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.,

Petitioners,

vs.

BEVERLY SLOUGH, ET AL.,

Respondents.

JOINT INITIAL BRIEF OF PETITIONERS DEPARTMENT OF STATE OF THE STATE OF FLORIDA, and VOTE YES ON 5 FOR PROPERTY TAX RELIEF, INC.

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STATEMENT OF THE CASE

Petitioner VOTE YES ON 5 FOR PROPERTY TAX RELIEF, INC., (the "Committee"), a Defendant/Intervenor below, is a not-for-profit corporation organized under Chapter 617, Florida Statutes, and registered with the Florida Department of State, Division of Elections, as a political committee pursuant to Section 106.03, Florida Statutes. The Committee was created to provide statewide advocacy for the passage of Amendment 5, a proposed Constitutional Amendment filed with the Taxation and Budget Reform Commission by former Florida Senate President John McKay.

The instant appeal comes to this Court pursuant to Article V, section 3(b)(5), Florida Constitution and Rule 9.125, Florida Rules of Appellate Procedure. The Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, rendered a Final Judgment for Plaintiffs on August 14, 2008, ordering that Amendment 5 be removed from the November 4, 2008 general election ballot. A copy of the Final Judgment for Plaintiffs is located in the Appendix at Tab "A."

At the trial court, Respondents challenged the placement of Amendment 5 on the ballot, arguing that the title and summary failed to fairly inform the voter, in clear and unambiguous language, of the chief purpose of the amendment and that it is misleading. The trial court conducted a hearing on August 13, 2008, and on August 14, 2008, rendered the Final Judgment for Plaintiffs. *See* App. A. The trial

court held that the ballot title and/or summary of Amendment 5 is misleading for two reasons: (a) the ballot title and summary provide no indication that the "hold harmless" provision of the proposed amendment is for a single year (2010-2011), *see* App. A at pp. 7-9; and (b) the ballot title and summary do not fairly inform a voter that the proposed Constitutional Amendment would reduce the annual maximum increase in real property assessments by local government for other than school taxes from 10% to 5%, *see* App. A at pp. 9-12. The trial court also rejected the remaining arguments made by Respondents below. *See* App. A at pp. 6-7.

Petitioner DEPARTMENT OF STATE OF THE STATE OF FLORIDA appealed the trial court's Final Judgment for Plaintiffs on August 15, 2008. On August 18, 2008, the Committee filed a Notice of Joinder. On August 19, 2008, the First District Court of Appeal entered an Order certifying the trial court's Final Judgment for Plaintiffs to this Court pursuant to Rule 9.125(a), Florida Rules of Appellate Procedure, stating that "the issues pending in this case are of great public importance requiring immediate resolution by the Supreme Court of Florida."

On August 19, 2008 this Court entered an order accepting jurisdiction of this case and setting a briefing and oral argument schedule.

STATEMENT OF FACTS

Amendment 5 is a proposal placed on the ballot for the General Election to be held on November 4, 2008, by the Taxation and Budget Reform Commission. The complete text of Amendment 5 is attached in the Appendix at Tab "B."

The proposal was the subject of engaged debate and numerous public hearings before the Commission and at its committee meetings. Upon its approval by 21 of the 25 Commission members, the ballot title and summary that is the subject of this appeal was drafted by the Style and Drafting Committee of the Commission (the "Drafting Committee"). The Drafting Committee consists of a former President of the American Bar Association and Member of the 1998 Constitution Revision Commission, Martha Barnett, a former President of the Florida Senate and a Member of the 1998 Constitution Revision Commission, James Scott, a former Speaker of the Florida House of Representatives, Allan Bense, and a former Democrat leader of both the Florida Senate and the Florida House of Representatives, Les Miller. Numerous public hearings were held by the Drafting Committee in its endeavor to ensure that the title and ballot language complied with constitutional and statutory standards.[1]

[1] The proposal was initially referred to two committees. It was considered during the course of 3 meetings of the Governmental Procedures and Structure Committee and then was considered during 2 meetings of the Finance and Taxation Committee. After being passed by both committees, the proposal was taken up by the full Commission and adopted on first hearing. The proposal was

Unlike a constitutional amendment proposed by citizen initiative, submitted pursuant to Article XI, Section 3, Florida Constitution, Amendment 5 was the focus of extensive public debate by the Commission Members at two meetings of the full Commission and numerous meetings of its committees, and by its opponents and supporters at all such public forums. Attached in the Appendix at Tab "C" is the Affidavit of John M. McKay filed at the trial court testifying as to the proceedings of Amendment 5 before the Commission. The filtering process that resulted in the ultimate approval of Amendment 5 was transparent and robust. As previously mentioned, not only the language of Amendment 5, but the ballot title and summary were subject to in depth scrutiny and consideration by a number of committees and the full Commission prior to final adoption and transmittal to the Secretary of State for placement on the ballot. [2]

Amendment 5 was proposed by the Commission against the backdrop of Florida's experience with requiring local property taxes as a condition for

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referred to the Drafting Committee, which carefully reviewed the language of the amendment itself, and then the title and summary on no less than 4 occasions before referring it back to the full Commission for its second and final hearing and passage.

[2] Furthermore, the language of the proposal and of the ballot title and summary were reviewed by legislative bill drafting before approval by the Drafting Committee.

receiving state educational funding and the constitutional limitations on annual increases in the assessed value of real property.

The Constitutional and Statutory Framework for the Legislature's Requirement of a Levy of School District Property Taxes as a Condition for Participation in the Florida Education Finance Program

The State is expressly prohibited from levying an ad valorem tax upon real estate or tangible personal property. Art. VII, § 1(a), Fla. Const. Notwithstanding such constitutional prohibition, the Legislature has done indirectly that which it cannot do directly by requiring school districts to levy ad valorem taxes as a condition of the receipt of state funds.

Florida's Constitution has required since at least 1968 that: "adequate provision shall be made by law for a uniform system of free public schools...." Art. IX, § 1, Fla. Const (1968). Beginning in 1973, the Legislature responded to this state education clause mandate with the creation of the Florida Education Finance Program (the "FEFP"). Under the umbrella of the FEFP, the Legislature has annually required school districts to levy local ad valorem taxes for school purposes to partially satisfy its requirement to adequately fund public schools. Since 1998, the state education clause mandates that it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders." . Thus, the Legislature satisfies its paramount duty to make adequate provision for the funding of public schools by a mixture of state revenues and a

legislatively required levy of ad valorem taxes by school districts. Such funding scheme has been legislatively institutionalized notwithstanding the express constitutional prohibition against the levy by the state of ad valorem taxes.[3]

The FEFP is currently made up of both state and local funds. The constitutional prohibition against state ad valorem taxation is circumvented by making participation in the FEFP "optional" by each school district. To participate in the FEFP and thereby receive state funds, each school district must levy a required local effort at a prescribed millage set by the Legislature. As part of the FEFP, the state makes an allocation of state funds to each participating school district in an amount determined by a statutory formula. § 1011.62(11), Fla. Stat. (2007). To be eligible to receive this state funding, each participating school district must contribute a minimum local funding effort from ad valorem taxes. §§ 1011.60(6); 1011.71(1), Fla. Stat. (2007). "The Legislature shall prescribe annually in the [general] appropriations act the maximum amount of millage a district may levy." § 1011.71(1), Fla. Stat. (formerly part of Ch. 263, Fla. Stat.).

[3]The FEFP is also driven by the uniformity provision in the state education clause embodied in Article IX, section 1, Florida Constitution, which requires a varying millage by school districts to ensure that the state funds are appropriated in a manner so that the equivalent per student amount required by each school district is subsequently uniform. The stated intent of the FEFP is "[t]o guarantee to each student in the Florida public school system the availability of programs and services appropriate to his educational needs, which are substantially equal to those available to any similar student, notwithstanding geographic differences and varying local economic factors." Ch. 73-345, § 2 at 1236, Laws of Fla.

Located in the Appendix at Tab “D” is line item 86 from Chapter 2007-72, Laws of Florida, the 2007 General Appropriations Act, which sets the required local effort for fiscal year 2007-2008 at $7,909,357,201. Line item 86 also sets the "base student allocation" from both state funds and local ad valorem taxes at $4,163.47.[4]

Thus, although the FEFP provides for the Legislature to set a maximum amount of millage a school district may levy, participation in the FEFP is treated by the Legislature as a local option. Under the formula for levying ad valorem taxes annually determined by the Legislature, participating school districts receive a benefit of state funds, and in turn, are subject to the burdens in the FEFP formula, including a mandate for the levy of ad valorem taxes at legislatively imposed millage rates.

Located in the Appendix at Tab “E” is a chart from the research presented to the Commission setting forth the required local effort by school district in terms of "Required Local Effort Mills" and "Required Local Effort Taxes." *See* App. E, Columns 1 and 2. The total amount raised of $7,909,648,521 generally conforms to the amount set in the General Appropriations Act for state fiscal year 2007-2008

[4]Funds included within the FEFP are allocated to each school district on the basis of various factors, including the number of students, the programs in which students are enrolled, cost differences between school districts, and the base student allocation, which is the amount to be appropriated for one full-time equivalent student.

as the required local effort. *See* App. D and E. As discussed previously, the maximum ad valorem millage each school district is required to levy to generate in the aggregate the amount mandated in the General Appropriations Act for state fiscal year 2007-2008 varies in compliance with the uniformity provision of the state education clause. Compare for example the required local effort for the Collier County School District of 2.786 mills to the required local effort of 5.007 mills mandated for the Sumter County School District.[5]

The fact that the amount of local ad valorem taxes required by the Legislature each year in the general appropriations act has substantially increased in the last ten years was a significant issue in the debate at the Commission meetings. Located in the Appendix at Tab "F" is a chart on public school funding from state fiscal year 1998-99 through 2007-08 documenting the required local effort mandated by the Legislature each year. The chart from the records of the Commission documents an increase from $3,867,264,014 in state fiscal year 1998-99 to $7,909,648,521 in state fiscal year 2007-08.[6] This dramatic increase in

[5]The required millage rate for each school district is calculated by first determining a statewide millage rate that would generate the total required local effort when applied to 95% of the estimated state total taxable value for school purposes, as provided in section 1011.62(4), Florida Statutes. This millage rate is then adjusted to ensure that no district's required local effort millage produces more than 90% of the district's total FEFP allocation.

[6]In the 2008 general appropriations act, the required local effort was set at $8,267,476,367, as provided in Chapter 2008-152, line item 81, Laws of Florida,

property taxes mandated by the state was a major issue before the Commission. *See* App. G (tax notice). The taxpayer in this example would receive a property tax reduction of $1,596.64 represented by the line designated as "School - Local Requirement." As discussed subsequently, Amendment 5 was adopted in response to provide meaningful tax reform.

The Current Constitutional Limits on Annual Increases in the Just Value Assessment of Real Property

Generally, Article VII, section 4, Florida Constitution, requires that general law regulations shall be prescribed to secure a just valuation of all real property for ad valorem taxation purposes. However, recent amendments proposed both by initiative and the Legislature have prescribed limitations on annual increases in the annual valuation of homestead property to the lower of three percent (3%) of the assessment for the prior year or the percent change in the Consumer Price Index. *See* Art. VII, § 4(c)(1), Fla. Const.[7] Additionally, Article VII, sections 4(f)(1) and

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for fiscal year 2008-2009. This exceeded the state revenue appropriation of $5,213,413,678.

[7]This annual limitation on assessment increases for homestead property is commonly referred to as the "Save Our Homes Provision." It was initially approved pursuant to voter initiative at the general election held in 1992. Subsequently, the Legislature in Amendment 1 submitted a proposed amendment creating Article VII, section 4(c)(8), Florida Constitution, to allow the homestead assessment limitation to be "portable" to new homestead property under certain circumstances. This constitutional amendment was approved at the election held January 29, 2008.

4(g)(1), Florida Constitution, were amended to place a limitation on annual increases in the change in assessment of non-homestead property for all levies other than school district levies to ten percent of the assessment for the prior year.[8]

[8]Such assessment increase limitation for non-homestead property was also included in Amendment 1 proposed by the Legislature and approved by the electors at the election held January 29, 2008.

SUMMARY OF THE ARGUMENT

The ballot title and summary for Amendment 5 informs the voter of the chief purpose of the proposed amendment and is not misleading.

Amendment 5 eliminates the state required school district ad valorem taxes and replaces the loss of such funding source with equivalent state revenues so that education is held harmless through the exercise of articulated legislative options.

The constitutional amendment embodied in Amendment 5 is both a prohibition on the power of the Legislature to require school districts to levy an ad valorem tax as a requirement for participation in the Florida Education Finance Program and an instruction to the Legislature to hold education harmless by the generation of an equivalent amount of state revenues. The instruction to the Legislature to generate the equivalent state revenues is directed to specific legislative options.

The prohibition on the reliance by the Legislature on school district property taxes as a revenue source for funding of the FEFP and the instruction to generate an equivalent hold harmless amount of state revenues takes effect in state fiscal year 2010-2011. In subsequent state fiscal years, the FEFP will be funded solely from state revenues and local school property taxes will be a constitutionally prohibited funding source available for legislative appropriation.

The express prohibition on the legislative requirement of school district property taxes and the instruction to the Legislature to generate an equivalent amount of state revenues, have equal constitutional status. The political power to both direct and limit the Legislature is reserved to the people under the Florida constitutional scheme. In reviewing the validity of the ballot title and summary, the Court has to assume that the Legislature will respond to the instruction of the people in their exercise of their reserved political power.

The replacement of school district property taxes with state revenues can occur only in the year the Legislature is prohibited from requiring a school district levy. Thereafter, the FEFP is funded entirely with state revenues and the level of education funding from state revenues is an annual appropriation decision by the Legislature based upon current conditions and public school needs.

Amendment 5 does not propose to create a guaranty of any future educational funding level or limit the power of the Legislature to appropriate state funds beyond the year school property taxes are eliminated and replaced with an equivalent hold harmless amount of state revenues. Nothing in Amendment 5 or the ballot title and summary or language of the Amendment implies or states otherwise.

The constitutional amendments proposed by the Taxation and Budget Reform Commission, like those proposed by the Legislature, are not limited by any

single subject requirement. Reliance by the trial court on cases construing the validity of legislative bill titles is misplaced. The Court has always held that the ballot title and summary must be read together to determine if the ballot information properly informs the voter. The ballot title is limited to 15 words, consisting of a caption by which the proposed amendment is commonly referred to or spoken of. Nothing in case law or statutory provisions requires that the title encompass all provisions contained in the ballet summary or a proposed amendment.

STANDARD OF REVIEW

This Court has previously held that review of a trial court's decision on the placement of a proposed constitutional amendment is a pure question of law, and is thus *de novo. Armstrong v. Harris*, 773 So. 2d 7, 11 and n.10 (Fla. 2000).

Section 101.161, Florida Statutes, sets forth the statutory ballot requirements for constitutional amendments:

> [w]henever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot[.] . . . Except for amendments and ballot language proposed by joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure . . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

§ 101.161(1), Fla. Stat. (2007). This Court has long held that "[i]n order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly and conclusively defective" under section 101.161. *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982). The *Askew* court further explained that section 101.161 requires:

> that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must

> decide . . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot . . . . Simply put, the ballot must give the voter fair notice of the decision he must make.

Id. at 155 (*quoting Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954)). In short, the "clear and unambiguous" requirement of 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. Furthermore, the ballot title and summary are not required "to explain every ramification of a proposed amendment, only the chief purpose." *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986).[9]

Courts must act with "extreme care, caution, and restraint" before removing a constitutional amendment from the vote of the people. *Advisory Op. to the Att'y Gen. re: Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006) (*quoting Askew v. Firestone*, 421 So. 2d at 156)). Thus, if "any reasonable theory" exists for approving an amendment for ballot placement, it should be upheld. *See Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (*quoting Gray v. Golden*, 89 So. 2d 790 (Fla. 1956)). In *Smith v. American Airlines*, 606 So. 2d 618, 621 (Fla.

[9] Constitutional amendments proposed by the Commission are not subject to the single-subject limitation set forth in Article XI, section 3, Florida Constitution, as required for amendments proposed by citizen initiative.

1992), this Court noted its reluctance to remove a Commission-proposed amendment from a vote of the public.

Whether a proposed constitutional amendment is wise policy on the merits is beyond the scope of judicial review, and Florida courts lack authority to inject their opinions on the merits into the process so long as the statutory requirements are satisfied. *See Advisory Op. to the Att'y Gen. re: Additional Homestead Tax Exemption,* 880 So. 2d 646, 648 (Fla. 2004).

ARGUMENT

I. THE BALLOT TITLE AND SUMMARY INFORMS THE VOTER OF THE CHIEF PURPOSE OF THE AMENDMENT AND IS NOT MISLEADING.

Elimination of Required School Property Taxes as a Condition of Participation by School Districts in the FEFP

The ballot title and summary to Amendment 5 provides, as follows:

> 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.

As its title states, the chief purpose of Amendment 5 is to instruct the Legislature to fund the FEFP with state revenues. This chief purpose is achieved by prohibiting the Legislature from requiring school districts to levy an ad valorem tax as a required local funding effort for participation in the FEFP.[10] This chief

[10]Expressly not affected is ad valorem millage dedicated to capital outlay, school renovation and repair, or for lease purchase payments authorized by general law; voter-approved millage authorized in the constitution; or discretionary millage for school districts authorized by general law.

purpose of the amendment is reflected in the ballot summary as well: "Replacing state required school property taxes with state revenues generating an equivalent hold harmless amount for schools...."

Commencing in the 2010-2011 fiscal year, Amendment 5 instructs the Legislature to replace the loss occurring by the elimination of the required local effort by the exercise of one or more of four enumerated options. The component of the amendment is described in the summary by specifying that the replacement state revenues must be generated "through one or more of the following options: repealing state sales tax exemptions not specifically excluded; increasing sales tax rate up to one percentage point; spending reductions; other revenue options created by the legislature." This provision appears in a new Section 19 of Article VII, Florida Constitution. To ensure legislative compliance, the constitutionally authorized school purpose millage limitation in Article VII, Section 9, Florida Constitution, is reduced from ten to five mills.[11]

In the new Article VII, Section 19, Florida Constitution, the Legislature is instructed to consider, in its replacement of the revenue impact to the FEFP from the elimination of the required local effort, one or more of the following revenue

[11]The schedule in Amendment 5 in Article XII, Section 28(b), Florida Constitution, provides that the reduction to five from ten mills of the authorized millage for school purposes shall not become effective until January 1, 2010, to coincide with the elimination of any local effort school district millage in fiscal year 2010-2011 as a requirement for participation in the FEFP.

options: (1) the repeal of sales tax exemptions not found by the Legislature to advance or serve a public purpose except those specifically excluded[12]; (2) an increase of up to one percentage point to the sales tax rate; and (3) the use of other revenues identified or created by the Legislature. Additionally, the instruction to the Legislature in Article VII, Section 19 proposed in Amendment 5 includes the option of spending reductions from other components of the state budget and revenue increases resulting from economic growth attributable to lower property taxes.

Instruction to the Legislature to Generate an Equivalent Amount of State Revenues

Subsection (b)(2) in the new Section 19 of Article VII, Florida Constitution, proposed in Amendment 5, instructs the Legislature as to an independently ascertainable amount of state revenue it is required to appropriate in the General Appropriations Act for the 2010-2011 fiscal year for the FEFP to replace the elimination of local school district taxes as a required local effort. Such amount 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

[12]The exemptions excluded from repeal include those relating to necessities and expenditures for charitable and religious organizations and those necessary to maintain fairness in the sales tax base and to prevent double taxation.

> set amount shall be referred to as the "education hold harmless amount."

See App. B. This education hold harmless amount can be determined in a precise dollar amount. Funds replaced by the Legislature designated as the education hold harmless amount, as well as other state education funds, will continue to be disbursed through the allocation formulas provided for schools under the FEFP through use of the various program factors, cost differentials and the base student allocation identified annually in the general appropriations bill.

Summary of Related Provisions

Amendment 5 amends Article VII, Section 4, Florida Constitution, to reduce from ten percent to five percent the maximum increase in annual assessments on non-homestead property for all levies other than school district levies. This component of the amendment is specifically described in the summary "Limiting annual increases in the assessment of non-homestead real property." Such reduction closes the disparity in treatment between homestead and non-homestead property under the limits in annual assessment increases in the Florida Constitution. Such constitutional disparity is the subject of pending litigation.[13]

[13]Three actions are currently pending relating to the three-percent Save Our Homes cap on annual increases in assessments for homestead property.

Lanning v. Pilcher, Case No. 1D07-6564, 1st DCA (Lower Case No. 37-2007-CA-000582, 2nd Cir.), is a challenge brought by non-residents to Florida

Article VII, Section 19(c) proposed in Amendment 5 requires that any future law creating a sales tax exemption shall contain the single subject of a single exemption and a legislative finding of the public purpose advanced or served. This component of the amendment is specifically described in the summary: "Limiting subject matter of laws granting future exemptions." Such legislative restriction opens the process for the consideration of exemptions to the sales tax and frames the public debate in a meaningful way. In adopting a more stringent single subject requirement for the enactment of a law granting a sales tax exemption, the people will ensure the creation of an open and reviewable process for the legislative grant of the special privilege provided by each sales tax exemption.

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owning residential property within the state. The property owners are challenging the Save Our Homes provision on the basis that it violates a number of federal constitutional provisions, including the Equal Protection Clause, the Dormant Commerce Clause, the federal right to travel under the Privileges and Immunities Clause, and the Due Process Clauses under the 5th and 14th Amendments to the United States Constitution.

Bruner v. Hartsfield, Case No. 37-2007-CA-003247, 2nd Cir., was filed by Florida residents owning homestead property who have obtained homestead status in the last 4 years. The property owners are challenging the Save Our Homes provision under the both the state and federal Equal Protection Clauses and the Privileges and Immunities Clause.

Deluccio v. Havill, Case No. 37-2008-CA-000412, 2nd Cir., was filed by non-residents owning residential property in Florida, who are challenging not only the three-percent cap, but also the portability provision added in Amendment 1, adopted by the voters on January 29, 2008, under the Dormant Commerce Clause and the Privileges and Immunities Clause.

The amendment revises Article VII, Section 9(b), to reduce the maximum millage for school purposes from ten to five mills. This component of the amendment is expressed in the ballot summary by the following: "Lowering property tax millage rate for schools."

The Ballot Title and Summary Inform the Voter of the Chief Purpose of Amendment 5

The ballot summary clearly sets forth the chief purpose of Amendment 5, as well as the other related provisions, in a manner that will not mislead voters and will allow them to make an informed decision. First, the ballot summary states the chief purpose of the proposal -- to replace the required school property taxes with state revenues through use of one or more specified options. The options listed are also transparent. The ballot language states that the Legislature is to replace the property taxes (1) by repealing sales tax exemptions not excluded -- putting voters on notice that some exemptions will not be repealed upon legislative review; (2) by increasing the sales tax rate by no more than one percentage point; (3) through spending reductions; (4) and with other revenue options created by the legislature.

As discussed previously, Amendment 5 is an instruction by the people to the Legislature to replace state revenues lost to the FEFP by the exercise of one or more of the enumerated options. While legislative prerogatives as to options to be exercised remain intact, Amendment 5 does not give the Legislature the choice not to replace revenues lost. In analyzing the validity of title and ballot summaries, the

Court cannot presume that the Legislature will ignore the requirements in an adopted constitutional provision. *See Williams v. State*, 360 So. 2d 417 (Fla. 1978). Additionally, should the Legislature turn a blind eye to the instruction of the people, Amendment 5 establishes a clear constitutional mandate that the education budget in the 2010-2011 fiscal year be held harmless from the elimination of the property tax to fund educational spending by the state.

The remainder of the ballot summary further informs voters that the proposal will limit the subject matter of laws granting future exemptions and limit increases in the assessment of non-homestead real property and that it will lower the constitutional millage rate for school purposes. Not only is the ballot summary not misleading, but it gives the voter fair notice of each provision of Amendment 5, while keeping within the 75-word limit requirement, thereby satisfying both section 101.161, Florida Statutes, and the requirements set forth by the Florida Supreme Court.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE BALLOT TITLE AND SUMMARY IS MISLEADING ON THE BASIS THAT IT DOES NOT EXPRESSLY STATE THAT THE REPLACEMENT FUNDS ARE NOT PERMANENTLY GUARANTEED.

Currently, the Legislature each year makes three fundamental decisions on the amount of funds appropriated for the FEFP for the operation of public schools. Such amount is set annually by the Legislature in the General Appropriation Act.

First, the amount of state funds to be appropriated for the ensuing state fiscal year is appropriated. Second, the amount of the required local effort school districts must levy for participation in FEFP funding for the ensuing school board fiscal year is set. These two amounts in the aggregate constitute the appropriation for the FEFP. Third, the "base student allocation" for the FEFP is set. *See* App. D for the appropriations set by the Legislature in the 2007 General Appropriation Act for each of these amounts.

The only constitutional restraint on the Legislature in making these decisions are the two provisions embodied in the state education clause of Article IX, Section 1, Florida Constitution. The adequacy provision provides that it is a paramount duty of the State to make adequate provision by law for the free public school system consistent with constitutional standards. The uniformity provision requires that the public school system be a uniform system of free public schools.

There exists no constitutional guaranty in Florida of any level of public school funding. Within the restraints of the two provisions in the state education clause, the level of funding for the FEFP for the operation of public schools is a political decision made annually by the Legislature within its appropriation discretion.

Amendment 5 does not propose to create a guaranty of any future education funding level. The proposed constitutional amendment simply eliminates the

ability of the Legislature to reach to local school district ad valorem taxes as an available revenue source in its annual appropriation decision to adequately fund the public school system. In addition to its prohibition of the Legislature from requiring school districts to levy an ad valorem tax as a required local effort for participation in the FEFP, Amendment 5 further directs the Legislature to hold education harmless by the generation of an equivalent amount of state revenues in 2010-2011 fiscal year. The Legislature is directed to replace the revenue impact of the elimination of the required local effort by the exercise of one or more legislative options articulated in the proposal.

This instruction to the Legislature on its options is consistently directed to be implemented in the general appropriations act adopted for the 2010-2011 fiscal year, which is the year in which the availability of school district ad valorem taxes are constitutionally removed as an available funding tool. The equivalent hold harmless amount is measured by the Legislature at the 2008-2009 fiscal year FEFP appropriation, plus a growth factor, which is the FEFP appropriation prior to the placement of Amendment 5 on the 2008 General Election ballot.

After the replacement of school ad valorem taxes with state revenues in state fiscal year 2010-2011 by the exercise of one or more of the legislative options set forth in Amendment 5, the amount of state revenues appropriated in future years for the FEFP is subject to the same political judgment of the Legislature within the

constitutional restraints of the state education clause. Amendment 5 does not change the power and discretion of the Legislature to set the level of FEFP funding beyond state fiscal year 2010-2011. The state required school district property taxes in state fiscal year 2010-2011 are eliminated and replaced with equivalent state revenues so that education is held harmless as a consequence of the elimination of property taxes as a funding source available to the Legislature.

The instruction and direction to the Legislature to replace the elimination of the availability of school district ad valorem taxes by the exercise of articulated legislative options is clear in the ballot title and summary. As argued previously, and as recognized by the trial court in its review of the ballot title and summary, the judiciary must assume that the Legislature will respond to the constitutional direction mandated by the people in a proposed amendment. The fact that a new Section 19 of Article VII, Florida Constitution proposed in Amendment 5 directs the removal of school district ad valorem taxes as an FEFP funding source, while relying on the Legislature to fulfill its responsibility under the constitutional mandate, may speak to the wisdom of the goal but not its validity. The prohibition and the instruction both have equal constitutional force and status.

Once the Legislature responds to the constitutional direction and instruction in state fiscal year 2010-2011, the elimination of school district property taxes in the funding by the Legislature of the FEFP has been achieved. Once replaced, the

elimination of the required local effort as an available funding source continues as a limitation on the appropriation power of the Legislature. In fiscal year 2011-2012, such revenue loss is constitutionally mandated to be replaced by the Legislature with equivalent state revenues. The hold harmless amount is defined in the new Section 19(b)(2) proposed in Amendment 5 with clarity. *See* page 18, *infra*.

The ballot summary informs the voters of the consequence of both the constitutional prohibition of the levy of school ad valorem taxes as a required local effort and the replacement of each local funding source with state revenues with equal clarity:

> 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. . . .

See App. B.

Under the clear language of the new Section 19(b)(2), of Article VII, proposed in Amendment 5, the required school ad valorem taxes are eliminated in state fiscal year 2010-2011 and replaced with state revenues by the exercise of the Legislature of one or more options. The ballot title and summary inform the voter that only state revenue will be available for the future funding of the FEFP.

Nothing in the ballot title or summary speaks to a future revenue guaranty. The Legislature is instructed to hold public schools harmless by the generation of an equivalent amount of state revenue only when the required school district ad valorem tax effort is eliminated. Which is in fiscal year 2010-1011.

This Court has recognized the limitation on the drafters of ballot language created by the seventy-five word limit included in section 101.161(1), Florida Statutes:

> [g]iven the seventy-five word limit contained in section 101.161(1), it would be impossible for sponsors to detail all possible effects or ramifications of the proposed amendment[.] . . . The statute itself requires only that the voter be made aware of the chief purpose of the amendment[.]

Advisory Op. to the Att'y Gen. re: Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient, 880 So. 2d 659,664 (Fla. 2004)(emphasis in original).[14] It would be similarly impossible for the ballot summary in Amendment 5 to fully inform voters of every detail of the proposal, however, in spite of this limitation, the summary clearly outlines and reflects each of the five main components of Amendment 5.

III. THE TRIAL COURT ERRED IN HOLDING THAT THE BALLOT TITLE AND SUMMARY ARE MISLEADING ON THE BASIS THAT

[14] *See also Advisory Op. to the Att'y Gen. re: Right to Treatment and Rehab. For Non-Violent Drug Offenses*, 818 So. 2d 491 (Fla. 2002); *Advisory Op. to the Att'y Gen. re: Funding of Embryonic Stem Cell Research*, 959 So. 2d 195 (Fla. 2007).

THE TITLE DOES NOT ENCOMPASS ALL PROVISIONS CONTAINED IN THE SUMMARY AND THE PROPOSED AMENDMENT.

This Court has previously held that "section 101.161(1) has always been interpreted to mean that the ballot title and summary must be read together in determining if the ballot information properly informs the voter." *Advisory Op. to the Att'y Gen re: People's Property Rights Amendment*, 699 So. 2d 1304, 1309 (Fla. 1997) (citing *Advisory Op. to the Att'y General re Limited Casinos*, 644 So. 2d 71, 75 (Fla. 1994)). *See also Advisory Op. to the Att'y General re Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002) (the ballot title and summary "may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters").

As discussed in Section I(A), *infra*, the chief purpose of Amendment 5 is to provide instruction to the Legislature to fund the FEFP with state revenues instead of school ad valorem property taxes set as the required local effort. The title to Amendment 5 clearly states that the Amendment will eliminate the school property taxes required by the state to fund education and that such funds are to be replaced with an equivalent hold harmless amount of state revenue. Neither section 101.161, Florida Statutes, nor the applicable judicial opinions require the title to reference every provision. Rather, section 101.161, Florida Statutes, only requires that the title "consist of a caption, not exceeding 15 words in length, by which the

measure is commonly referred to or spoken of." The title for Amendment 5 contains exactly 15 words, and does not include any misleading or emotional language.

The reliance by the trial court on cases construing legislative bill titles is misplaced.[15]

The title to a legislative bill is similar in function and scope to the ballot summary mandated in section 101.161(1), Florida Statutes. Such statutory direction requires that the ballot summary state the "substance of the amendment" in the form of an "explanatory statement . . . of the chief purpose of the measure." Section 101.161(1) further limits the summary to 75 words in length. In contrast, the ballot title mandated in section 101.161(1) is merely the "caption . . . by which the measure is commonly referred to or spoken of." The title cannot exceed 15 words in length.

Nowhere in statute or case law is any requirement that a ballot title, as a caption of common reference, encompass or state the chief purpose or the substance of the amendment. That is the statutory function of the ballot summary.

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[15] The operative provision relating to legislative titles is Article III, Section 6, Florida Constitution, which provides:

> Section 6. Laws. – Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title … .

Art. III § 6, Fla. Const. (2008).

Furthermore, there is no single subject requirement for constitutional amendments proposed by the Legislature or by the Taxation and Budget Reform Commission. The Commission is a constitutional body created to recommend changes to taxation and budget matters, and these by definition are complex. The conclusion that a voter might be misled by a true statement would limit the Commission to recommending only the simplest changes. Despite the complex nature of this proposal, the ballot summary fairly informs the voter of the 5 constitutional components of Amendment 5 and is not misleading.

The trial court held that the title and summary are misleading because "[a] voter reading the title may well be misled into voting for or against the amendment without reading further because the title gives assurance that the amendment deals only with the required local school tax and replacement state funding." Final Judgment at p. 10. The title and summary read as follows:

> 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.

See App. B (emphasis added).

The Committee directs the Court's attention to the emphasized sentence in the summary. This sentence is clear and unambiguous, providing a voter fair notice that Amendment 5 will limit increases in the assessment of non-homestead real property.

The trial court held that this sentence,

> does make reference to a limitation on increases in assessment of non-homestead property. The statement is technically accurate, but technical accuracy will not save a summary if, within the full context of the title and summary, it is misleading. Askew v. Firestone, 421 So. 2d 151 (Fla. 1982). This is the case here.

Final Judgment at p. 11. The trial court went on to hold that this sentence, "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." Final Judgment at pp. 11-12. The trial court further held that this was "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." Final Judgment at p. 12.

In *Askew v. Firestone,* the Court also held that "[t]he purpose of section 101.161 is to insure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors . . . ." Put another way, the ballot title and summary cannot "hide the ball" as to the amendment's true effect. *See Armstrong,* 773 So. 2d at 16. In *Askew,* the Court found that the summary flew under false colors because the summary failed to explain that the amendment would supersede an already existing constitutional provision that imposed an absolute two-year ban on lobbying by former legislators. *See Askew,* 421 So. 2d at 156. In *Armstrong,* this Court held that the title and summary flew under false colors and hid the ball because they failed to mention that the amendment would nullify existing rights a citizen has under the United States Constitution. *See Armstrong,* 773 So. 2d at 17-18.

The trial court's holding is that the ballot title and summary are misleading (and, presumably, flies under false colors or hides the ball as to the amendment's true intent) in that the ballot title's supposed emphasis on school property taxes misleads the voter when the amendment also, in fact, limits annual increases in the assessment of non-homestead real property.

Nothing in the ballot title and summary, when read together, can be categorized as hiding the ball or flying under false colors. The ballot title and summary, when read together, are clear and unambiguous, and provide fair notice

to the voter. The emphasized sentence in the summary informs a voter that Amendment 5 will limit increases in the assessment of non-homestead real property.

CONCLUSION

The ballot title and summary of Amendment 5 sets out the chief purpose of the proposal, provides fair notice to the voters of his or her decision and is not misleading, and thus satisfies all statutory and constitutional requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to: LOUIS F. HUBENER, ESQ., Chief Deputy Solicitor General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; and BARRY RICHARD, ESQ., Greenberg Traurig, 101 East College Avenue, Tallahassee, Florida 32301, this 21st day of August, 2008.

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MARK HERRON, ESQ.

CERTIFICATE OF FONT SIZE 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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