IN THIS COURT OF FLORIDA

Case No. SC10-1508

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

Appellant,

v.

BRIAN K. DOYLE and FLORIDA AFL-CIO,

Appellees

ANSWER BRIEF OF APPELLEES BRIAN K. DOYLE AND FLORIDA AFL-CIO

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TABLE OF CONTENTS

Statement of the Facts 1

Summary of Argument 4

Argument 7

THE BALLOT AND SUMMARY OF AMENDMENT 3 ARE MATERIALLY MISLEADING AS TO TWO SIGNIFICANT ELIGIBILITY PROVISIONS 7

The ballot summary fails to inform the voter that only properties purchased after January 1, 2010 are eligible for an additional exemption 10

The ballot summary erroneously indicates that certain homeowners would not be eligible for the additional exemption 14

THE COURT SHOULD NOT SUBSTITUTE THE ENTIRE AMENDMENT IN PLACE OF THE DEFECTIVE SUMMARY 19

Conclusion 21

Certificate of Service 22

Certificate of Compliance 22

TABLE OF AUTHORITIES

Cases **Page**

Additional Homestead
880 So. 2d 646 (Fla. 2004) 19, 20

Armstrong v. Harris
773 So. 2d 7 (Fla. 2000) 8

Askew v. Firestone
421 So. 2d 151 (Fla. 1982) 8, 13

Casino Authorization
656 So. 2d 466 (Fla. 1995) 9

Florida Department of State v. Slough
992 So. 2d 142 (Fla. 2008) 8, 11, 12

Florida Marriage Protection Amendment
926 So. 2d 1229 (Fla. 2006) 8

Independent Nonpartisan Comm'n
926 So. 2d 1218 (Fla. 2006) 8

Laws Related to Discrimination
632 So. 2d 1018 (Fla. 1994) 9, 18

Limited Political Terms
592 So. 2d 225 (Fla. 1991) 9

People's Property Rights
699 So. 2d 1304 (Fla. 1997) 17, 18, 19

Property Tax Cap
2 So. 3d 968 (Fla. 2009) 12, 13

Proposed Property Rights
644 So. 2d 486 (Fla. 1994) 18

Right of Citizens to Choose Healthcare Providers
705 So. 2d 563 (Fla. 1998) 9, 17

Smith v. American Airlines
606 So. 2d 618 (Fla. 1992) 9, 13, 18

Spending for Experimentation
959 So. 2d 210 (Fla. 2007) 19, 20

Voluntary Universal Pre-Kindergarten Education
824 So. 2d 161 (Fla. 2002) 7

Voter Approval Required for New Taxes
699 So. 2d 1304 (Fla. 1997) 18

Wadhams v. Board of County Comm'rs
567 So. 2d 414 (Fla. 1990) 13

Florida Constitution

Fla. Const. art. VII 1, 10
Fla. Const art. XII 2, 10, 13, 14

STATEMENT OF THE FACTS

Appellees accept the statement of the facts presented in the Secretary's brief with one clarification.

The Secretary states:

> Amendment 3 would also amend Article XII of the Florida Constitution to establish the effective date of the additional exemption as January 1, 2011, "for properties purchased on or after January 1, 2010." Omission of the effective date was not challenged or addressed in the order appealed.

Appellant brief, p. 4. It is correct that the January 1, 2011 effective date is not challenged in this action. The January 1, 2010 provision was not part of the effective date. It was a condition of eligibility for the additional homestead exemption. The failure of the ballot summary to mention it was challenged below and was one of the two grounds upon which the lower court struck the measure from the ballot.

For the Court's convenience, the pertinent portions of the text of Amendment 3 and the ballot title and summary are repeated here:

Amendment Text

Article VII

SECTION 6. Homestead exemptions. ―

* * * * *

(f)(1) By general law, and subject to conditions specified therein, the legislature shall provide an additional homestead exemption to the person or persons who:

a. Establish the right to receive the homestead exemption in subsection (a) within one year after purchasing the homestead property; and

b. Have not owned a principal residence during the eight year period before the purchase. For married persons, neither the purchaser nor his or her spouse may have owned a principal residence during the preceding eight years.

(2) The additional homestead exemption shall equal 25 percent of the just value of the property on January 1 of the year in which the homestead exemption in subsection (a) is received, but not more than $100,000.

a. The amount of the additional exemption shall be reduced in each subsequent year by an amount equal to twenty percent of the amount of the initial additional exemption or by an amount equal to the difference between the just value of the property and the assessed value determined under subsection (d) of section 4 of this Article, whichever is greater.

b. The additional homestead exemption shall not apply after the fifth year after the initial additional exemption is granted.

(3) Only one additional exemption under this subsection may apply to a single homestead property.

* * * * *

Article XII

SCHEDULE

Property tax limit for nonhomestead property.—The amendment to Section 4 of Article VII reducing the limit on the

maximum annual increase in the assessed value of nonhomestead property to five percent from ten percent and this section shall take effect January 1, 20ll.

Additional homestead exemption for first-time homestead property owners.—The amendment to subsection (f) of Section 6 of Article VII providing for an additional homestead exemption for persons who have not owned a principal residence within an eight-year period and this section shall take effect January 1, 2011, and shall be available for properties purchased on or after January 1, 2010.[1]

Ballot Title and Summary

PROPERTY TAX LIMIT FOR NONHOMESTEAD PROPERTY; ADDITIONAL HOMESTEAD EXEMPTION FOR NEW HOMESTEAD OWNERS.—The State Constitution generally limits the maximum annual increase in the assessed value of nonhomestead property to 10 percent annually. This proposed amendment reduces the maximum annual increase in the assessed values of those properties to 5 percent annually.

This amendment also requires the Legislature to provide an additional homestead exemption for persons who have not owned a principal residence during the preceding 8 years. Under the exemption, 25 percent of the just value of a first-time homestead, up to $100,000, will be exempt from property taxes. The amount of the additional exemption will decrease in each succeeding year for 5 years by the greater of 20 percent of the initial additional exemption or the difference between the just value and the assessed value of the property. The additional exemption will not be available in the 6th and subsequent years.

[1] Underlining is as it appears in SJR 532 and signifies language that would be added to the constitution.

SUMMARY OF ARGUMENT

The lower court properly removed Amendment 3 from the ballot because the ballot summary is materially misleading in two respects. First, the amendment makes an additional homestead exemption available to anyone who has not owned a principal residence for eight years prior to purchasing the property on which the exemption is sought, *provided that the property was purchased on or after January 1, 2010.* The ballot summary mentions the eight year requirement, but fails to disclose that the exemption is only available for properties purchased on or after January 1, 2010, thus eliminating from eligibility most current property owners in Florida. The provision is not just an effective date that indicates when a property owner can first *apply* for the new exemption. It is a condition on eligibility that permanently disallows the exemption for anyone who purchased the property before January 1, 2010. The provision is not, as the Secretary argues, "merely a detail" that does not have to be included in the summary. It is a significant limitation on eligibility for an exemption that is a chief aspect of the proposed amendment.

Second, the summary states that it is only available for a "first-time homestead." The term "first-time" indicates to the voter that in order to be eligible for the exemption, a person must never previously have owned homestead property. There was such a requirement in SJR 532 as originally

introduced, but it was removed in favor of the eight year limitation prior to passage. There is now no requirement that a person have not previously declared homestead and there is no mention of the term "first-time homestead" or any equivalent language in the amendment text. Contrary to what the ballot summary indicates, the exemption is available to anyone who meets the eight year requirement regardless of how many times prior to that the person declared homestead.

The Secretary suggests that voters should realize that the provision requiring an eight year hiatus on ownership of a principal residence defines "first-time homestead." However, there is nothing in the summary to indicate that the two references are linked or that "first-time homestead" really means first time in eight years. The terms "principal residence" and "homestead" are not synonymous. It is reasonable for a voter to conclude from the summary language that the inclusion of both terms means that a person must not have owned a principal residence for eight years before purchase *and* never previously have declared homestead.

These two provisions create material conditions on a chief aspect of the proposed amendment. This Court has made clear that it is not enough that voters might have been able to learn of the actual effect of the amendment before entering the voting booth. Provisions of this significance must be noted

in the ballot summary, and the erroneous statements in the summary of Amendment 3 are misleading to an extent that this Court has consistently held to be of sufficient magnitude to require removal from the ballot.

The Court should not, as the amicus suggests, order the entire 12-page amendment placed on the ballot in lieu of the summary. There is no legal authority or precedent for the Court to take such action and it would set a bad precedent.

ARGUMENT

THE BALLOT AND SUMMARY OF AMENDMENT 3 ARE MATERIALLY MISLEADING AS TO TWO SIGNIFICANT ELIGIBILITY PROVISIONS.

Amendment 3 would effect a major change in the Florida Constitution by significantly reducing the primary source of revenue by which local governments fund their operations. The amendment would lower by 50% the cap on annual increases in assessments of non-homestead property – which is not challenged in this action – and would provide an additional homestead exemption to a limited group of persons who are able to meet certain key conditions, which is challenged. Because the proposition fails to give voters clear and unambiguous notice of those conditions, the lower court properly ordered it removed from the ballot.

The standards for evaluation of a ballot title and summary have been oft repeated by this Court. In order to appear on the ballot, the title and summary of a proposed amendment must be accurate and must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Voluntary Universal Pre-Kindergarten Education*, 824 So. 2d 161, 166 (Fla. 2002). 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 held that the application of these principles requires a reviewing court to focus on two questions:

(1) Whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and

(2) Whether the language of the title and summary, as written, misleads the public.

Florida Marriage Protection Amendment, 926 So. 2d 1229, 1236 (Fla. 2006); *Independent Nonpartisan Comm'n*, 926 So. 2d 1218 (Fla. 2006). These requirements are rooted in constitutional law and apply "across-the-board to all constitutional amendments" including those proposed by the Florida Legislature. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000); *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008).

It is true, as the Secretary states, that 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 at 1233 (Fla.

2006). However, the Court has also emphasized the equal importance of ensuring that the ballot title and summary are clear and accurate. *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.") Accordingly, the Court has not hesitated to remove measures from the ballot when the title and summary included terminology that was affirmatively misleading or omitted material facts necessary to make the summary not misleading, *Limited Political Terms*, 592 So. 2d 225 (Fla. 1991); *Casino Authorization*, 656 So. 2d 466, 469 (Fla. 1995) ("This language is misleading not because of what it says, but what it fails to say."), or contained an ambiguity that required the voter to guess at the amendment's meaning or effect. *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992); *Right of Citizens to Choose Healthcare Providers*, 705 So. 2d 563 (Fla. 1998).

The ballot summary for Amendment 3 contains two significant flaws, both of which are materially misleading and either of which independently requires that the proposition be removed from the ballot.

The ballot summary fails to inform the voter that only properties purchased after January 1, 2010 are eligible for an additional exemption.

The proposal would amend Article VII, Section 6 of the Florida Constitution to provide certain persons with an additional homestead exemption equal to 25% of the just value of the property in the first year of its application and a reducing percentage during the next four years. However, the amendment makes the exemption available to only a narrow portion of Florida homeowners by placing a significant condition upon eligibility. The proposal would amend Article XII of the Florida Constitution to include the following language in pertinent part:

> The amendment to subsection (f) of Section 6 of Article VII providing for an additional homestead exemption for persons who have not owned a principal residence within an eight-year period and this section shall take effect January 1, 2011, ***and shall be available for properties purchased on or after January 1, 2010***.

[emphasis added] Neither the title nor the summary give any hint that the additional exemption is only available for properties purchased on or after January 1, 2010.

The Secretary argues that the property purchase date "is merely a detail" and then mixes a defense of the January 1, 2010 purchase date requirement with a defense of the unchallenged January 1, 2011 effective date of amendment.

The January 1, 2011 date is truly an effective date, providing the first date on which the additional exemption can be *applied for*. That may well be a mere detail, at least in some amendments, and it is not challenged in this case. The January 1, 2010 purchase date threshold is a different matter entirely. It is not an effective date at all. The language clearly states that the exemption "*shall be available* for properties purchased on or after January 1, 2010." It is a material limitation on eligibility to claim the exemption at any time, eliminating from eligibility most property owners in Florida. It defines the group to whom the new benefit is offered by the amendment.

The Secretary's assertion that the purchase date limitation is merely a detail suggests that it would not be material to a voter's decision, but that makes no sense. As the lower court noted, a voter might be persuaded to vote for the amendment in the mistaken belief that he or she would be entitled to the new exemption and, conversely, a voter might be led to vote against the amendment for concern over the fiscal impact of a new exemption that appears to have broader applicability than it actually has.

This Court has removed from the ballot a number of proposed amendments based upon the failure of the summaries to include material information similar to that which is lacking here. One such case was *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008). The proposed

amendment eliminated state required school property taxes and purported to replace them with an "equivalent hold harmless amount." The summary mentioned the hold harmless provision, but failed to mention that the amendment only required it for one fiscal year. The Court cited the failure of the summary to give notice of this limitation as a ground for removing the proposal from the ballot. The Court stated:

> We agree with the trial court that the summary is misleading because of its failure to mention the duration limitation with regard to the "hold harmless amount," which is one of the chief aspects of the amendment. This failure leaves the voters with the impression that the amendment will accomplish something permanent and continuing, when in reality it does not.

Id. at 148. As in *Slough*, the failure of the summary in the case at bar relates to one of the chief aspects of the proposed amendment — the additional homestead exemption — and the summary tells the voters that the exemption is available to many more property owners than it actually is.

In *Property Tax Cap*, 2 So. 3d 968 (Fla. 2009), this Court again removed a provision from the ballot because of its failure to notify the voters of a material condition. The amendment would have placed a cap on total ad valorem taxes, permitting exceptions with voter approval. The Court found that the summary was misleading because it failed to note that even with voter

approval, an exception from the limit could not extend for longer than two years.[2]

The Secretary cites language in several cases to the effect that a voter is expected to become acquainted with the details of a ballot proposal and to have a reasonable degree of common knowledge. The cases cited and others making similar comments are inapposite. The quoted language was discussing either details not deemed by the court to be material to a voter's decision or the meaning of commonly understood terms. Such language, which is often cited out of context in ballot review cases, has never been used by this Court to excuse a material omission or misstatement. To the contrary, the Court has made clear that the ballot title and summary must themselves fully and accurately inform the voter of all material provisions, and that failure to do so will render the proposition unfit for the ballot. *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992); *Wadhams v. Board of County Comm'rs*, 567 So. 2d 414 (Fla. 1990); *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982).[3]

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[2] The factors that motivated the dissent in *Property Tax Cap* are distinguishable. The eligibility limitation in the instant case is considerably more significant than the durational limitation in *Property Tax Cap*, and this legislative proposal is not subject to the 75 word limit on the summary.

[3] In this case, even a conscientious voter who reads the text of the proposed amendment itself could well be misled as to the post-January 1, 2010 property purchase requirement. Article XII of the Constitution, entitled "Schedule," which is where the purchase date limitation would be placed, contains a series of true effective dates and grandfather provisions relating to previous

The ballot summary erroneously indicates that certain homeowners would not be eligible for the additional exemption.

The pertinent portion of the ballot summary reads:

> This amendment also requires the Legislature to provide an additional homestead exemption for persons who have not owned a principal residence during the preceding 8 years. Under the exemption, 25 percent of the just value of ***a first-time*** homestead, up to $100,000, will be exempt from property taxes. * * * *.

[emphasis added] The use of the term "first-time homestead" conveys the unmistakable message that in order to be eligible for the additional exemption, a property owner must never have previously declared homestead. In fact, nothing in the text of the proposed amendment requires that a person be a first-time homestead owner or that property be designated homestead for the first time. The pertinent text of the proposed amendment states:

> (f)(1) By general law, and subject to conditions specified therein, the legislature shall provide an additional homestead exemption to the person or persons who:
>
> a. Establish the right to receive the homestead exemption in subsection (a) within one year after purchasing the homestead property; and

---

amendments. Most of the text of Amendment 3 adding language to Article XII does, in fact, provide for the effective dates of the amendment's various provisions. However, inserted at the very end is the phrase limiting the availability of the additional homestead exemption to properties purchased on or after January 1, 2010. If enacted, it would be the only provision in Article XII establishing an eligibility requirement rather than an effective date.

> b. Have not owned a principal residence during the eight year period before the purchase. For married persons, neither the purchaser nor his or her spouse may have owned a principal residence during the preceding eight years.

The only eligibility requirement in the amendment relating to period of ownership is that the person have not owned "a principal residence" during the preceding eight years. A person who has lived in rental housing since 2001 would be eligible for the exemption regardless of how many times the person had declared homestead in prior years, but that is not what the summary says.

There appears to be a consensus in this case that the terms "principal residence" and "homestead" are not synonymous. The lower court stated:

> The summary does refer to the principal residence requirement, but voters cannot be presumed to know that the authors intended that the term "principal residence" be read synonymously with "homestead." Florida law does not define "principal residence" as the equivalent of "homestead" for tax purposes.

[R. 56] The Secretary agrees that the terms are not synonymous, stating that, "Contrary to the trial court's order, 'principal residence' is not intended to be read synonymously with 'homestead.'" Appellant brief, p. 20.[4] And the legislative history of SJR 532, which placed Amendment 3 on the ballot, shows that the Legislature in fact was not using the terms synonymously. The

[4] Despite the Secretary's acknowledgment that the terms are not intended to be read synonymously, her argument rests upon the assumption that a voter will read them synonymously.

language of the pertinent portion of SJR 532 *as originally introduced* in the Legislature said just what the ballot summary says:

> (c) As provided by general law and subject to conditions specified therein, every person who establishes the right to receive the homestead exemption provided in subsection (a) within one year after purchasing the homestead property ***and who has not previously owned property to which the homestead exemption provided in subsection (a) applied*** is entitled to an additional homestead exemption in an amount equal to fifty percent of the homestead property's just value on January 1 of the year the homestead is established. The amount of the initial additional exemption shall be reduced by twenty percent on January 1 of each year after the additional exemption is granted. ***The additional exemption is not available if any owner of the property has previously owned property to which the homestead exemption provided in subsection (a) applied.***[5]

[emphasis added] SJR 523 (3/3/2009).[6] The resolution was amended before passage, deleting from the proposed amendment the language limiting the assessment to property owners who had "not previously owned property to which the [current] homestead exemption" applied and the language specifying that "the additional exemption is not available if any owner of the property has previously owned property to which the [current] homestead exemption" applied. The deleted language was replaced with the current language limiting the new exemption to persons who had not owned a principal residence for the eight years prior to purchasing the property. The ballot summary added a

[5] The referenced subsection (a) is the current homestead exemption.

[6] http://www.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s0532.pdf

reference to the new "principal residence" provision, but failed to delete reference to the now non-existent limitation to first-time homestead owners.[7]

Thus, it is undisputed that the references in the ballot summary to "principal residence" and to "first-time homestead" are to two different things. Nevertheless, the Secretary's position would expect a voter to conclude from the summary that "homestead" really means "principal residence" and "first-time" really means "the preceding eight years." A voter could more rationally conclude that in order to be eligible for the additional homestead, 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 property a homestead.

At very least, the phraseology of the summary is ambiguous as to this material eligibility requirement. Voters might well vote for or against the proposed amendment based upon a misunderstanding of the requirement. This Court has frequently removed proposed amendments from the ballot due to similar ambiguities. *E.g.*, *Right of Citizens to Choose Healthcare Providers*, 705 So. 2d 563 (Fla. 1998) (discrepancy between "citizens" in summary and "natural person" in amendment text material ambiguity); *People's Property*

[7] The amicus brief gives an extensive explanation of why the change in wording came about. However, even the best of intentions does not substitute for a clear and unambiguous ballot summary.

Rights, 699 So. 2d 1304 at 1307 (Fla. 1997) (discrepancy between "people" in title and "owner" in summary material ambiguity); *Proposed Property Rights*, 644 So. 2d 486 at 395 (Fla. 1994) (material ambiguity because "owner" in summary included natural persons and businesses while text of amendment didn't define "owner" and included no reference to businesses); *Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) (material ambiguity because summary language could cause voter to conclude amendment only affected existing laws while it also curtailed power of government to enact new laws on subject); *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992) (reference to "ad valorem" in summary material ambiguity because term applies to real or personal property."). The Court has consistently recognized that a proposed amendment cannot be allowed on the ballot when the summary contains an ambiguity that requires voters to guess at the amendment's meaning or effect.[8]

The Secretary concedes that "Amendment 3's chief purpose is to provide an additional homestead exemption to a particular subset of individuals." Appellant brief, p. 14. The Secretary is correct. What the Secretary overlooks is

[8] The fact that the ambiguity also appears in the text of an amendment, as it does in the Schedule portion of Amendment 3, does not cure the defect in the summary. This Court has previously removed proposed amendments that contained material ambiguities even when the ambiguous language in the summary had been lifted verbatim from the text of the proposed amendment itself. See, *e.g.*, *Voter Approval Required for New Taxes*, 699 So. 2d 1304 (Fla. 1997); *Property Rights*, 699 So. 2d 1304 (Fla. 1997).

that the subset consists of persons who (1) own property that was purchased after January 1, 2010, and (2) have not owned a principal residence in the eight years prior to purchasing the property. The problem is that the summary does not mention the first requirement at all and is misleading as to the second requirement. A survey of Supreme Court case law reviewing proposed constitutional amendments over the past thirty years reveals that the court has never sustained a proposition where the ballot title and summary omit a material fact or contain a misleading statement of the type and magnitude that exist in Amendment 3. It should not do so now.

THE COURT SHOULD NOT SUBSTITUTE THE ENTIRE AMENDMENT IN PLACE OF THE DEFECTIVE SUMMARY.

The amicus brief suggests that the Court order that the entire proposed amendment be placed on the ballot in lieu of the summary if it finds the summary to be defective. Such action would be bad public policy and would be unsupported in law.

In support of its suggestion, amicus cites this Court's opinion in *Spending for Experimentation*, 959 So. 2d 210 (Fla. 2007) and Justice Bell's concurring opinion in *Additional Homestead*, 880 So. 2d 646 (Fla. 2004). The opinions do not provide support for amicus' suggested remedy in this case.

In *Spending*, the Court approved an initiative proposal in which the 19-word, one-sentence text of the amendment was repeated verbatim as the summary. The opinion does not indicate that there was any objection to the use of the amendment text as the summary and the Court approved it without further discussion of the issue. In *Additional Homestead*, the Court found that the ballot summary was defective and struck it from the ballot. The Court did not order the 52 word amendment text to be substituted and even Justice Bell did not suggest that the Court should do so. He simply stated:

> The deficiencies in this twenty-two-word ballot summary could easily have been avoided by simply submitting the actual amendment itself, which is less than seventy-five words. I would encourage future proponents of proposed amendments where no summary is necessary to carefully consider whether or not it is best to simply submit the amendment itself in lieu of a summary.

Id. at 880 So. 2d 654.

In contrast to *Spending* and *Additional Homestead*, the amendment in this case consists of twelve pages of complex language that would surely not serve to communicate to the voter in the short time spent in the voting booth the nature of the proposed changes. Moreover, there is not constitutional or statutory authority for this Court to take such action and it has never done so. Even if the Court were to conclude that it has the authority to do so, it is respectfully suggested that to do so would set a bad precedent. If an amendment of this length and complexity is deemed permissible, where would the Court

draw the line? What criteria would the Court use to determine how long is too long and how complex is too complex? It would also invite sponsors to be even more cavalier than many have historically been in the confidence that, at worst, they could rely upon the Court to fix the problem by substituting the entire amendment for them.

CONCLUSION

The Court is respectfully urged to affirm the lower court and order that Amendment 3 be removed from the ballot.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 11th day of August, 2010 to the following:

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_____

BARRY RICHARD

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.

_____

BARRY RICHARD

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