

IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

Case No.: SC08-1569

L.T. No. 1D08-4077

DEPARTMENT OF STATE OF
THE STATE OF FLORIDA; AND
VOTE YES ON 5 FOR PROPERTY TAX RELIEF, INC.,

Petitioners,

vs.

BEVERLY SLOUGH, ET AL.,

Respondents

**AMICUS CURIAE BRIEF IN FAVOR OF THE RESPONDENTS BY
FLORIDA TAXWATCH**

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STATEMENT OF IDENTITY AND INTEREST IN THE CASE

Florida TaxWatch is a statewide, nonpartisan, nonprofit research institute that over its 29-year history has served as the watchdog of citizens' tax dollars. Its purpose is to provide the citizens of Florida and public officials with high quality, independent research and education on government revenues, expenditures, taxation, public policies, and programs. The three-pronged mission of Florida TaxWatch is to improve taxpayer value, government accountability, and citizens' understanding of and constructive participation in their government. Florida TaxWatch is the only statewide organization devoted entirely to Florida taxing and spending issues.

This issue of whether the ballot title and summary of Amendment fairly inform the voter of the purpose of the amendment is of substantial importance to Florida TaxWatch because of the organization's specified mission of improving citizen understanding about taxation and fiscal policy, which includes ensuring that the voters of Florida are adequately and accurately informed about the implications of proposed tax policy changes when they are taken directly to the public through referenda.

Additionally, Florida TaxWatch has closely followed the work of the Taxation and Budget Reform Commission (hereinafter "the Commission") since its original creation in 1988, in which Florida TaxWatch had a significant role.

Florida TaxWatch conducted extensive study and published analyses of many of the proposals that appeared before the most recent Commission and continues to study and explain to the public the seven proposed constitutional amendments that were the result of the Commission's work. The results of previously conducted Florida TaxWatch analyses may have relevance to this Court on this matter.

SUMMARY OF ARGUMENTS

The use of the term "equivalent" in the ballot title and summary to describe the amount of replacement revenue that the amendment will raise to off-set the revenue lost through the elimination of the required local effort is misleading because the amendment will actually require the Legislature to raise significantly more revenue than will be returned to the taxpayers by the elimination of the required local effort –as much as \$2.8 billion or more.

The ballot summary provided with Amendment 5 does not adequately inform the voters of the implications of Amendment 5 because the proposal is too complicated and the implications too uncertain. Due to the amount of revenue involved, these changes will be the largest in the state's history. The 75-word summary, while making a laudable attempt, does not sufficiently inform voters of even significant likely impacts of Amendment 5, including, but not limited to, the likelihood that the Legislature will have to drastically raise a variety of taxes and fees that are not discussed in the summary.

ARGUMENT

I. THE BALLOT SUMMARY INCORRECTLY IMPLIES THAT THE TAX REVENUE LOST FROM THE ELIMINATION OF THE REQUIRE LOCAL EFFORTS WOULD BE REPLACED BY “EQUIVALENT” STATE REVENUES, WHEREAS THE AMOUNT OF STATE REVENUE ACTUALLY NEEDED TO COMPLY WITH AMENDMENT 5 IS SIGNIFICANTLY MORE THAN THE REVENUE ELIMINATED BY AMENDMENT 5.

Analysis of the language of the amendment reveals that the education “hold harmless amount” provided in the text of the proposal will result in a need for the Florida Legislature to raise more revenue from the taxpayers of Florida (albeit by a different taxing entity and through different tax policies) than will be returned to the taxpayers as a group by elimination of the RLE. The changes to the constitution from the proposal will very likely result in a net tax increase, which could exceed \$2.8 billion.

Petitioners in this matter have noted that “section 101.161 mandates two things that are necessary for a voter to intelligently cast a ballot: that the voter (1) has notice as to what he is voting for, and (2) not be misled by the content of the ballot summary.”¹

¹ Both parties to this matter have offered a legal standard of review based on constitutional, statutory, and case law; Florida TaxWatch, as Amicus Curiae, does not support either standard or wish to provide an additional one.

The amount in the current budget (FY 2008-09) for Florida Education Finance Program (hereafter “FEFP”) is \$16.9 billion. Conf. Rep. H.R. 5001, *General Appropriations Act for Fiscal Year 2008-09*, 2008 Leg., Reg. Sess. (Fla., 2008). Of the total, the state appropriated \$8.605 billion for the FEFP (which comes almost entirely from general revenue), and required \$8.267 billion in RLE. *Id.* at 23 (Program: State Grants/K-12 Program – FEFP Total Funds \$8,604,956,222), 20 (line-item 81 “Total Required Local Effort for Fiscal Year 2008-2009 shall be \$8,267,476,367”). According to the funding formula that would be Section 19(b)(2), the education “hold harmless amount” in 2010-2011 would be \$19.7 billion.² Assuming the current state appropriation of \$8.6 billion, if the RLE is eliminated the state will have to find an additional \$11.1 billion in

² Although a specific formula is provided in the amendment, there could be a dispute about the result of the formula to determine the “hold harmless amount,” which reads in relevant part; “the amount appropriated and set in the General Appropriations Act in the 2010-2011 fiscal year shall not be less than the amount appropriated and set in the 2008-2009 fiscal year for the funding of public schools under the Florida Education Finance Program, as increased by the average historical growth for such amounts during state fiscal years 2006-2007 and 2007-2008, which appropriated and set amount shall be referred to as the ‘education hold harmless amount.’” The Florida TaxWatch method of applying this formula was to increase the FY 2008-09 (current year) funding amount by the percentage difference the FY 2005-06 funding amount and the FY 2007-08 funding amount. This interpretation of the formula applies the growth in funding from the previous year for both of the years mentioned in Section 19(b)(2) to the two year gap between the current funding level (FY 2008-09) specified by the provision as the base year for the calculation and the funding year specified as the subject of the formula (FY 2010-11).

state revenues to comply with the “hold harmless amount” required by Section 19(b)(2).³ To the extent that \$11.1 billion (additional amount of state revenue needed) is larger than \$8.3 billion (total of tax cut to taxpayers by elimination of the required local effort), the summary is misleading by using the term “equivalent” to describe the amount of state revenue increase in relation to the amount of required local effort tax collections cut.

It is conceded that the amount of additional revenue could be less if the legislature significantly increases the state’s FEFP contribution in FY 2009-10; but that is doubtful given the current budget and revenue outlook. Florida has just gone through another series of multibillion dollar reduced revenue forecasts, leaving the state with less money to spend in three consecutive years – an unprecedented occurrence. *See* FLA. CONSENSUS ESTIMATING CONFERENCE, GENERAL REVENUE ESTIMATING CONFERENCE COMPARISON REPORT (Aug. 15, 2008) *available at* <http://edr.state.fl.us/conferences/generalrevenue/grpackage.pdf>. The newest estimates reduced the amount of projected state revenue for FY 2008-

³ Additionally, to the extent that the “education hold harmless amount” is actually a specified formula for funding in a specified future year (fiscal year 2010-2011 only) and most likely a funding increase (from \$16.9 billion in current public education funding to \$19.7 billion in funding in fiscal year 2010-11), the phrase “hold harmless amount” is misleading.

09 by \$1.766 billion (7 percent) and lowered FY 2009-10 revenue estimates by \$2.155 billion (8 percent). *Id. at 1.*

The current fiscal and economic situation in Florida indicates that there will not be substantial additional revenues for the legislature to plug into the FEFP next year. According to the current revenue forecast, the amount of general revenue available for next year's budget (fiscal year 2009-10) will be more than \$1 billion less than the amount in the current budget. *Id. at 2-3.* Given that the overall state budget is estimated to shrink by more than \$1 billion next year, it is unlikely that the legislature will be able to significantly increase the FEFP next year, and could lead to another reduction (the FEFP was reduced by \$1.2 billion in FY 2008-09 while RLE was increased by \$358 million).⁴ Any reduction means an increase in the additional revenue the Legislature would need raise above the \$8.3 billion cut.

A voter given access to only the amendment summary and title, even read together and with the utmost diligence, is misinformed about the implications of

⁴ Conf. Rep. H.R. 5001, *General Appropriations Act for Fiscal Year 2008-09*, 2008 Leg., Reg. Sess. (Fla., 2008) at 23 (Program: State Grants/K-12 Program – FEFP Total Funds \$8,604,956,222), 20 (line-item 81 “Total Required Local Effort for Fiscal Year 2008-2009 shall be \$8,267,476,367”; Conf. Rep. S. 2800, *General Appropriations Act for Fiscal Year 2007-08*, 2007 Leg., Reg. Sess. (Fla., 2007) at.26 (Program: State Grants/K-12 Program – FEFP Total Funds \$9,851,444,784), 23 (line-item 86 “Total Required Local Effort for Fiscal Year 2007-2008 shall be \$ 7,909,357,201.”

the amendment to the extent that the ballot summary, as written, indicates that Amendment 5 would replace the lost RLE revenue with “equivalent” revenue when the proposal will require that more tax revenue be raised than will be cut.

II. THE BALLOT SUMMARY PROVIDED WITH AMENDMENT 5 DOES NOT EXPLAIN THE RANGE OF TAXATION AND SPENDING CHANGES THAT THE LEGISLATURE WILL BE REQUIRED TO MAKE BECAUSE OF AMENDMENT 5.

Even with the extensive knowledge and experience possessed by the analysts of Florida TaxWatch, it is difficult to accurately evaluate the “before and after” of Amendment 5 because there is so much uncertainty associated with the proposal. Key aspects of Amendment 5, including the change in education funding policy, do not take place until FY 2010-2011. Among significant unknowns are: the amount of taxes that the Legislature would have to raise in order to ensure the required state revenue, what the tax package needed to raise the revenue would look like, and whether there will be spending cuts to state-funded programs and services, and if so, to which ones and how much they would be affected.

Examining the Revenue Options

Analysis of the amount of additional state revenue required by Amendment 5 reveals that the Legislature will have to find significantly more tax sources than are specifically identified by the ballot summary. The ballot summary to

Amendment 5 identifies four options for raising the revenue required to fund schools: “repealing sales tax exemptions not specifically excluded; increasing sales tax up to one percentage point; spending reductions; other revenue options created by the legislature.”

The Repeal of Sales Tax Exemptions Option

The amendment excludes most (in terms of dollar value) of the \$12.4 billion in exemptions in current law from consideration, including food, prescription drugs, residential rent, and utilities. Using data from the *2008 Florida Tax Handbook*, Florida TaxWatch estimates removing the exemptions prohibited from repeal by the amendment leaves only \$4.1 billion of exemptions for the Legislature to consider for taxation. *See* App. A. Additionally, it is important to note that the value of the various exemptions are just estimates. In fact, the *Handbook* cautions that there is overlap among the exemptions and that repeal of numerous exemptions may not produce the full value of the individual estimates.

The \$4.1 billion figure includes a significant number of exemptions that are not likely to be repealed (and some of which cannot, by federal law, be repealed), not to mention exemptions for school textbooks and lunches, agriculture, and other popular exemptions. *See* FLA SEN., 2008 FLORIDA TAX HANDBOOK 123-26, available at <http://edr.state.fl.us/reports/taxhandbooks/taxhandbook2008.pdf>. The

estimate also includes \$100 million in credits, collection allowances, and subsidies that do not qualify as exemptions. *Id.* Three of the largest remaining exemptions illustrate how difficult it will be to raise anywhere close to \$4 billion by the repeal of sales tax exemptions: the exclusion of purchases by governments accounts for \$468.2 million; metered water represents \$305.4 million; and the value of trade-ins and discounts (i.e., the value of trade-in vehicles applied to new vehicle purchase and coupons) is worth \$542.0 million. *Id.*

The remaining exemptions also include many that promote economic development, such as exemptions for machinery and equipment for new and expanding businesses, electricity used in manufacturing, research and development, cogenerated energy, the space industry, and the film industry. Forcing the Legislature to repeal a significant portion of current exemptions is likely to produce some counterproductive results.

A 2003 Florida TaxWatch Task Force found that there were less than \$1 billion (updated to 2008) worth of exemptions that did not fit into three categories that should not be repealed: (1) life's necessities, (2) structural, and (3) economic development. *See* FLA. TAXWATCH, JOINT REPORT OF THE FLORIDA TAXWATCH COST SAVINGS TASK FORCE AND THE CENTER FOR A COMPETITIVE FLORIDA TASK FORCE ON TAX SYSTEM MODERNIZATION 16-21 (Mar. 2003), *available at*

<http://www.floridataxwatch.org/resources/pdf/JOINTREPORT.pdf>. The remaining exemptions include some that Amendment 5 takes off the table and others that may have tax administration or social considerations that may contraindicate repeal.

A close examination of the sales tax system highlights the fact that the assertion that there are billions of dollars of exemptions constituting unjustified loopholes is incorrect. Because of this fact, the wording in Amendment 5 will make it difficult to repeal exemptions; the language of the amendment limits the repeals to those exemptions “which are determined not to advance or serve a public purpose.” This limitation sets a high bar and could provide a basis for legal challenges to the repeal of exemptions. Even the Commission's staff analysis of the proposal (Constitutional Proposal 02) that become Amendment 5 states: “One could argue that nearly all exemptions, and the exemption of most services from a sales tax on services, serve some public purpose.” TAXATION AND BUDGET REFORM COMMISSION, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 8 (Jan. 16, 2008) available at <http://www.floridatbrc.org/pdf/CP0002.pdf> .

The One-Penny Sales Tax Increase Option

Since the Commission completed its work in April, revenue estimates have been revised. The reductions in the state’s official estimates reduce the amount of revenue that a one-penny sales tax increase would generate to \$3.3 billion. *See*

FLA CONSENSUS ESTIMATING CONFERENCE, GENERAL REVENUE ESTIMATING CONFERENCE COMPARISON REPORT 9 (Aug. 15, 2008). Under these projections, the additional one-penny will only be worth \$3.66 billion in 2010-11. *Id.* Furthermore, the additional sales tax would probably not produce that much revenue for the Legislature to use since the *Tax Handbook* cautions that the estimate **does not** account for decreased demand and reduced collections due to a tax or price increase. It must also be recognized that a portion of sales tax collections are diverted to specific uses, including local governments through revenue sharing schemes. In fact, only 89% of the 6% Sales and Use Tax collections go to general revenue. Additional statutory changes would be necessary to have 100% of the sales tax hike go to replace RLE. How much revenue a one-penny sales tax increase would bring in is uncertain, but it would produce far less than half of the needed replacement revenue, and likely less than one-third.

Spending reductions

With billions in budget cuts already implemented and more potentially on the way this year and in the upcoming 2009-10 budget year before Amendment 5 would take effect, the option of using budget cuts to fund the requirements of Amendment 5 may not be practically or politically feasible. Moreover, the cuts

made to date have dramatically affected the provision of services to the citizens of Florida. If additional spending reductions are necessitated by Amendment 5, and similar across-the-board cuts are made by the Legislature in response, these additional funding cuts to core services could jeopardize services provided to vulnerable citizens, actually reduce total education spending, and undermine the rule of law by slashing funding for the state court system.

The Revenue Gap

If the Legislature raises the sales tax a penny, then the estimated value of exemptions will increase by as much as 16.67 percent. Even given this fact, it is doubtful that the Legislature will raise more than \$1 billion to \$2 billion from repealing exemptions, which means that, even coupled with a one-penny rate increase, the Legislature will still have to find much more money – perhaps as much as \$5 billion to \$6 billion. The option of “revenue increases resulting from economic growth attributable to property tax reductions” is likely not going to help because it would be very difficult to identify such revenue with any reasonable degree of accuracy and, furthermore, no enhanced economic activity will have occurred when the time comes to make decisions on how to fund the budget (since any “revenue increases resulting from [the] property tax reduction” would be

realized after the fiscal year 2010-2011 budget was already passed and the necessary replacement funds already found).

The General Complexity of the Proposal

In addition to the inherent complexities of the individual taxation and fiscal policy implications of the proposal, the fact that it took 2nd Circuit Judge John C. Cooper significant effort to understand the amendment a strong indication of its general complexity. Josh Hafenbrack, *Judge Has Issue With Wording of Amendment 5 Tax Ballot*, ORL. SENT, Aug. 14, 2008 ("I don't know if I'm the average voter, but it took me three hours to understand it").

Overall, the ballot summary gives the impression that the Legislature will be able to raise the needed revenue through the specified options, whereas careful analysis of the proposal reveals that the Legislature will largely rely on "other revenue options," which are not known to the voter in the ballot box. This important uncertainty is part of the general complexity of the overall proposal. Due to the complexity of the proposal and the far-reaching implications for taxation and spending policy in Florida, the ballot summary cannot possibly sufficiently inform the voters.

CONCLUSION

Florida TaxWatch is concerned that the ballot title and summary will misinform or mislead voters about the actual and likely implications of Amendment 5 on Florida taxpayers and its unintended and potentially adverse effects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail this 27th day of August, 2008 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) .

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**Florida TaxWatch Analysis of Additional State Revenue Available
from "repealing sales tax exemptions not specifically excluded" Option
of Amendment 5**

| Exemptions Excluded From Review and Elimination under Amendment 5 as Identified by Florida TaxWatch | million \$ |
|--|-------------------|
| 4 Rent on low income housing | 68.2 |
| 17 Rent charges paid by certain long term occupants | 3.8 |
| 18 Rent charges paid by certain full-time students | 1.0 |
| 19 Rent charges paid by active military personnel | 9.6 |
| 20 Rent charges paid by permanent residents | 1,354.0 |
| 21 Charges for rent in certain mobile home parks | 3.1 |
| 22 Rent charges for living accommodations in migrant labor camps | 4.1 |
| 48 Dues, fees non-profits | 44.1 |
| 99 Groceries purchased for human consumption | 2,544.6 |
| 100 Food purchased with food stamps | 1.1 |
| 101 Prescription drugs | 906.0 |
| 102 Non-prescription drugs | 204.8 |
| 103 Eyeglasses and other corrective lenses | 45.7 |
| 104 Medical supplies and products such as syringes and prosthetics | 135.5 |
| 160 Charges for hospital meals and rooms | 448.2 |
| 161 In-facility meals purchased by residents of homes for the aged | 83.9 |
| 162 Purchases of power & heating fuels by residential households | 2,295.5 |
| 165 certain meals provided by non-profits | 24.0 |
| 167 Sales or leases to churches | 2.2 |
| 168 items purchased or leased by non-profits | 11.0 |
| 169 Non-profits provided transportation to church members | 0.1 |
| 170 Non-profit religious TV | 0.5 |
| 177 Section 501(c)(3) organizations | 45.2 |
| 200 Nonprofit cooperative hospital laundries | 0.1 |
| 207 Complimentary food items | 0.8 |
| 208 Food or beverages donated to nonprofit organizations | 0.3 |
| 212 non-profit water systems | 0.9 |
| Total Exemptions Excluded from Review and Elimination by Amendment 5 | 8,238.3 |

| Florida TaxWatch Calculation of Value of Exemptions Available for Review and Elimination | |
|---|----------------|
| Total Exemptions in 2008 Tax Handbook | 12,354.6 |
| Less those Excluded from Review and Elimination by the language of Amendment 5 | -8,238.3 |
| Exemptions "On The Table" Under Amendment 5 | 4,116.3 |

Source: Calculations by Florida TaxWatch, based on Florida Senate, The 2008 Florida Tax Handbook, pp 123-26.