The proposed amendment amounts to a legislative policy decision to create a new executive department

This is particularly true when the proposed amendment appears to exclude the governor's appropriation line item veto conferred by Article III, section 8(a) of the Florida Constitution. The proposed university governance system is made subject only to the legislature's power of appropriation, not to the governor's power to veto any specific appropriation.

with independent status, that makes substantial changes to the legislature's powers, and creates governance boards that perform both legislative and executive functions.

The Sponsor admits that the proposed boards will perform functions reserved for the executive branch. Specifically, the sponsor recognizes that the proposed amendment calls for the "exercise of executive responsibility" in the boards. *See* Sponsor's Brief at p. 23. The local boards administer each university, and the statewide board manages the whole university system.

The proposed amendment also performs and changes the legislature's functions in higher education, and delegates significant legislative power. The Sponsor admits that the purpose of the proposed amendment is to "protect the universities from the legislature," and "to entrust control of academic institutions to citizen boards rather than to the legislature." Sponsor's Brief, pp. 10-11. This necessarily requires a transfer of substantial legislative authority to the proposed university governance system. In fact, the proposed amendment expressly gives the statewide board the authority to establish the powers and duties of the local boards, and to regulate and operate the

universities and define their mission. This contravenes Article IX, section 1 of the Florida Constitution, which specifically provides for the legislature to provide for establishment, maintenance, and operation of institutions of higher learning. In accord with this constitutional duty, the legislature has already enacted extensive policies, guidelines and operational structure for the state university system. *See discussion supra on Existing University Governance Structure* at p. 2.

The Sponsor urges that the proposed amendment will cure harmful relations between the legislature and the universities by creating a separate constitutional governance system that will replace the legislature's governance structure and will be insulated from legislative oversight and lawmaking except for appropriation of funds. Sponsor's Brief, pp. 9, 20. Local boards of trustees will supplant legislatively created university boards, and the statewide board of governors will perform functions delegated to the Florida Board of Education. But by immunizing the universities from the legislature, the proposed amendment necessarily changes the legislature's functions envisioned by the Constitution, performs those functions, and substantially affects the existing governance

structure. Clearly, the proposed amendment “implements a public policy decision of statewide significance and thus performs an essentially legislative function.” *Save Our Everglades*, 636 So.2d at 1340.

The Sponsor also concedes that the legislature’s authority “will be modified,” but says this is a natural consequence of the right to preempt the legislature through the initiative process. Sponsor’s Brief, p. 15. However, the proposed amendment does not merely provide details that are logically related to a singular project or prohibited conduct. *Compare Protect People From the Health Hazards of Second Hand Smoke*, 27 Fla. L. Weekly at S268 (measure respects the legislative function by making allowance for legislative implementation). Here, the proposed amendment usurps, impedes or substantially changes the legislature’s authority to establish university policies, to provide for a coordinated education vision, to delegate operational authority for the universities, to administer the capital outlay fund for bonding of university projects, and to otherwise maintain and operate state universities as a vital part of Florida’s education system. There is no oneness of purpose in a change that creates a governance

system that alters and performs substantial legislative and executive functions. *See Fine v. Firestone*, 448 So.2d 984, 990 (Fla. 1984) (proposal may not affect separate distinct functions of existing governmental structure.)

The Sponsor maintains that the legislative function of the statewide board is limited to establishing the powers and duties of the boards of trustees for each university as provided in subsection (b) of the proposed amendment. Of course, providing for the governance of each state university is a very significant power. In addition, the statewide board is empowered to operate, regulate and control the university system, and to define the distinctive mission of each university and its articulation with other schools and colleges. Subsection (d). This legislative authority has already been exercised by the legislature pursuant to Article IX, section 1 of the Florida Constitution. *See e.g.* sections 229.003(5)(b) and 240.209, Fla. Stat. The policy choice of establishing the university governance system is itself legislative and alters legislative authority otherwise given by the Constitution.

The Sponsor contends that the Constitution allows the people, through the initiative process, to constitutionally legislate a system of governance and establish the executive duties it will perform. The Sponsor relies on *Fish and Wildlife Conservation Commission* to support its contention. But the proposed amendment in that case is not comparable to the one here. Specifically, the proposed amendment in *Fish and Wildlife Conservation Commission*, which was ultimately stricken from the ballot, did not create a new governance system. Article IV, section 9, which the provision sought to amend, already provided for a Game and Fresh Water Fish Commission. The proposed amendment would have merely renamed and expanded the jurisdiction of that existing commission to include marine aquatic life. The Court recognized that:

Unlike the initiative in *Save Our Everglades*, this one does not create a new entity where none exists. Rather, it builds upon an established constitutional entity, which already possesses the regulatory and executive powers of the state in the areas of wild animal life and freshwater aquatic life by expanding that entity's jurisdiction to cover marine aquatic life as well. The initiative does not bestow upon the renamed commission a government function that the existing one does not already have.

Fish and Wildlife Conservation Commission, 705 So. 2d at 1354. Although the Court noted that the proposed amendment set forth the powers and duties of the new commission, it also noted that “[w]ith the exception of the first sentence, which furnishes the commission’s name and dictated the selection process and number of members, all of the existing language of Article IV, section 9 is included within section (c) of the proposed amendment.” *Id.* at 1354, n. 1. The proposed amendment did not affect the legislature’s authority to enact legislation to aid the Commission as provided in the existing Article IV, section 9. The proposed amendment, therefore, maintained the same governmental functions as previously existed and did not substantially change governmental structure.

Consequently, the Sponsor’s attempt to equate the proposed amendment in this case, which creates an entirely new governance system, with the proposed amendment in *Fish and Wildlife Conservation Commission* is completely without merit.

Finally, the Sponsor argues that the fact that the legislature maintains control of appropriations under the proposed

amendment prevents it from violating the single-subject rule. The sponsor contends there is no problem with the university governance system having both executive and legislative authority because the executive power begins where the legislative power of appropriation ends. The Sponsor relies on the 1978 proposed Amendment regarding the Board of Regents, but that proposal was not an initiative petition subject to the single-subject rule. In fact, it was proposed by the Constitutional Revision Commission. Regardless, control of appropriations is not the sole legislative function. Because that legislative function is not changed, or because the usurpation of legislative functions by the proposed amendment could be greater, the proposed amendment is not excused from the single-subject rule. *See Advisory Opinion to the Attorney General Re Amendment to Bar Government From Treating People Differently Based on Race in Public Education*, 778 So.2d 888, 893 (Fla. 2001).

B. The Proposed Amendment Substantially Affects Or

If the governor has no appropriation line item veto over higher education, this is another significant constitutional change and usurpation of executive power by the proposed amendment.

Changes Unidentified Constitutional Provisions.

In *Advisory Opinion to the Attorney General Re Voter Approval of New Taxes*, 644 So.2d 486, 491 (Fla. 1994), the Court invalidated an initiative proposal requiring voter approval for any new taxes because it substantially affected constitutional provisions that were not identified. *Id.* at 492. In particular, the Court held that Article VII, section 1(a) of the Florida Constitution conferred power on the legislature to impose taxes by general law, without a referendum. Because the proposed amendment would substantially affect this unidentified provision, the voters would not be able to comprehend the contemplated changes in the constitution. *Id.* at 493.

In this case, Article IX, section 1, of the Florida Constitution directs that provision “shall be made by law” for the establishment, maintenance and operation of institutions of higher learning. The Sponsor’s Brief asserts at p. 26 that this provision remains unchanged because the State’s obligation to provide for higher education would remain unchanged. However, the proposed amendment would preclude the legislature from providing by law for universities as explicitly directed in Article IX, section 1. The

situation is exactly parallel to *Voter Approval of New Taxes*, and the proposed amendment here must also be removed from the ballot.

The Sponsor also argues that Article IX, section 3 of the Florida Constitution remains unchanged because the legislature would continue to be able to set terms for members of community college boards and other non-university boards dealing with education. However, Article IX, section 3 confers power upon the legislature to set the terms for all boards dealing with education, including any local or statewide university boards. The proposed amendment fixes the terms for members of those boards at five and seven years respectively, and thus unquestionably abrogates the legislature's power to set the terms for those board members. The current statutes providing for four year staggered terms for university boards of trustees and the Florida Board of Education would be nullified.

When explicitly conferred constitutional powers are diminished, usurped, or placed in conflict or doubt, they are changed or substantially affected. Because the initiative petition fails to explain how existing constitutional provisions will be altered, or to identify them as substantially affected, the Courts'

established jurisprudence requires it to be removed from the ballot.

C. The Proposed Amendment Involves Multiple Subjects Of State And Local University Governance.

In *Voter Approval of New Taxes*, 644 So.2d at 492, the Attorney General suggested that the proposed amendment there “presents a form of ‘log rolling’ in that a voter is not given the opportunity to disapprove of the initiative’s application to state, local or regional taxes, but is forced to accept all of these separate applications or none of them.” The Court did not address that contention because it chose to invalidate the initiative for another reason, *i.e.*, because the proposed amendment substantially affected unidentified constitutional provisions. This case, however, presents an analogous and more compelling defect which provides yet another reason to strike the initiative from the ballot.

The initiative here does not just propose a limitation on a particular government action at various levels as the proposed amendment in *Voter Approval of New Taxes*. Instead, the proposal here asks voters to accept an entire system of governance. Voters are asked to approve localized boards to control each university, as

well as a statewide board to control them. A voter who agrees that there should be a state board to address supposed harmful relations with the legislature, but does not want multiple local boards or tiers of boards to control the universities, is left in a quandary.

If the initiative had proposed a transportation governance system with local and state boards to control transportation issues, that would obviously present two subjects of local and statewide transportation regulation. When an entire area of government is divided into multiple parts by a proposed amendment for both local and statewide control, voters are presented with multiple issues to resolve. The initiative thus presents a form of logrolling as suggested by the Attorney General in *Voter Approval of New Taxes*, and for this reason as well, must be removed from the ballot.

Respectfully submitted this _____ day of May, 2002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. MAIL to The Honorable Charles Canady, General Counsel for the Governor of the State of Florida, Office of the Governor, The Capitol, Tallahassee, FL 32399-0001; The Honorable Bob Butterworth, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; Mr. Robin Gibson, 212 E. Stuart Avenue, Lake Wales, FL 33853; this _____ day of May, 2002.

ATTORNEY

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

ATTORNEY

