IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-1527
L.T. No.: 2010-CA-2202

DEPARTMENT OF STATE,
an agency of the State of Florida, and
DAWN K. ROBERTS, in her official
capacity as the Secretary of State,

Appellants,

vs.

MONA MANGAT, DIANA DEMEREST,
GRACIE FOWLER, and LOUISA MCQUEENEY,

Appellees.

ANSWER BRIEF OF APPELLEES

MESSER, CAPARELLO & SELF, P.A.
MARK HERRON, ESQ.
Florida Bar No.: 0199737
E. GARY EARLY, ESQ.
Florida Bar No.: 0325147
P.O. Box 15579
Tallahassee, Florida 32317
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

Attorneys for Mona Mangat, Diana Demerest, Gracie Fowler, and Louisa McQueeney

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STATEMENT OF THE CASE

Appellees do not take issue with the Statement of the Case as presented by the Appellants. However, the statement is incomplete in that it fails to recognize that the trial court held that the ballot summary considered and passed by the Legislature was misleading to the electorate, and on that basis the amendment was removed from the 2010 ballot (R.146-147, 149). The Appellants have not challenged the lower court's Final Judgment on that issue, and that ruling is thus no longer in dispute.

STATEMENT OF THE FACTS

Appellees do not dispute the accuracy of the statements contained in the Statement of the Facts. However, the Statement of the Facts is incomplete, and Appellees request that the Court consider the following:

HJR 37 was introduced for consideration by the House of Representatives at its 2010 regular session on March 2, 2010 (R.57). At that time, the proposed ballot summary did not contain the misleading language that necessitated this case.

On March 22, 2010, the House Health Care Regulation Policy Committee adopted one strike-all amendment to House Joint Resolution 37. The strike-all amendment moved the provision from Article X, Miscellaneous, of the Florida Constitution to Article I, Bill of Rights and made several changes to the amendment itself, but made no material changes to the ballot summary (R.58-66).

CS/HJR 37 was introduced and read a first time by publication on March 26, 2010 (R.67-72). The proposed ballot summary did not, at that time, contain the language that the lower court found to be misleading.

On April 19, 2010, six weeks after the introduction of HJR 37 and three days before the final vote of the House on the resolution, the House Rules & Calendar Council adopted a strike-all amendment to CS/HJR 37. The strike-all amendment made several changes to the amendment related to insurance plans, and introduced, for the first time, the misleading ballot summary stating that the amendment would "ensure access to health care services without waiting lists, protect the doctor-patient relationship, and prohibit mandates that don't work" (R.73-81). The bill as amended was thereupon read a first time by publication (R.82-86).

Without further amendment to either the amendment or the summary, CS/CS/HJR 37 passed the House on April 22, 2010 (R.87). CS/CS/HJR 37 passed the Senate on the same day (R.88), and was thereupon Enrolled (R.89-93).

SUMMARY OF THE ARGUMENT

The lower court correctly determined that the ballot summary of Amendment 9 was misleading, thereby requiring removal of the proposed amendment from the ballot. That issue has not been challenged in this appeal. Appellants instead seek to have this Court correct the misleading ballot summary by substituting the amendment in its stead.

There is no authority for this Court to assume the role of the legislature in the amendment process by removing the ballot summary adopted as part of the amendment resolution. It cannot be said that the disputed ballot summary was not added to the resolution as a material element to influence legislators to vote for the joint resolution. Thus, replacing the ballot summary could result in an amendment being placed on the ballot that, in its altered state, may not have had necessary support. In any event, it is not within the powers of the Court to exercise that fundamentally legislative duty.

Applicable precedent stands for the proposition that the Court cannot rewrite legislative action. Other applicable precedent has resulted in this Court's refusal to substitute the language of an amendment for a defective ballot summary. That precedent remains valid and effective. Appellants have provided no legitimate policy reason why the legislature's efforts to amend the Constitution should be treated any differently from those of the citizens of Florida, or the state's constitutionally created commissions. Therefore, this court should not recede from its precedent, and should decline to rewrite the misleading ballot summary considered and adopted by the legislature.

For the reasons set forth herein, the Court should not exercise its judicial powers to rewrite the misleading resolution, and should affirm the action of the lower court in removing Amendment 9 from the 2010 ballot.

STANDARD OF REVIEW

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 & n.10 (Fla. 2000).

ARGUMENT

I. THERE IS NO AUTHORITY FOR THE COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE LEGISLATURE BY ALLOWING PUBLICATION OF THE FULL TEXT OF AMENDMENT 9 ON THE BALLOT IN LIEU OF THE DULY CONSIDERED AND PASSED BALLOT SUMMARY

Appellants argue that the Court should merely substitute the text of Amendment 9 for that of the ballot summary that was passed by the legislature. There is no constitutional authority for the judiciary to determine that legislative action relating to the amendment of the Constitution was made without some specific intent, thus allowing it to be discarded in favor of an alternative judicial proposal.

Legislative Action in Reliance on the Proposed Ballot Summary

In this case, the misleading ballot summary language was added to HJR 37 immediately before the resolution was brought to a vote. The amendment, title and ballot summary were all passed as part of that single vote. No one can say with any certainty what motivated members of the legislature to vote for the resolution, or what the vote of the legislature would have been if the disputed ballot summary

language had not been a material part of the resolution. The ballot summary ascribes what most would perceive as beneficial results of the amendment, i.e. the amendment would "ensure access to health care services without waiting lists, protect the doctor-patient relationship, [and] guard against mandates that don't work." The problem, as found by the lower court, is that those results appear nowhere, either expressly or by implication, in the amendment. (R.146-147) It is as reasonable an assumption as any other that the last minute inclusion of the misleading language in the summary was designed to sway a sufficient number of undecided legislators to vote for, and thus pass the resolution. However, neither the Appellants nor the Appellees can make that determination, and neither can this Court.

It is not within the powers and duties of the Court to guess which portions of the resolution influenced the votes of the legislators, or to substitute its judgment for a resolution that was brought before the legislature and passed in due course. However, the Appellants request that this Court step into the shoes of the legislature, disregard the duly considered ballot summary passed by the legislature during the 2010 Session, and rewrite that summary by substitution. The judicial modification of an act of the legislature is not relief that is authorized by the Constitution, statute or case law when a ballot summary violates the accuracy

requirements of Article XI, § 5 of the Florida Constitution and Section 101.161(1), Florida Statutes.

Authority of the Court to Amend the Legislature's Action

Appellants do not cite or attempt to distinguish *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992), precedent unambiguously holding that the Court lacks authority to rewrite legislative acts, and which was discussed at length in the lower court and relied upon by the trial judge (Tr.58:13-60:25). In *Smith*, the Court struck from the ballot a proposed amendment to the state constitution proposed by the Taxation and Budget Reform Commission because the ballot summary failed to set forth the chief purpose of the proposed amendment. The Court determined that action to be necessary, even though it prevented voters from voting on the merits of the proposal, because the Court lacked authority to revise the Commission's action to conform with Section 101.161(1), Florida Statutes. In so holding, the Court stated 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." *Id.* at 621. The Court then urged the legislature, "in order to prevent this problem from recurring in the future . . . to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by revision commissions or the legislature." *Id.*

The Court's plea to the legislature in *Smith* echoed a nearly identical plea ten years earlier, when the Court was compelled to strike an amendment proposed by the legislature because it found the ballot title and summary clearly and conclusively defective. In *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), Justice Overton recognized issues of the lost opportunity for the public to vote resulting from limitations on the Court's authority to correct misleading ballot language. *Id.* at 157 (Overton, J., concurring). In his concurring opinion, Justice Overton concluded that:

> This Court should do everything possible to cooperate [with the legislature] in establishing such a process so that we may eliminate the necessity for this Court to again have to deny the people a right to vote on the merits of a constitutional proposition due to faulty ballot language.

Id. (emphasis added).

Despite these decades-old entreaties to the legislature to provide authority for the Court to repair proposed amendments stricken due to inaccurate ballot summaries, it has not done so. The Appellants' present assertions that the court possesses inherent, plenary authority to rewrite or replace a ballot summary on the legislature's behalf is unavailing in light of the clear case law and the legislature's perpetual refusal to grant the court such authority.

Appellants' reliance upon the unpublished order of the Florida Supreme Court in *American Civil Liberties Union v. Hood*, Case No. SC04-1671 (Fla. Sept.

2, 2004) is misplaced. There, the Court ordered the Secretary of State to place on the ballot "the actual text of the proposed amendment itself and not the proposed ballot summary." *Id.* The Court provided no analysis, no reasoning, and no authority for this relief. Although it stated an opinion would follow, the Court subsequently determined, again via unpublished order, that it would not issue an opinion in the case. *American Civil Liberties Union v. Hood*, Case No. SC04-1671 (Fla. Dec. 22, 2004). In the absence of some explanation of the basis for the Court's action, the unpublished orders in *ACLU* do not overrule or recede from the Court's opinion in *Smith* that it lacks authority to rewrite or correct a misleading ballot summary.

Requirement for a Ballot Summary

Appellants argue that the legislature is not required to provide an explanatory statement, i.e. a ballot summary, for an amendment placed on the ballot by legislative resolution. *See* Initial Brief at 11.

Appellants are correct in noting that Article XI, Section 1 of the Constitution does not require a "ballot summary" for a legislatively proposed constitutional amendment. It is equally correct that the Constitution does not require a ballot summary for an amendment proposed by a revision commission, (Article XI, § 2, Fla. Const.), an amendment proposed by an initiative petition, (Article XI, § 3, Fla. Const.), an amendment proposed by a constitutional convention, (Article XI, § 4,

Fla. Const.), or an amendment by the Taxation and Budget Reform Commission, (Article XI, § 6, Fla. Const.) All that is constitutionally required is that the amendment, regardless of by whom it is proposed, "be submitted to the electors." Article XI, § 5, Fla. Const.

Rather than being a requirement directly imposed by the Constitution, it is Section 101.161(1), Florida Statutes, that imposes a clear duty upon the legislature to include a ballot summary in the joint resolution being proposing the amendment to the State Constitution. Section 101.161(1), Florida Statutes, provides:

> (1) Whenever 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 after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The 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, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. 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. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5). 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.

(Emphasis added).

It was the legislature itself that chose to impose the requirement that the "substance of the amendment" be presented to the electorate in "clear and unambiguous language."[1] The "substance of the amendment" must be embodied in the authorizing resolution or proposal. This Court has repeatedly construed "substance of the amendment" as synonymous and interchangeable with "ballot summary." *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 184 (Fla. 2009); *Armstrong v. Harris*, *supra* at 12-13; *Advisory Opinion to the Attorney General - - Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993); *Carroll v. Firestone*,

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[1] It has been a statutory requirement since 1895 that, whenever a constitutional amendment is submitted to a vote of the people, the "substance of such amendment" be printed on the ballot. *See* §34, Ch. 4238 (1895). In 1945, the statutory requirement was amended to provide:

> The phraseology of the substance of the amendment or other public measure furnished to the several counties by the Secretary of State so as to insure uniformity.

§1, Ch. 22616 (1945). In 1973, the statutory requirement was further revised to provide:

> The exact wording of the substance of the amendment or other public measure to appear on the ballot shall be embodied in the enabling legislation, and shall be furnished to the several counties by the Department of State….

§1, Ch. 73-7, Laws of Florida.

497 So. 2d 1204, 1206 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351, 1354-1355 (Fla. 1984).

Appellants' assertion that the legislature is not required to provide a ballot summary is incorrect.[2] While the legislature is not bound by the 75 word limitation on the ballot summary, the legislature is required to provide a summary for submission to the voters as part of its resolution. The basis for the extended word count was explained by the First District Court of Appeal, which held that "the lack of a single subject requirement (which is imposed on citizen's initiatives) makes legislative proposals clearly different requiring the Legislature have the freedom to adequately explain the proposed change in a more lengthy ballot summary." *Florida Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 676 (Fla. 1st DCA 2007).

The legislature in this case adopted a more lengthy ballot summary. The lower court found the validly adopted ballot summary to be misleading. Thus, the only constitutional remedy is to remove the joint resolution from the ballot. The remedy is not for the Court to substitute itself for the legislature, determine what elements of the legislature's resolution must be retained and which can be

[2] It is also contrary to legislative practice since 2000, when Section 101.161(1), Florida Statutes, was amended to exempt "amendments proposed by joint resolution" from the 75 word limit for any legislative ballot summary explaining the "chief purpose" of the amendment. In every instance since 2000, the legislature has provided a ballot summary consistent with Section 101.161(1), Florida Statutes.

discarded and, in effect, become an active participant in the amendment of the Constitution by legislative resolution.

Deference

Appellants attempt to bolster their argument that the Court should craft some hybrid judicial/legislative solution in this case with an analysis of cases holding that the judiciary should employ deference to its co-equal branch of government. *See* Initial Brief at 9-10. However, despite the general expectation of comity between the branches, there is nothing that ascribes greater importance, or that requires a heightened degree of deference to constitutional amendments proposed by legislative resolution, than should be granted to amendments proposed by any constitutional means. In that regard, this Court has assessed the relative importance of each method of amending the Constitution, and in determining whether any is of more importance than another, held that:

> The four methods of amending our constitution must be considered as a whole to effect their overall purpose. *Smathers v. Smith*, 338 So.2d 825 (Fla. 1976). They are delicately balanced to reflect the power of the people to propose amendments through the initiative process and the power of the legislature to propose amendments by its legislative action without executive check.... [A]ny restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process. The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity.

State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566 (Fla. 1980). That the Court does not "play favorites" to upset the balance between the various amendment processes is well established.

> Although this Court traditionally has accorded a measure of deference to constitutional amendments proposed by the Legislature, our discretion is limited by the constitution itself. The accuracy requirement in article XI, section 5, imposes a strict minimum standard for ballot clarity. This requirement plays no favorites - it applies across-the-board to *all* constitutional amendments, including those proposed by the Legislature.

Armstrong v. Harris, *supra* at 21 (emphasis in original).

The suggestion that the Court has the authority to merely substitute an amendment for the required ballot summary is unsupported by directly applicable precedent. In *Advisory Opinion to the Attorney General re: Additional Homestead Tax Exemption*, 880 So. 2d 646, 654, (Fla. 2004), the Court considered the 22 word ballot summary for an amendment proposed by initiative petition that contained fewer than 75 words. The proposed amendment was removed from the ballot due to a misleading statement in the summary.

Under the theory advanced by Appellants, the Court in *Additional Homestead Tax Exemption* should have just substituted the amendment for the ballot summary since the amendment did not exceed the applicable word limit. However, there was no suggestion in that case that the Court possessed the

constitutional authority to substitute the amendment for the summary that was authorized by the citizen signators of the initiative petition. Rather, the Court understood the limitation on its power to substitute its judgment for that of the sponsors as reflected in the concurring opinion of Justice Bell, who noted that:

> The irony of this result is difficult to ignore. 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 654.

The process of amendment by joint resolution is no more worthy of deference than is the process of amendment by any other constitutional method. A legislative proposal is not entitled to an extraordinary set of procedures or remedies different from those accorded to amendments proposed in other ways, including by initiative. In that regard, this Court has "traditionally [ ] accorded a measure of deference to the Legislature....This deference, however, is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000). That this Court found no authority for it to substitute a proposed amendment as a compliant ballot summary in *Additional Homestead Tax Exemption*, an initiative case, is persuasive authority

for the limitation on the Court's constitutional authority to discard a validly passed legislative ballot summary and substitute the text of a proposed amendment as an alternative summary.

Balancing Policy

Finally, the Court should consider all of the policy considerations that apply in cases in which the fundamental charter of our state is being opened for change.

Courts must act with "extreme care, caution, and restraint" before removing a constitutional amendment from the vote of the people. *Advisory Opinion to the Attorney General re: Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006) (*quoting Askew v. Firestone*, 421 So. 2d at 156)). Whether a proposed constitutional amendment is wise policy on the merits is not a question for the courts, so long as the statutory requirements are satisfied. (emphasis added) *See Advisory Opinion to the Attorney General re: Additional Homestead Tax Exemption, supra* at 648. 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, supra* at 154. 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, Section 101.161, Florida Statutes mandates that the voter (1) has notice as to what he or she is voting for, and (2) not be misled by the content of the ballot summary.

Even in recognition of the policy of providing the electorate with the right to vote on an amendment, the courts have applied the sanction of removal from the ballot to avoid the influence of electors through misleading efforts. For example, this Court has held that "the ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth." *Evans v. Firestone*, *supra* at 1355. Justice Overton opined that the comments affixed to the ballot summary under review in *Evans:*

> [M]ay meet advertising criteria for the marketing of a product, but it cannot be tolerated for constitutional ballot language that is intended to inform the voter of what changes in the constitution are being proposed. We emphatically stated in *Askew v. Firestone,* 421 So.2d 151, 155 (Fla.1982), that the ballot language must be objective and fair and must sufficiently advise the voter so as to permit a knowledgeable decision on the merits of the proposal. In my view, the ballot language in the

> instant case appears to have been intentionally drawn to create an erroneous perception of the effect of this constitutional proposal. I am at a loss to understand why the proponents of this amendment did not take heed of the *Askew v. Firestone* decision.

Id. at 1356.

Similarly, in establishing the legal and policy considerations that affect the decision as to whether to remove an amendment from the ballot, this Court has held that:

> We have previously stated that the "ballot summary should tell the voter the legal effect of the amendment, and no more." *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). This summary flies under false colors with a promise of "tax relief." *See Askew*, 421 So. 2d at 156 ("A proposed amendment cannot fly under false colors . . ."). The use of the phrase "provides property tax relief" clearly constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment. *See In re Advisory Op. to the Att'y Gen.--Save Our Everglades*, 636 So. 2d 1336, 1341-42 (Fla. 1994) (finding "emotional language" of ballot title and summary to be misleading as it resembled "political rhetoric" more than "accurate and informative synopsis"); *Evans*, 457 So. 2d at 1355 (holding ballot summary defective in part because phrase "thus avoiding unnecessary costs" constituted "editorial comment"). This misleading language does not reflect the true legal effect of the proposed amendment. *See Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994) (stating that the ballot summary must be accurate and informative and "objective and free from political rhetoric").

Advisory Opinion to the Attorney General re: Additional Homestead Tax Exemption at 653.

Appellants argue that regardless of how misleading a resolution may be, the Court should absolve the legislature of any responsibility for its efforts and substitute an alternative ballot summary for consideration by the electorate – a remedy that is not available to any other form of amendment, including those proposed by the citizens themselves.[3] Thus, under Appellants' argument, the legislature is entitled to a remedy for misleading language that is unavailable to any other form of amendment proposal. The effect of Appellants' position would give the legislature license to insert all manner of misleading or deceptive political rhetoric in its ballot summaries with impunity, hoping it would go unchallenged, but knowing that there would be no meaningful sanction if it were. Such a license would fly in the face of equally important and applicable policy considerations which provide that:

> Deception of the voting public is intolerable and should not be countenanced. The purpose of section 101.161(1)

[3] Though not directly at issue in this case, there may be instances in which the publication of the proposed amendment in lieu of a ballot summary may not, either due to omission or lack of context, explain the chief purpose of the measure as required by Section 101.161(1), Florida Statutes. That is a statutory purpose of a ballot summary. In such a case, the legal effect of an amendment may involve an explanation that goes beyond the words of the amendment itself. Mere placement of the text of an amendment on the ballot in lieu of a defective summary, without analysis of its chief purpose and effect, does not assure that the electorate is advised on the meaning and ramifications of the proposed amendment.

> is to assure that the electorate is advised of the meaning and ramifications of the proposed amendment. Because the ballot at issue failed to comply with the mandate of the legislature expressed in section 101.161(1), the proposed amendments must be stricken.

Wadhams v. Board of County Commissioners of Sarasota County, Florida, 567 So. 2d 414, 418 (Fla. 1990).

CONCLUSION

The lower court correctly determined that the ballot summary of Amendment 9 was misleading, thereby requiring removal of the amendment from the ballot. There is no authority for this Court to assume the role of the legislature in the amendment process by removing the ballot summary adopted as a material part of the amendment resolution. It cannot be said that the disputed ballot summary was not added to the resolution days before it came to a vote as a means to influence legislators to vote for the resolution. Thus, replacing the ballot summary could result in an amendment being place on the ballot that in its altered state may not have had necessary support.

Applicable precedent stands for the proposition that the Court cannot rewrite legislative action. Other applicable precedent has resulted in this Court's refusal to substitute the language of an amendment for a defective ballot summary. That precedent remains valid and effective. Appellants have provided no legitimate policy reason why the legislature's efforts to amend the Constitution should be

treated any differently from those of the citizens of Florida, or its constitutionally created commissions. Therefore, this court should not recede from its precedent.

For the reasons set forth herein, the Court should not exercise its judicial powers to rewrite the misleading resolution, and should affirm the action of the lower court in removing Amendment 9 from the 2010 ballot.

Respectfully submitted,

_____

MARK HERRON, ESQ.
Florida Bar No. 0199737
E. GARY EARLY, ESQ.
Florida Bar No. 0325147
MESSER, CAPARELLO & SELF, P.A.
P.O. Box 15579
Tallahassee, Florida 32317
(850) 222-0720 Telephone
(850) 224-4359 Facsimile

ATTORNEYS FOR APPELLEES, MONA MANGAT, DIANA DEMEREST, GRACIE FOWLER, AND LOUISA MCQUEENEY.

CERTIFICATE OF FONT COMPLIANCE

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

_____
E. GARY EARLY, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service and by electronic mail on this 10th day of August, 2010:

Russell S. Kent, Esq.
Russell.kent@myfloridalegal.com
Ashley E. Davis, Esq.
Ashley.davis@myfloridalegal.com
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

C.B. Upton, Esq.
General Counsel
cbupton@dos.state.fl.us
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399

_____
E. GARY EARLY, ESQ.

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MESSER, CAPARELLO & SELF, P.A.
MARK HERRON, ESQ.
Florida Bar No.: 0199737
E. GARY EARLY, ESQ.
Florida Bar No.: 0325147
P.O. Box 15579
Tallahassee, Florida 32317
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

Attorneys for Mona Mangat, Diana Demerest, Gracie Fowler, and Louisa McQueeney

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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 & n.10 (Fla. 2000).

ARGUMENT

I. THERE IS NO AUTHORITY FOR THE COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE LEGISLATURE BY ALLOWING PUBLICATION OF THE FULL TEXT OF AMENDMENT 9 ON THE BALLOT IN LIEU OF THE DULY CONSIDERED AND PASSED BALLOT SUMMARY

Appellants argue that the Court should merely substitute the text of Amendment 9 for that of the ballot summary that was passed by the legislature. There is no constitutional authority for the judiciary to determine that legislative action relating to the amendment of the Constitution was made without some specific intent, thus allowing it to be discarded in favor of an alternative judicial proposal.

Legislative Action in Reliance on the Proposed Ballot Summary

In this case, the misleading ballot summary language was added to HJR 37 immediately before the resolution was brought to a vote. The amendment, title and ballot summary were all passed as part of that single vote. No one can say with any certainty what motivated members of the legislature to vote for the resolution, or what the vote of the legislature would have been if the disputed ballot summary

language had not been a material part of the resolution. The ballot summary ascribes what most would perceive as beneficial results of the amendment, i.e. the amendment would "ensure access to health care services without waiting lists, protect the doctor-patient relationship, [and] guard against mandates that don't work." The problem, as found by the lower court, is that those results appear nowhere, either expressly or by implication, in the amendment. (R.146-147) It is as reasonable an assumption as any other that the last minute inclusion of the misleading language in the summary was designed to sway a sufficient number of undecided legislators to vote for, and thus pass the resolution. However, neither the Appellants nor the Appellees can make that determination, and neither can this Court.

It is not within the powers and duties of the Court to guess which portions of the resolution influenced the votes of the legislators, or to substitute its judgment for a resolution that was brought before the legislature and passed in due course. However, the Appellants request that this Court step into the shoes of the legislature, disregard the duly considered ballot summary passed by the legislature during the 2010 Session, and rewrite that summary by substitution. The judicial modification of an act of the legislature is not relief that is authorized by the Constitution, statute or case law when a ballot summary violates the accuracy

requirements of Article XI, § 5 of the Florida Constitution and Section 101.161(1), Florida Statutes.

Authority of the Court to Amend the Legislature's Action

Appellants do not cite or attempt to distinguish *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992), precedent unambiguously holding that the Court lacks authority to rewrite legislative acts, and which was discussed at length in the lower court and relied upon by the trial judge (Tr.58:13-60:25). In *Smith*, the Court struck from the ballot a proposed amendment to the state constitution proposed by the Taxation and Budget Reform Commission because the ballot summary failed to set forth the chief purpose of the proposed amendment. The Court determined that action to be necessary, even though it prevented voters from voting on the merits of the proposal, because the Court lacked authority to revise the Commission's action to conform with Section 101.161(1), Florida Statutes. In so holding, the Court stated 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." *Id.* at 621. The Court then urged the legislature, "in order to prevent this problem from recurring in the future . . . to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by revision commissions or the legislature." *Id.*

The Court's plea to the legislature in *Smith* echoed a nearly identical plea ten years earlier, when the Court was compelled to strike an amendment proposed by the legislature because it found the ballot title and summary clearly and conclusively defective. In *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), Justice Overton recognized issues of the lost opportunity for the public to vote resulting from limitations on the Court's authority to correct misleading ballot language. *Id.* at 157 (Overton, J., concurring). In his concurring opinion, Justice Overton concluded that:

> This Court should do everything possible to cooperate [with the legislature] in establishing such a process so that we may eliminate the necessity for this Court to again have to deny the people a right to vote on the merits of a constitutional proposition due to faulty ballot language.

Id. (emphasis added).

Despite these decades-old entreaties to the legislature to provide authority for the Court to repair proposed amendments stricken due to inaccurate ballot summaries, it has not done so. The Appellants' present assertions that the court possesses inherent, plenary authority to rewrite or replace a ballot summary on the legislature's behalf is unavailing in light of the clear case law and the legislature's perpetual refusal to grant the court such authority.

Appellants' reliance upon the unpublished order of the Florida Supreme Court in *American Civil Liberties Union v. Hood*, Case No. SC04-1671 (Fla. Sept.

2, 2004) is misplaced. There, the Court ordered the Secretary of State to place on the ballot "the actual text of the proposed amendment itself and not the proposed ballot summary." *Id.* The Court provided no analysis, no reasoning, and no authority for this relief. Although it stated an opinion would follow, the Court subsequently determined, again via unpublished order, that it would not issue an opinion in the case. *American Civil Liberties Union v. Hood*, Case No. SC04-1671 (Fla. Dec. 22, 2004). In the absence of some explanation of the basis for the Court's action, the unpublished orders in *ACLU* do not overrule or recede from the Court's opinion in *Smith* that it lacks authority to rewrite or correct a misleading ballot summary.

Requirement for a Ballot Summary

Appellants argue that the legislature is not required to provide an explanatory statement, i.e. a ballot summary, for an amendment placed on the ballot by legislative resolution. *See* Initial Brief at 11.

Appellants are correct in noting that Article XI, Section 1 of the Constitution does not require a "ballot summary" for a legislatively proposed constitutional amendment. It is equally correct that the Constitution does not require a ballot summary for an amendment proposed by a revision commission, (Article XI, § 2, Fla. Const.), an amendment proposed by an initiative petition, (Article XI, § 3, Fla. Const.), an amendment proposed by a constitutional convention, (Article XI, § 4,

Fla. Const.), or an amendment by the Taxation and Budget Reform Commission, (Article XI, § 6, Fla. Const.) All that is constitutionally required is that the amendment, regardless of by whom it is proposed, "be submitted to the electors." Article XI, § 5, Fla. Const.

Rather than being a requirement directly imposed by the Constitution, it is Section 101.161(1), Florida Statutes, that imposes a clear duty upon the legislature to include a ballot summary in the joint resolution being proposing the amendment to the State Constitution. Section 101.161(1), Florida Statutes, provides:

> (1) Whenever 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 after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The 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, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. 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. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5). 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.

(Emphasis added).

It was the legislature itself that chose to impose the requirement that the "substance of the amendment" be presented to the electorate in "clear and unambiguous language."[1] The "substance of the amendment" must be embodied in the authorizing resolution or proposal. This Court has repeatedly construed "substance of the amendment" as synonymous and interchangeable with "ballot summary." *Advisory Opinion to the Attorney General re: Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 184 (Fla. 2009); *Armstrong v. Harris*, *supra* at 12-13; *Advisory Opinion to the Attorney General - - Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993); *Carroll v. Firestone*,

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[1] It has been a statutory requirement since 1895 that, whenever a constitutional amendment is submitted to a vote of the people, the "substance of such amendment" be printed on the ballot. *See* §34, Ch. 4238 (1895). In 1945, the statutory requirement was amended to provide:

> The phraseology of the substance of the amendment or other public measure furnished to the several counties by the Secretary of State so as to insure uniformity.

§1, Ch. 22616 (1945). In 1973, the statutory requirement was further revised to provide:

> The exact wording of the substance of the amendment or other public measure to appear on the ballot shall be embodied in the enabling legislation, and shall be furnished to the several counties by the Department of State….

§1, Ch. 73-7, Laws of Florida.

497 So. 2d 1204, 1206 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351, 1354-1355 (Fla. 1984).

Appellants' assertion that the legislature is not required to provide a ballot summary is incorrect.[2] While the legislature is not bound by the 75 word limitation on the ballot summary, the legislature is required to provide a summary for submission to the voters as part of its resolution. The basis for the extended word count was explained by the First District Court of Appeal, which held that "the lack of a single subject requirement (which is imposed on citizen's initiatives) makes legislative proposals clearly different requiring the Legislature have the freedom to adequately explain the proposed change in a more lengthy ballot summary." *Florida Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666, 676 (Fla. 1st DCA 2007).

The legislature in this case adopted a more lengthy ballot summary. The lower court found the validly adopted ballot summary to be misleading. Thus, the only constitutional remedy is to remove the joint resolution from the ballot. The remedy is not for the Court to substitute itself for the legislature, determine what elements of the legislature's resolution must be retained and which can be

[2] It is also contrary to legislative practice since 2000, when Section 101.161(1), Florida Statutes, was amended to exempt "amendments proposed by joint resolution" from the 75 word limit for any legislative ballot summary explaining the "chief purpose" of the amendment. In every instance since 2000, the legislature has provided a ballot summary consistent with Section 101.161(1), Florida Statutes.

discarded and, in effect, become an active participant in the amendment of the Constitution by legislative resolution.

Deference

Appellants attempt to bolster their argument that the Court should craft some hybrid judicial/legislative solution in this case with an analysis of cases holding that the judiciary should employ deference to its co-equal branch of government. *See* Initial Brief at 9-10. However, despite the general expectation of comity between the branches, there is nothing that ascribes greater importance, or that requires a heightened degree of deference to constitutional amendments proposed by legislative resolution, than should be granted to amendments proposed by any constitutional means. In that regard, this Court has assessed the relative importance of each method of amending the Constitution, and in determining whether any is of more importance than another, held that:

> The four methods of amending our constitution must be considered as a whole to effect their overall purpose. *Smathers v. Smith*, 338 So.2d 825 (Fla. 1976). They are delicately balanced to reflect the power of the people to propose amendments through the initiative process and the power of the legislature to propose amendments by its legislative action without executive check.... [A]ny restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process. The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity.

State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566 (Fla. 1980). That the Court does not "play favorites" to upset the balance between the various amendment processes is well established.

> Although this Court traditionally has accorded a measure of deference to constitutional amendments proposed by the Legislature, our discretion is limited by the constitution itself. The accuracy requirement in article XI, section 5, imposes a strict minimum standard for ballot clarity. This requirement plays no favorites - it applies across-the-board to *all* constitutional amendments, including those proposed by the Legislature.

Armstrong v. Harris, *supra* at 21 (emphasis in original).

The suggestion that the Court has the authority to merely substitute an amendment for the required ballot summary is unsupported by directly applicable precedent. In *Advisory Opinion to the Attorney General re: Additional Homestead Tax Exemption*, 880 So. 2d 646, 654, (Fla. 2004), the Court considered the 22 word ballot summary for an amendment proposed by initiative petition that contained fewer than 75 words. The proposed amendment was removed from the ballot due to a misleading statement in the summary.

Under the theory advanced by Appellants, the Court in *Additional Homestead Tax Exemption* should have just substituted the amendment for the ballot summary since the amendment did not exceed the applicable word limit. However, there was no suggestion in that case that the Court possessed the

constitutional authority to substitute the amendment for the summary that was authorized by the citizen signators of the initiative petition. Rather, the Court understood the limitation on its power to substitute its judgment for that of the sponsors as reflected in the concurring opinion of Justice Bell, who noted that:

> The irony of this result is difficult to ignore. 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 654.

The process of amendment by joint resolution is no more worthy of deference than is the process of amendment by any other constitutional method. A legislative proposal is not entitled to an extraordinary set of procedures or remedies different from those accorded to amendments proposed in other ways, including by initiative. In that regard, this Court has "traditionally [ ] accorded a measure of deference to the Legislature....This deference, however, is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000). That this Court found no authority for it to substitute a proposed amendment as a compliant ballot summary in *Additional Homestead Tax Exemption*, an initiative case, is persuasive authority

for the limitation on the Court's constitutional authority to discard a validly passed legislative ballot summary and substitute the text of a proposed amendment as an alternative summary.

Balancing Policy

Finally, the Court should consider all of the policy considerations that apply in cases in which the fundamental charter of our state is being opened for change.

Courts must act with "extreme care, caution, and restraint" before removing a constitutional amendment from the vote of the people. *Advisory Opinion to the Attorney General re: Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006) (*quoting Askew v. Firestone*, 421 So. 2d at 156)). Whether a proposed constitutional amendment is wise policy on the merits is not a question for the courts, so long as the statutory requirements are satisfied. (emphasis added) *See Advisory Opinion to the Attorney General re: Additional Homestead Tax Exemption, supra* at 648. 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, supra* at 154. 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, Section 101.161, Florida Statutes mandates that the voter (1) has notice as to what he or she is voting for, and (2) not be misled by the content of the ballot summary.

Even in recognition of the policy of providing the electorate with the right to vote on an amendment, the courts have applied the sanction of removal from the ballot to avoid the influence of electors through misleading efforts. For example, this Court has held that "the ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth." *Evans v. Firestone*, *supra* at 1355. Justice Overton opined that the comments affixed to the ballot summary under review in *Evans:*

> [M]ay meet advertising criteria for the marketing of a product, but it cannot be tolerated for constitutional ballot language that is intended to inform the voter of what changes in the constitution are being proposed. We emphatically stated in *Askew v. Firestone,* 421 So.2d 151, 155 (Fla.1982), that the ballot language must be objective and fair and must sufficiently advise the voter so as to permit a knowledgeable decision on the merits of the proposal. In my view, the ballot language in the

> instant case appears to have been intentionally drawn to create an erroneous perception of the effect of this constitutional proposal. I am at a loss to understand why the proponents of this amendment did not take heed of the *Askew v. Firestone* decision.

Id. at 1356.

Similarly, in establishing the legal and policy considerations that affect the decision as to whether to remove an amendment from the ballot, this Court has held that:

> We have previously stated that the "ballot summary should tell the voter the legal effect of the amendment, and no more." *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). This summary flies under false colors with a promise of "tax relief." *See Askew*, 421 So. 2d at 156 ("A proposed amendment cannot fly under false colors . . ."). The use of the phrase "provides property tax relief" clearly constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment. *See In re Advisory Op. to the Att'y Gen.--Save Our Everglades*, 636 So. 2d 1336, 1341-42 (Fla. 1994) (finding "emotional language" of ballot title and summary to be misleading as it resembled "political rhetoric" more than "accurate and informative synopsis"); *Evans*, 457 So. 2d at 1355 (holding ballot summary defective in part because phrase "thus avoiding unnecessary costs" constituted "editorial comment"). This misleading language does not reflect the true legal effect of the proposed amendment. *See Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994) (stating that the ballot summary must be accurate and informative and "objective and free from political rhetoric").

Advisory Opinion to the Attorney General re: Additional Homestead Tax Exemption at 653.

Appellants argue that regardless of how misleading a resolution may be, the Court should absolve the legislature of any responsibility for its efforts and substitute an alternative ballot summary for consideration by the electorate – a remedy that is not available to any other form of amendment, including those proposed by the citizens themselves.[3] Thus, under Appellants' argument, the legislature is entitled to a remedy for misleading language that is unavailable to any other form of amendment proposal. The effect of Appellants' position would give the legislature license to insert all manner of misleading or deceptive political rhetoric in its ballot summaries with impunity, hoping it would go unchallenged, but knowing that there would be no meaningful sanction if it were. Such a license would fly in the face of equally important and applicable policy considerations which provide that:

> Deception of the voting public is intolerable and should not be countenanced. The purpose of section 101.161(1)

[3] Though not directly at issue in this case, there may be instances in which the publication of the proposed amendment in lieu of a ballot summary may not, either due to omission or lack of context, explain the chief purpose of the measure as required by Section 101.161(1), Florida Statutes. That is a statutory purpose of a ballot summary. In such a case, the legal effect of an amendment may involve an explanation that goes beyond the words of the amendment itself. Mere placement of the text of an amendment on the ballot in lieu of a defective summary, without analysis of its chief purpose and effect, does not assure that the electorate is advised on the meaning and ramifications of the proposed amendment.

> is to assure that the electorate is advised of the meaning and ramifications of the proposed amendment. Because the ballot at issue failed to comply with the mandate of the legislature expressed in section 101.161(1), the proposed amendments must be stricken.

Wadhams v. Board of County Commissioners of Sarasota County, Florida, 567 So. 2d 414, 418 (Fla. 1990).

CONCLUSION

The lower court correctly determined that the ballot summary of Amendment 9 was misleading, thereby requiring removal of the amendment from the ballot. There is no authority for this Court to assume the role of the legislature in the amendment process by removing the ballot summary adopted as a material part of the amendment resolution. It cannot be said that the disputed ballot summary was not added to the resolution days before it came to a vote as a means to influence legislators to vote for the resolution. Thus, replacing the ballot summary could result in an amendment being place on the ballot that in its altered state may not have had necessary support.

Applicable precedent stands for the proposition that the Court cannot rewrite legislative action. Other applicable precedent has resulted in this Court's refusal to substitute the language of an amendment for a defective ballot summary. That precedent remains valid and effective. Appellants have provided no legitimate policy reason why the legislature's efforts to amend the Constitution should be

treated any differently from those of the citizens of Florida, or its constitutionally created commissions. Therefore, this court should not recede from its precedent.

For the reasons set forth herein, the Court should not exercise its judicial powers to rewrite the misleading resolution, and should affirm the action of the lower court in removing Amendment 9 from the 2010 ballot.

Respectfully submitted,

_____

MARK HERRON, ESQ.
Florida Bar No. 0199737
E. GARY EARLY, ESQ.
Florida Bar No. 0325147
MESSER, CAPARELLO & SELF, P.A.
P.O. Box 15579
Tallahassee, Florida 32317
(850) 222-0720 Telephone
(850) 224-4359 Facsimile

ATTORNEYS FOR APPELLEES, MONA MANGAT, DIANA DEMEREST, GRACIE FOWLER, AND LOUISA MCQUEENEY.

CERTIFICATE OF FONT 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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E. GARY EARLY, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service and by electronic mail on this 10th day of August, 2010:

Russell S. Kent, Esq.
Russell.kent@myfloridalegal.com
Ashley E. Davis, Esq.
Ashley.davis@myfloridalegal.com
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

C.B. Upton, Esq.
General Counsel
cbupton@dos.state.fl.us
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399

_____
E. GARY EARLY, ESQ.