IN THE SUPREME COURT 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.,

Appellants,

vs.

BEVERLY SLOUGH, et al.,

Appellees.

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE FACTS AND CASE

The Tax and Budget Reform Commission proposed Amendment 5, which is scheduled to appear on the November 2008 general election ballot. Amendment 5 would make five material changes to the Florida Constitution:

1. Prohibit the Legislature from requiring school districts to levy ad valorem taxes as a required local effort for participation in the Florida Education Finance Program;

2. Direct the Legislature to replace the revenue lost by elimination of the required local effort by appropriation of an equitable "hold harmless amount" in the 2010-2011 fiscal year;

3. Require that laws creating sales tax exemptions contain a single subject of a single exemption and legislative findings that the exemption advances or serves one of several listed public purposes;

4. Reduce the maximum millage that local government can levy for all school purposes from 10 mills to 5 mills;

5. Reduce the annual maximum increase in real property assessments for all levies other than school district levies from 10% to 5%.

[R. 8-17; App. 1-10] The ballot title and summary read:

> ELIMINATING STATE REQUIRED SCHOOL PROPERTY TAX AND REPLACING WITH EQUIVALENT STATE REVENUES TO FUND EDUCATION. ─
>
> Replacing state required school property taxes with state revenues generating an equivalent hold harmless amount for schools through one or more of the following options: repealing sales tax exemptions not specifically excluded; increasing sales tax rate up to one percentage point; spending

> reductions; other revenue options created by the legislature. Limiting subject matter of laws granting future exemptions. Limiting annual increases in assessment of non-homestead real property. Lowering property tax millage rate for schools.

The plaintiffs filed this action against the Secretary of State seeking to have the measure removed from the ballot on the grounds that the ballot title and summary failed to give notice in clear and unambiguous language of the material changes effected by the amendment and were misleading. [R. 1-17] The lower court entered final judgment for the plaintiffs and ordered the Secretary of State to remove the amendment from the ballot. [R. 126-148] The Secretary of State filed a notice of appeal, thus invoking an automatic stay pursuant to Fla. R. App. R. 9.310(b)(2). [R. 149-173]

SUMMARY OF ARGUMENT

The notice requirements for the ballot title and summary are rooted in the constitution and apply to all proposed amendments regardless of the sponsor. The Court has recognized that, while courts must exercise caution in removing an amendment from the ballot, they must be equally cautious about approving ballot titles and summaries that do not meet constitutional standards of fair notice and accuracy.

Failure to Disclose One-Year Limitation on Hold Harmless Requirement

Amendment 5 would permanently eliminate the required local school tax that has increased every year since 1999 and now produces almost $8 billion a year. In return, the title and summary represent that the amendment will "hold harmless" this lost revenue by providing for "equivalent" state revenues to fund education. The title and summary fail to disclose that the hold harmless amount is required by the amendment for only one year. The one-year limitation is a material element of the proposed amendment and the voter must be given fair notice of it in the ballot title and summary.

The title and summary are also misleading because they represent that there is a balanced trade-off between the elimination of one source of school revenue and the establishment of new sources that will produce equivalent revenues. In fact, while the cutoff of the required local tax is automatic and permanent, the provision for a hold harmless amount is temporary and contingent upon legislative action. This Court has held that suggesting the existence of a trade-off that does not exist is sufficiently misleading to require removal from the ballot.

Failure of the Title and Summary to Clearly and Unambiguously Inform the Voters Material Provisions of the Amendment

The title is affirmatively misleading because it represents that the amendment does only two things: eliminates the required local school tax, and replaces it with equivalent state revenues. In fact, the amendment makes three other major changes, two of them having no connection at all to school funding. This Court has held that the title and summary must be read together in a number of cases in which the titles were too general to provide some necessary details, but has never held that a title that misrepresents the contents of an amendment, and can thereby mislead a voter into reading no further, can be cured by the summary.

Even if the title and summary are read, the resulting ambiguity is sufficient to require removal of the measure from the ballot. The 50% reduction in maximum annual increase in ad valorem tax for all non-school purposes is a dramatic change in the constitution. Read within the context of the title and the summary, in which all other references to taxation and funding relate to schools, the reference in the summary to a limitation on annual ad valorem increases can mislead a voter into thinking that the reference is only to ad valorem taxes for school funding or leave a voter uncertain as to what the reference means. Such ambiguities have consistently been held by this Court to require removal from the ballot.

ARGUMENT

This Court has by now firmly established as a bedrock principle of law that the ballot title and summary for a proposed amendment to the Florida Constitution must meet a two-part criteria. The title and summary: (1) must, in clear and unambiguous language, inform the voter of the chief purpose of the proposed amendment; and (2) must not be misleading. *Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1236 (Fla. 2006); *Independent Nonpartisan Comm'n*, 926 So. 2d 1218 (Fla. 2006). These requirements are not aspirational. They are absolute, and the failure of a proposition to comply with them will, as illustrated by the cases discussed below, invariably necessitate removal from the ballot. The requirements are rooted in the Florida Constitution and apply "across-the-board to all constitutional amendments" regardless of their source. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (applying criteria to proposed amendment passed by the Florida Legislature).

As noted by the appellees, this Court has recognized that it "must act with extreme care, caution, and restraint before we remove a constitutional amendment from the vote of the people," and that it will do so only when "the laws governing the process have been clearly and conclusively violated." *Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233

(Fla. 2006). However, the court has also emphasized the importance of giving equal weight to ensuring that the ballot title and summary meet constitutional requirements. *Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994) ("Although we are wary of interfering with the public's right to vote on an initiative proposal [citation omitted], we are equally cautious of approving the validity of a ballot summary that is not clearly understandable"). The trial court found that the ballot title and summary for The Amendment failed to accurately state the chief purpose of the amendment and were misleading. The court was correct. The judgment below should be affirmed.

I

The ballot title and summary are misleading because they fail to inform the voter that the "hold harmless" provision only applies for one year.

For 120 years, the primary source of funding for Florida's elementary and secondary schools has been local ad valorem taxes.[1] Since 1973, that funding has been implemented through the Florida Education Funding Program, which included a required local tax effort. The required local effort has increased steadily year after year, reaching $7.9 billion in the 2007-08 fiscal year. [Appellee's Appendix, Exh. F]

[1] See Florida Constitution (1868), Art. VIII, § 5, 8; Florida Constitution (1885), Art. XII, § 6, 8; Florida Constitution (1968), Art. VII, § 9; Fla. Stat., Ch. 1011 and predecessor chapters.

The Amendment would radically change school funding by eliminating the required local effort, prohibiting the Legislature from replacing it with a successor program, and cutting in half the millage available for local governments to fund most school purposes. [R. 145-6; A. 7-8] The changes become effective automatically in 2010 and are permanent.

The Amendment includes a "hold harmless" provision that directs the Legislature to appropriate funds *for one year*, the 2010-2011 fiscal year, according to a formula designed to provide for revenue to fund education equivalent to that provided in prior years:

> In implementing this section, 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**."

[R. 146; A. 8] (emphasis added). The title and summary inform the voters that the amendment replaces the required local effort "with an equivalent hold harmless amount for schools," but fails to indicate that the hold harmless provision is in force *for only one year*:

> ELIMINATING STATE REQUIRED SCHOOL PROPERTY TAX AND **REPLACING WITH**

> **EQUIVALENT STATE REVENUES TO FUND EDUCATION**. — **Replacing state required school property taxes with state revenues generating an equivalent hold harmless amount for schools** through one or more of the following options: repealing sales tax exemptions not specifically excluded; increasing sales tax rate up to one percentage point; spending reductions; other revenue options created by the legislature. Limiting subject matter of laws granting future exemptions. Limiting annual increases in assessment of non-homestead real property. Lowering property tax millage rate for schools.

The title and summary give no hint of this significant limitation on the "hold harmless" provision. To the contrary, the language of the title and summary convey the distinct impression that the balance of lost revenue and replacement revenue are coterminous.

The voter "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982). This Court has not hesitated to strike from the ballot propositions that omitted material facts from the title and summary. See *Term Limits Pledge*, 718 So. 2d 798 (Fla. 1998); *Fish and Wildlife Comm'n,* 705 So. 2d 1351 (Fla. 1998); *Tax Limitation,* 644 So. 2d 486 (Fla. 1994); *Limited Political Terms*, 592 So. 2d 225 (Fla. 1991). The one-year limitation

on the implementation of the "hold harmless amount" is a material fact of which the voter must be given notice.

Even if the hold harmless provision could somehow be interpreted to have continuing application, the title and summary would fail to give the voter fair notice of the sweep of Amendment 5. The title and summary represent to the voter that Amendment 5 creates a balanced trade-off: in return for loss of a long-term, reliable source of consistently increasing funding, Amendment 5 guarantees by a hold harmless provision another source of an "equivalent" amount of funding. In reality, the trade-off is not at all balanced. The cut-off of local funding is constitutionally self-executing and occurs automatically in 2010. The replacement revenue, on the other hand, is contingent upon the Legislature agreeing to levy new taxes or otherwise finding and appropriating replacement revenue.

It is not sufficient for the appellees to simply say that it should be presumed that the Legislature will comply with the constitution. The issue is not whether the Legislature can be trusted to follow a constitutional directive, but whether the voters are to be given fair notice of what they are voting on. There is a real distinction between a self-executing constitutional provision and one contingent upon legislative action. In order to provide "equivalent state funds," the Legislature must identify new state sources

from which to raise at least $7.9 billion dollars a year. It is possible for every member of the Legislature to make a good faith effort to fulfill his or her oath to uphold the constitution and still fail to achieve the consensus necessary to replace the lost revenue.

The Amendment does not create an equal trade-off. The cutoff will happen. The replacement revenue might or might not happen. It is for the voters, not the Commission, to decide whether to take the risk. The voters can take that risk if they choose to, but they cannot be misled by the ballot title and summary as to the nature of that risk. "Just as it is clearly misleading to reveal only one half of a constitutional 'tradeoff' in the ballot summary, *Askew*, 421 So. 2d at 157 (Ehrlich, J., concurring), so it is fatally misleading to imply a constitutional trade-off where none is, in fact, contemplated." *Evans v. Firestone*, 457 So. 2d at 1356.

The appellees argue that Amendment 5 simply forces the Legislature to shift school funding from the local to the state level and does not attempt to control the Legislature's discretion to set the funding level. The appellees concede, however, that Amendment 5 would, indeed, control the funding level for the 2010-11 fiscal year by mandating that the Legislature appropriate a "hold harmless amount" in that year. The hold harmless amount is established by a constitutionally set formula designed to maintain

a level of funding not only equivalent in amount to the previous year, but increased in an amount equivalent to historical increases. What the appellees do not acknowledge is that, while the title and summary assure the voter that the revenue lost by the elimination of historic sources of school funding will be replaced by a hold harmless provision, they neglect to mention that this provision is limited to one year. The appellees dismiss this glaring omission by stating that, "Nothing in the ballot title or summary speaks to a future revenue guaranty." It is true that the language does not explicitly refer to such a guaranty, but it certainly gives a voter good reason to assume that the hold harmless provision will continue to ensure replacement of the lost revenue. The title and summary represent to the voter that the hold harmless provision will produce "equivalent" revenues to replace a tax that Amendment 5 permanently eliminates and that had generated steadily increasing revenue levels for at least the previous eight years.

The appellees also urge the Court to excuse the failure of the ballot summary to mention the one-year applicability of the hold harmless provision because of the seventy-five word limit on the summary. It would be impossible, the appellees state, for the summary to inform the voters of every detail of Amendment 5. The one-year limitation is not just any detail and the summary could easily have been worded to include reference to the

one-year limitation. The Court has made clear that its recognition of the practical limitations arising from the 75-word limit do not excuse failure to give adequate notice:

> We have never required that the summary explain the complete details of a proposal at great and undue length, nor do we do so now. However, the word limit does not give drafters of proposed amendments leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement in the hope that this Court's reluctance to remove issues from the ballot will prevent us from insisting on clarity and meaningful information.

Bar Government from Treating People Differently, 778 So. 2d 888, 899 (Fla. 2001) quoting *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992).

II

The title and summary are inadequate because they do not clearly and unambiguously inform the voter of two material changes that would be effected by the amendment.

The Amendment would make five separate significant changes in the constitution. The title only mentions two of them:

> ELIMINATING REQUIRED SCHOOL PROPERTY TAX AND REPLACING WITH EQUIVALENT STATE REVENUES TO FUND EDUCATION

It fails to mention that Amendment 5 would also:

- Require that laws creating sales tax exemptions contain a single subject of a single exemption and legislative findings that the exemption advances or serves one of several listed public purposes.

- Reduce the maximum millage that local government can levy for school purposes from 10 mills to 5 mills.

- Reduce the annual maximum increase in real property assessments by local government for other than school purposes from 10% to 5%.

The appellees note that these changes are mentioned in the summary and that this Court has held that the title and summary must be read together to determine whether the voter is given adequate notice. That is correct, but the title in this case is a different animal than this Court has heretofore addressed. Previous cases have involved titles that lacked necessary specifics provided by the summary, but that were broad enough to encompass all major changes effected by the amendment. That is what distinguishes the title in the case at bar.

Instead of a general title broad enough to cover all substantial changes included in the measure, the Commission chose to use a restrictive title that represents to the voter that the measure does only two things, both related to school funding. This title is not simply insufficiently detailed, it is affirmatively misleading. As the lower court noted, a voter reading the title can easily be misled into voting for the measure or skipping it altogether in reliance upon the title's erroneous representation that Amendment 5 deals with only the required school tax.

The lower court looked to cases dealing with legislative bill titles for guidance. Those cases hold that legislative bill titles may be general, so long as they are broad enough to include all provisions in the act and are not employed as a mere guise to cover incongruous legislation. Alternatively, such titles may be restrictive, as is the title for Amendment 5, but then the title must not be so narrow as to exclude material provisions of the bill. See *State v. Tindall*, 88 So. 2d 123 (Fla. 1956); *State ex rel. Crump v. Sullivan*, 128 So. 478 (Fla. 1930). The appellees respond that legislative bill titles are distinguishable from constitutional amendment titles and they are correct. However, the principle enumerated in the legislative cases applies with equal logic to amendment titles and the appellees fail to address that principle. A general enough title might need more specifics, but it puts the voter on notice to read further. A restrictive title that leaves out material changes can mislead a voter into not reading further. This Court has never held that a measure can remain on the ballot despite an affirmatively misleading title so long as the summary corrects the deception.

The appellees assert that because the Commission has no single-subject limitation and deals with complex issues, requiring a more accurate title would limit it to recommending only the simplest changes. The assertion is incorrect because the solution is not a more complex title, but a

more general one. Section 101.161 requires only that the ballot title provide a caption by which the measure is commonly referred to. Comparison with a prior amendment proposed by the Constitution Revision Commission provides a useful illustration. In 1978, the Commission proposed a complex change in Florida tax laws, which carried the following summary:

> Proposing a revision of the Florida Constitution to provide that property owned by a municipality and held for municipal purposes shall be exempt from taxation; to extend the personal property tax exemption to all natural persons, and to extend widowers the property tax exemption of not less than five hundred dollars; to provide for ad valorem tax exemption for leasehold interests created prior to January 1, 1978 in government owned property; to provide that leasehold interests in government property leased for public purposes in connection with air, water or ground transportation may be exempt from taxation as provided by law; to permit adjustments to tax assessments relating to stock in trade and livestock, historic property and solar energy systems; to permit the revaluation of property every two years; to authorize the use of tax abatement and increment for redevelopment of slum and blighted area; to provide the corporate income tax may not be levied against the appreciation of property value occurring prior to November 2, 1971; to permit an annual adjustment to the homestead exemption to maintain a constant value using 1979 as a base year and providing for replacement of revenue to local governments; to provide that state bonds may be used to finance water facilities and may be combined for sale; to provide that revenue bonds may only be issued for fixed capital outlay projects, to place limitations on revenue bonds and bond anticipation notes issued by local governments; and to provide that revenue bonds may be issued for housing related facilities.

The amendment was as complex as any that has been proposed by the Taxation and Budget Reform Commission, but the Commission had no

trouble drafting a simple and accurate title: "Finance and Taxation." If the title had instead been "Extending Personal Property Tax Exemption to All Natural Persons," a reference to only one of the several material changes effected by the amendment, it would have been markedly deceptive. The commission wisely used a general title with a broad enough reach to cover all subjects of the summary. In this instance, the Commission did not.

As the lower court concluded, even if the title and summary of Amendment 5 are read together, they do not fairly inform the voter of what Amendment 5 would do. The Florida Constitution deals with assessments of real property for non-school district levies separately than assessments for school district levies.[2] The Amendment materially changes the limit on increases in assessment for non-school district levies, reducing the maximum annual increase from 10% to 5%. This is a major change, affecting the primary source of local tax funding for all non-school related purposes. For this loss of revenue, the Amendment provides no hold harmless, even for one year. As important as such a change is, it deserves prominent, unambiguous disclosure in the title and summary. Instead, it is hidden in a title and summary that, at best, are ambiguous.

[2] Article VII, §§ 4(f)(1), (g)(1)

The lower court correctly found that, when read together, the title and summary failed to adequately notify the voter of this important change in Florida tax law:

> When read within the context of the title and surrounding text of the summary, all of which refer to limits on taxes and on funding only with respect to schools, a voter could well conclude that the cited sentence also refers to a change in the constitutional section dealing with school tax levies. The reference to a limit on annual assessment of real property is, at best, ambiguous, likely to mislead some voters into thinking that it refers only to assessments for school funding and leaving others guessing as to the amendment's true reach. The title and summary must "clearly and unambiguously" inform the voter of all material changes effected by the proposed amendment, and the Supreme Court has consistently removed measures containing ambiguities such as the one in the present measure from the ballot. *Right of Citizens to Choose Healthcare Providers*, 705 So. 2d 562 (Fla. 1998); *People's Property Rights*, 699 So. 2d 1304 (Fla. 1997); *Casino Authorization*, 656 So. 2d 466 (Fla. 1995); *Tax Limitation*, 644 So. 2d 486 (Fla. 1994); *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

[R. 136-37]

In *People's Property Rights*, 699 So. 2d 1304 (Fla. 1997), a case cited by the appellees for the proposition that the title and summary must be read together, the Court found that when read together in that case, an ambiguity was created that made the two misleading:

> We also find that the initiative's ballot title and summary are misleading. The title provides, "People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects." The initiative's

> summary refers to the owner of real property but does not define "owner." Consequently, the use of the term "people" in the title "People's Property Rights Amendments" is confusing because it is unclear if "owner" is restricted to people who own the property or also to corporate entities.

Id. at 1308-09. The lesson taught by this Court in *People's Property Rights* is that the consequences of reading the title and summary can run in either direction. A summary can provide essential details not provided by a short but accurate title. On the other hand, an improperly worded title can create a fatal ambiguity in a summary that might not otherwise arise from the language of the summary itself.

In the court below, the intervener/defendant argued that the Commission should be given such deference, quoting *Fine v. Firestone,* 448 So. 2d 984 (1984). The quote was made in connection with a discussion of the single subject requirement applicable to amendments proposed by petition. The Court did not say in *Fine*, and no court has ever said, that a revision commission has a greater degree of latitude to place misleading titles and summaries on the ballot than does the average citizen, and such a holding would make no sense.

In their brief before this Court, the appellees again suggest that the Commission is entitled to some deference, although more obliquely, devoting a considerable portion of their Statement of the Facts to a

discussion of the Commission's process and motivation in adopting the proposal, and citing *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla. 1992). Appellees state that the Court in *Smith* "noted its reluctance to remove a Commission-proposed amendment from a vote of the public." In *Smith,* the Court did, in fact, remove a Commission-sponsored amendment from the ballot because of an ambiguous ballot summary. In doing so, the Court made no suggestion that the Commission was entitled to special deference. Its comment regarding reluctance was as to removal of any proposed amendment with no reference to a Commission-sponsored amendment in particular.

If anything, the Commission should be held to a higher standard than citizen sponsors. The Commission has the budget, staff and resources to get it right, and the greater credibility that its sponsorship carries demands that it exercise the utmost care to ensure that the voter is given "fair notification in the proposition itself that is neither less nor more extensive than it appears to be." *Askew v. Firestone*, 421 So. at 155.

CONCLUSION

The Court is respectfully urged to affirm the decision of the lower court.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This document is submitted in Times New Roman 14-point font.

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