IN THE SUPREME COURT OF FLORIDA

Case No. SC 10-1508
Lower Tribunal No(s): 1D10-3935, 2010-CA-2114

DAWN K. ROBERTS as ACTING SECRETARY OF STATE OF THE STATE OF FLORIDA,

Appellant,

vs.

BRIAN K. DOYLE and FLORIDA AFL-CIO,

Appellees.

BRIEF OF FLORIDA REALTORS® AS AMICUS CURIAE IN SUPPORT OF APPELLANT

On Discretionary Review
From the District Court of Appeal, First District

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STATEMENT OF INTEREST

Florida Realtors® (f/k/a Florida Association of Realtors®) is the largest trade association in Florida, with more than 115,000 members. The mission of the Florida Realtors® includes advancing Florida's real estate industry by shaping public policy. Florida Realtors® has participated consistently and actively over many years in the development of public policy related to the taxation of real property, and was a major proponent of Amendment 3 in 2009.

Florida Realtors® opposed the 1992 constitutional initiative that resulted in the "Save Our Homes" cap on annual assessment increases for residential real estate because it foresaw the long-term potential for unequal taxation of similarly-situated homeowners. *See* Art. VII, § 4(d), Fla. Const. [hereinafter "Save Our Homes"]. However, over the course of the legislative property tax debates of 2006-2008, Florida Realtors® concluded this tax benefit would not be swapped for more equitable tax relief, so the association turned its attention to efforts to minimize the discriminatory effects of Save Our Homes on new homebuyers.

Thus, Florida Realtors® worked on and promoted Amendment 3 as a means to incentivize potential homebuyers. As major stakeholders actively involved in evolution of the language of Amendment 3, Florida Realtors® has a special perspective on the purpose and intended application of the proposal and its relationship to the title and summary of the constitutional amendment at issue.

SUMMARY OF ARGUMENT[1]

The ballot title and summary for Amendment 3 accurately state the chief purpose of Amendment 3 and are not misleading. A review of the legislative history of this measure shows that the Legislature provided this description of the measure to reflect policy decisions about how Amendment 3 is to be applied.

As originally filed, the proposal that became Amendment 3 would have restricted the new homestead exemption to persons who had never owned a residence that qualified for a Florida homestead exemption, creating administrative challenges and limiting application for Florida residents. Moreover, the benefit would not have been available until the 2012 tax year, frustrating the intended purpose of spurring home sales in Florida and potentially inducing new home construction. As originally proposed, the ballot title described the intended beneficiaries of the additional exemption as "[f]irst-time homestead property owners" and the summary described the amendment as providing "first-time homestead property owners with an additional homestead exemption."

Lawmakers revised the measure to address their policy concerns by extending the additional exemption to anyone who had not owned a principal residence anywhere within the preceding eight years, and by adding a schedule to

[1] References to the Record on Appeal are denoted by brackets containing "R." followed by the pertinent page number, or "[R.]". References to the Appendix are denoted by brackets containing "A." followed by the pertinent page number.

ensure that the additional exemption would first be available during the 2011 tax year. Thus, the ballot title was modified to change the reference from "first-time homestead property owners" to "new homestead property owners," which more accurately reflects the requirement that these property owners needed to acquire new homestead properties in Florida, but not necessarily be persons who had never owned property in Florida that qualified for the homestead exemption. Under the schedule, in order to qualify for the additional exemption the property at issue had to be acquired on or after January 1, 2010; as such, it was "new homestead property" and the persons owning it were correctly described as "new homestead property owners." The ballot title and summary are legally sufficient.

If the Court concludes the ballot title and summary are not legally sufficient, we respectfully suggest that the Court should direct the Secretary of State to place the complete amendment text on the ballot as a substitute title and summary. Such a remedy would be consistent with the statutory command regarding ballot summaries and would constitute a lesser intrusion into the democratic process than the remedy ordered by the trial court, striking Amendment 3 from the ballot altogether.

The trial court should be reversed or, in the alternative, this Court should order a remedy that substitutes the amendment text for the ballot title and summary adopted by the Legislature.

ARGUMENT

I.

The ballot title and summary do not mislead, but correctly inform the electors, that the chief purpose of Amendment 3 is to provide an additional homestead exemption to persons who acquire new homestead property in Florida, and who have not owned a principal residence in the preceding eight tax years.

The touchstone for evaluating whether the ballot title and summary for a proposed constitutional amendment are legally sufficient is whether – when read together – they fairly inform the voter of the amendment's "chief purpose", and whether they avoid misleading the public. *Adv. Op. to the Att'y Gen. re Fla. Marriage Protection Amend.*, 926 So. 2d 1229, 1236 (Fla. 2006). A review of Amendment 3's legislative history, and the tax policy concerns which led to its being proposed by the legislature in 2009, will help to illuminate Amendment 3's chief purpose for this Court and to evaluate the precision of the language used.

Since the adoption in 1992 of Save Our Homes, which imposed a cap on annual assessment increases for residences with a homestead exemption, policymakers have considered whether to address the ways in which Save Our Homes created distortions in the valuation of residential property for ad valorem tax purposes, and the corresponding consequences of those distortions on the real estate market and State and local government revenues. *See, e.g.*, Ch. 2006-311, § 3, Laws of Fla. (requiring study of ad valorem taxation).

In 2009, these long-simmering issues gained additional impetus from the real estate market downturn and its corresponding consequences on the economy and State and local government finances. *See, e.g.*, Fla. Office Econ. & Demog. Research, Executive Summary, Revenue Estimating Conference for the General Revenue Fund, at 1 (Nov. 21, 2008) (available at http://edr.state.fl.us/Archives2009/Spring/Conferences/generalrevenue_11-21-08.pdf); T. F. on Resid. Mort. Forecl. Cases, *Final Report and Recommendations on Residential Mortgage Foreclosure Cases* (Aug. 17, 2009) (available at http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf). Policymakers considered whether to propose additional homestead property benefits to mitigate the inequities of Save Our Homes while also stimulating home sales and, it was hoped, new home construction to bolster Florida's beleaguered economy.

As originally filed, the Senate joint resolution proposing an additional homestead exemption would have restricted the exemption to persons who had never owned a residence that qualified for a Florida homestead exemption. *See* Fla. SJR 532, at 8-9 (2009) (proposed art. VII, § 6(c), Fla. Const. [hereinafter SJR 532] [A. 8-9]. Moreover, the proposal contained no schedule for implementation of the amendment. As such, the general rule would have applied; the amendment would have taken effect on January 4, 2011 (the first Tuesday following the first Monday

in January, following its presumed November 2010 approval). Art. XI, § 5(e), Fla. Const. Thus, because entitlement to a homestead property tax exemption is determined as of January 1 of each year, § 196.031(1)(a), Fla. Stat. (2009), this additional exemption would not have been available to new homeowners until the 2012 tax year.

The ballot title as proposed in the original version of the Senate joint resolution described the intended beneficiaries of the additional exemption as "[f]irst-time homestead property owners." SJR 532, at 10-11 [A. 10-11]. The original summary described the amendment as providing "first-time homestead property owners with an additional homestead exemption." *Id*.

Three issues arose with SJR 532 as originally proposed.

First, the proposal's intention to make the additional exemption available so long as a homebuyer had <u>never</u> before claimed a homestead exemption would obligate State and local authorities to look back to the Great Depression, when Florida first provided for a homestead exemption, to police for prior ownership of homestead property. *See* Fla. HJR 20 (1932) (proposing art. X, § 7, Fla. Const. of 1885) (approved May 27, 1933) (available at http://www.law.fsu.edu/crc/conhist/1934amen.html). Obvious problems associated with the administrative feasibility of such an extended backward-looking period prompted consideration of a shorter look-back period. The measure's original

sponsor proposed a floor amendment calling for a three-year look-back period.[2] *See* Fla. S. Jour. 957-59 (Reg. Sess. Apr. 30, 2009) (amendment 1 to Fla. CS for SJR 532) (available at http://www.flsenate.gov/data/session/2009/senate/journals/final/2009-dailyJournal-04302009.pdf). However, fiscal concerns over the potential revenue losses from the additional exemption argued for a longer look-back period. Obviously, the longer the look-back period for homestead ownership as a condition of the additional exemption, the fewer the people who qualify for the additional exemption and the less the potential fiscal impact; the shorter the look-back period the more people qualify and the greater the potential fiscal impact. Lawmakers compromised on an eight-year qualifying period for homebuyers to claim the additional exemption. *See* Fla. S. Jour. 959-60 (Reg. Sess. Apr. 30, 2009) (amendment 2 to Fla. CS for SJR 532) (available at http://www.flsenate.gov/data/session/2009/senate/journals/final/2009-dailyJournal-04302009.pdf).

Second, SJR 532 as originally proposed would have treated a homebuyer more favorably if he or she had moved from a principal residence <u>outside</u> Florida to a principal residence <u>in</u> Florida, than it would have treated a Florida resident

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[2] A three-year look-back on homeownership was the period previously adopted for the federal "first-time homebuyer tax credit." *See* 26 U.S.C.S. § 36 (LexisNexis 2010).

moving intrastate from one principal residence to another. *See* SJR 532, at 8-9 [A. 8-9]. The former person—who might have owned a principal residence outside Florida and enjoyed the benefits of that state's preferential treatment for principal residences—would have received the additional exemption under SJR 532 because he or she had not owned Florida homestead property before. The latter—who had owned property entitled to a Florida homestead exemption—would not have been eligible for the additional exemption. Concerns over disparate treatment of long-time Florida residents (and taxpayers) resulted in the additional exemption being available to otherwise-qualified homebuyers regardless of where they previously had a principal residence.

Third, the delayed implementation occasioned by the lack of a schedule in SJR 532 as originally proposed meant that the intended incentive for purchasing homes would have no immediate value to those in the market to buy a home. Thus, it was less likely Amendment 3 would achieve its purpose.[3] Concerns over a lag in the additional exemption helping to stimulate home sales resulted in the schedule providing for the additional exemption to first apply on January 1, 2011, for homes purchased in 2010 or later, if other qualifications were met.

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[3] The members of Florida Realtors® had witnessed first-hand the drag on the residential real estate market artificially created as various property tax relief proposals were considered and rejected by the Florida Legislature and the courts during 2006 and 2007. Florida Realtors® members reported that some potential homebuyers were delaying their purchases to ensure that they would benefit from "portability" and other tax relief changes ultimately approved.

During the Legislature's consideration of SJR 532, these concerns received considerable attention. They were addressed by allowing the additional exemption for anyone who had not owned a principal residence anywhere within the preceding eight years, and by adding a schedule to ensure that the additional exemption would be available at the earliest possible opportunity—the 2011 tax year. *See* Fla. S. Jour. 959-60 (Reg. Sess. Apr. 30, 2009) (amendment 2 to Fla. CS for SJR 532) (available at http://www.flsenate.gov/data/session/2009/senate/journals/final/2009-dailyJournal-04302009.pdf).

In light of these policy decisions, the title of the amendment was modified to change the reference from "first-time homestead property owners" to "new homestead property owners," which more accurately reflects the requirement that these property owners had to acquire new homestead properties in Florida, but not necessarily be persons who had never owned property in Florida that qualified for the homestead exemption. In other words, under the schedule, in order to qualify for the additional exemption a property had to be acquired on or after January 1, 2010; as such, it was "new homestead property" and the persons owning it were correctly described as "new homestead property owners." At the same time, the summary was amended to reflect the revisions to the amendment's text. *Id.*

Opponents below have made much of the use of the phrase "principal residence", suggesting that it is neither a legally defined phrase nor one that the average elector can be expected to understand. The trial court accepted this argument, concluding that "[a] voter reading the title and summary could easily conclude that in order to be eligible for the additional homestead exemption, a property owner would have to meet two conditions: have not owned a principal residence during the preceding eight years and have never previously declared the homestead." *Doyle v. Roberts*, Case No. 2010-CA-2114, Final Judgment for Plaintiffs, at 7 (Fla. 2nd Cir. Ct. July 23, 2010) (e.o.).

However, and importantly, the electors are alerted in the summary that the amendment is mandatory but not self-executing because it "requires the Legislature to provide an additional homestead exemption for persons who have not owned a principal residence during the preceding 8 years." This language in the summary clearly signals to the elector that more details will follow as the Legislature implements Amendment 3, if adopted.[4] Further, common sense

[4] The Legislature is the proper entity to define the phrase "principal residence" in light of Amendment 3's purpose. The core requirement for entitlement to any homestead exemption in Florida is establishment of "permanent residence", which is defined by law to mean "that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred." § 196.012(18), Fla. Stat. (2009) (e.a.).

suggests that the average person—when asked to name his or her "principal residence"—will give his or her permanent home address, not a temporary hotel accommodation, a beach house or other secondary or temporary place of residence.

Opponents below complained of the use of the phrase "first-time homestead," suggesting that those words conveyed the message that the additional exemption was unavailable to a property owner unless they "have not owned a principal residence during the preceding eight years and have never previously declared the property a homestead." *Doyle*, Case No. 2010-CA-2114, Plaintiffs Memorandum of Law in Favor of Final Judgment, at 7 (Fla. 2nd Cir. Ct. July 9, 2010) (e.o.).

The ballot summary does not refer to "first-time homestead property owners" as did the originally proposed summary, or to "first-time homesteaders," both of which would describe the owner of the property. Instead, the revised summary references a "first-time homestead," which accurately describes the exemption available to the property. The reference is contained in a sentence immediately following one that explains that the "additional exemption [is] for persons who have not owned a principal residence during the preceding 8 years." As such, the placement of the reference to the phrase "first-time homestead" can be read naturally as a short-hand reference to its antecedent, that is, "the additional

exemption for persons who have not owned a principal residence during the preceding 8 years."

The ballot summary for Amendment 3 adequately describes the chief purpose of the Amendment and is not misleading. It gives "the voter fair notice of the decision he must make." *Askew v. Firestone,* 421 So. 2d 151, 155 (Fla. 1982).

II.

If a ballot title and summary for a constitutional amendment proposed by the Florida Legislature is ruled defective, an appropriate remedy is to order substitution of the proposed amendment's text on the ballot.

In the trial court, the Defendant Secretary of State's Memorandum of Law argued that "Amendment 3 should remain on the ballot for a vote on its merits," and the Appellant renewed this argument in the Initial Brief. Appellant's Initial Brief, at 12 n. 2. Subsumed within this request is the potential remedy ordered by this Court in *ACLU of Fla., Inc. v. Hood*, Case No. SC04-1671 (Fla. Sept. 2, 2004), which is to place the text of the proposed constitutional amendment on the ballot in lieu of the ballot title and summary adopted by the legislature.

While Florida Realtors® asserts that the ballot title and summary are legally sufficient, if this Court disagrees, we respectfully suggest that the Court should address the violation in a manner that is least intrusive to the democratic process. It should order a remedy which shows deference to a co-equal branch of government and allows the people to decide whether to amend their constitution.

As this Court has stated, the judiciary must exercise "extreme care, caution and restraint before it removes a constitutional amendment from a vote of the people." *Askew*, 421 So. 2d at 156.

Article XI, section 5 of the Florida Constitution includes an implicit command that any "proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (e.o.). However, there is no constitutional requirement that the electors receive a summary of a proposed constitutional amendment. Article XI, Section 1 dictates that a legislatively proposed amendment "be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature," and that the "full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house." Article XI, Section 5(a) requires that a proposed amendment "be submitted to the electors at the next general election" absent special circumstances. Section 5(d) requires publication of the text of a proposed amendment in a newspaper of general circulation.

Section 101.161(1), Florida Statutes, requires that, "[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." (e.a.). This legislatively adopted requirement also provides that, "[e]xcept 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." (e.a.).

In *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992), the Court considered a proposed amendment advanced by the Florida Taxation and Budget Reform Commission. After determining that the ballot summary was misleading, the Court noted that "[n]either party argues that this Court has the authority to independently rewrite the ballot summary to conform to the statute, and our independent research has revealed no authority to do so." *Smith,* 606 So. 2d at 621. The Court concluded by urging the legislature "to consider amending the statute to empower the Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by revision commissions or the legislature." *Smith,* 606 So. 2d at 622. Justice Overton also had previously suggested that a process be created to remedy judicially invalidated ballot language. *See Askew*, 421 So. 2d at 157.

While the Florida Legislature has not acted upon judicial suggestions to allow the courts to redraft a defective ballot summary, subsequent to *Smith v. American Airlines*, the legislature revised section 101.161 to remove legislatively proposed amendments from the strict statutory requirement that voters receive on

their ballots an "explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure."

This increased flexibility was discussed by the First District Court of Appeal in *Sancho v. Smith*, 830 So. 2d 856 (Fla. 1st DCA 2002), *rev. denied*, 828 So. 2d 389 (2002). Therein, the Florida Legislature used the complete text of the proposed amendment as the ballot summary. Supervisors of Elections challenged this approach, arguing that use of the text did not constitute a "summary" of the amendment. The First District rejected the challenge, explaining that "the Florida Constitution does not impose a brevity requirement for ballot summaries," and the brevity requirement in Section 101.161(1) was no longer applicable to amendments submitted by the legislature. *Sancho,* 830 So. 2d at 863. The Court explained that "[n]othing in the language of the ballot summary for Amendment 1 is untrue or misleading. Perhaps the summary could have been more concise, but that is not the test of its constitutional validity." *Id.* The Court correctly recognized that, while dispensing with a briefer summary may create practical problems, the Court's "review of proposed amendments is narrowly focused on legal and constitutional issues presented." *Sancho,* 830 So. 2d at 864.

After *Sancho v. Smith*, Justice Bell, in a concurring opinion, suggested that flaws in a summary in another initiative "could easily have been avoided by simply submitting the actual amendment itself." *Adv. Op. to Att'y Gen. re Additional*

Homestead Exemption, 880 So. 2d 646, 654 (Fla. 2004). Subsequently, the Florida Legislature adopted this approach and this Court approved it, noting that "both prongs of the summary analysis [advising the voters of the chief purpose of the amendment and avoiding misleading the voters] are easily satisfied since the entire amendment also serves as the summary to be placed on the ballot." *Adv. Op. to the Att'y Gen. Re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo*, 959 So. 2d 210, 214 (Fla. 2007).

In *Smith v. American Airlines,* the Court expressed the further concern that section 101.161 "specifically provides that the wording of the ballot summary shall be embodied in the Commission proposal itself." *Smith,* 606 So. 2d at 622. Today, section 101.161 dictates that "[t]he wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution. . . " § 101.161(1), Fla. Stat. (2009) (e.a.).

This statutory command would be problematic if the Court attempted to amend a defective summary or write a new one. However, we respectfully suggest that the Court may direct the Secretary of State to place the complete amendment text on the ballot as the "substance" and a substitute for a summary. Such a remedy would be consistent with section 101.161 because the amendment text is "embodied in the joint resolution" which proposed Amendment 3 to the electors. § 101.161(1), Fla. Stat. (2009). Thus, this remedy would address a ballot title or

summary defect in a manner that complies with the law and constitutes a lesser intrusion into the democratic process than striking Amendment 3 from the ballot. If the Court finds the ballot title and summary clearly and conclusively defective, it should substitute the text of Amendment 3.

CONCLUSION

Wherefore, Amicus Florida Realtors® respectfully requests that this Court determine that the trial court (1) erroneously determined that the ballot summary for Amendment 3 fails to inform the voter, in clear and unambiguous language, of the chief purpose of the amendment and is misleading, and/or (2) erred in striking Amendment 3 from the ballot. For the reasons of law and policy discussed above, the decision below should be reversed or, in the alternative, the text of Amendment 3 should be substituted for the ballot title and summary adopted by the legislature.

Respectfully submitted on this 9th day of August, 2010.

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I certify that a copy of this "Brief of Amicus Curiae Florida Realtors®, in Support of Appellant" was furnished by hand delivery on this 9th day of August 2010, to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure as the type style utilized is 14-point New Times Roman.

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