IN THE SUPREME COURT OF FLORIDA

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

Appellants,

v.

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

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

Appellees.

INTIAL BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Appellants, the FLORIDA DEPARTMENT OF STATE and DAWN K. ROBERTS, in her official capacity as the Interim Secretary of State of Florida,[1] were Defendants below; this brief will refer to them as "Appellants." Appellees, MONA MANGAT, DIANA DEMEREST, GRACIE FOWLER, and LOUISA MCQUEENY, were Plaintiffs below; this brief will refer to them as "Appellees."

The record consists of one volume. References to the record shall be by "R." followed by the appropriate page number(s), *e.g.*, (R.25-26). The record also contains the transcript of the July 29, 2010 final hearing. References to the final hearing transcript shall be by "T." followed by the appropriate page number(s).[2]

All emphases are supplied.

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[1] The Secretary is the head of the Florida Department of State and serves as the chief elections officer of the state. See §§ 20.10(1) and 97.012, Fla. Stat. (2009).

[2] Appellants intend to supplement the record with the transcript of the July 23, 2010 motion hearing. That transcript should be available on August 9, 2010.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This appeal seeks review of the trial court's order granting final judgment in favor of Appellees, directing Appellants to remove Amendment 9 from the November 2010 general election ballot, and refusing to place the text of Amendment 9 on the ballot in lieu of the challenged summary. (R.144-151.) On June 24, 2010, Appellees filed an action challenging the ballot summary for Amendment 9. (R.4-16.) On July 8, 2010, the trial court entered a Case Management Order, directing the parties to submit memoranda of law on an expedited basis and setting a final, non-evidentiary hearing for July 29, 2010. (R.24.) On July 14, 2010, Appellees submitted their memorandum of law.[3] (R.33-93.) Appellants filed their memorandum of law on July 21, 2010, along with an answer. (R.102-118.)

On the same date, Appellants also filed a motion seeking the entry of a final judgment placing the text of Amendment 9 on the ballot in lieu of the challenged ballot summary. (R.94-101.) Appellees responded to the motion on July 22, 2010. (R.119-125.) The next day, Appellants filed a notice of supplemental authority

[3] Appellees actually filed a motion for summary judgment and supporting memorandum. (R.25-93.) The trial court's Case Management Order, however, directed the parties to file "memoranda of law." (R.24.) The matter was not decided as a summary judgment motion. (T.4-5; R.144, 150-51.)

addressing the arguments raised by Appellees. (R.126.) At the motion hearing, the trial court inquired as to the Legislature's position regarding the relief requested by Appellants.[4] The trial court executed an order denying Appellants' motion on July 23, 2010 but the order was not rendered until July 29, 2010. (R.143.)

A final, non-evidentiary hearing was held on July 29, 2010 and the trial court entered its final judgment on the following day. Appellants appealed on August 2, 2010. (R.152-161.) On August 4, 2010, the First District Court of Appeal certified the appeal as one of great public importance and this Court accepted jurisdiction on the same day. The appeal has proceeded on an expedited basis.

Statement of the Facts

The original version of HJR 37 was filed in the House on July 27, 2009. (R.50.) It is the product of two committees (Health Care Regulation Policy and Rules and Calendar Council), four sponsors, and no less than sixty-three (63) co-sponsors. (R.50-52.) The Florida Legislature passed House Joint Resolution 37 by a vote of 74 – 42 in the House on April 22, 2010 and 26 – 11 in the Senate on the same day. See Fla. H.R. Jour. 862 (Reg. Sess. 2010); Fla. S. Jour. 742 (Reg. Sess.

[4] In response to that inquiry, the Florida Legislature filed a motion on July 27, 2010, asking for permission to appear as *amicus curiae* in support of Appellants. (R.132.) The trial court granted this motion and heard argument from the Legislature at the final hearing. (R.144, 149; T.31-43.)

2010). On May 20, 2010, the Florida Department of State approved the measure for placement on the general election ballot as Amendment 9. (R.8 ¶11, 117 ¶11.)

Amendment 9 would create the Health Care Freedom Constitutional Amendment in a new Section 28 in Article I of the Florida Constitution. It would prohibit compelled participation in any health care system by authorizing any person or employer to pay, and healthcare providers to be paid, directly for health care services without a fine or penalty.

Amendment 9 states in pertinent part:

> SECTION 28. Health care services.—
>
> (a) To preserve the freedom of all residents of the state to provide for their own health care:
>
> (1) A law or rule may not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.
>
> (2) A person or an employer may pay directly for lawful health care services and may not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and may not be required to pay penalties or fines for accepting direct payment from a person or an employer for lawful health care services.
>
> (b) Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems may not be prohibited by law or rule.

(c) This section does not:

(1) Affect which health care services a health care provider is required to perform or provide.

(2) Affect which health care services are permitted by law.

(3) Prohibit care provided pursuant to general law relating to workers' compensation.

(4) Affect laws or rules in effect as of March 1, 2010.

(5) Affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or an employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or an employer for lawful health care services, except that this section may not be construed to prohibit any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges.

(6) Affect any general law passed by a two-thirds vote of the membership of each house of the legislature after the effective date of this section, if the law states with specificity the public necessity that justifies an exception from this section.

(d) As used in this section, the term:

(1) "Compel" includes the imposition of penalties or fines.

(2) "Direct payment" or "pay directly" means payment for lawful health care services without a public or private third party, not including an employer, paying for any portion of the service.

(3) "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or health care information for its participants.

(4) "Lawful health care services" means any health-related service or treatment, to the extent that the service or treatment is permitted or not prohibited by law or regulation, which may be provided by persons or businesses otherwise permitted to offer such services.

(5) "Penalties or fines" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government which is used to punish or discourage the exercise of rights protected under this section. For purposes of this section only, the term "rule by an agency" may not be construed to mean any negotiated provision in any insurance contract, network agreement, or other provider agreement contractually limiting copayments, coinsurance, deductibles, or other patient charges.

The ballot title and summary of Amendment 9 state:

HEALTH CARE FREEDOM
CONSTITUTIONAL AMENDMENT
ARTICLE I, SECTION 28

HEALTH CARE SERVICES.—Proposing an amendment to the State Constitution to ensure access to health care services without waiting lists, protect the doctor-patient relationship, guard against mandates that don't work, prohibit laws or rules from compelling any person, employer, or health care provider to participate in any health care

> system; permit a person or an employer to purchase lawful health care services directly from a health care provider; permit a health care provider to accept direct payment from a person or an employer for lawful health care services; exempt persons, employers, and health care providers from penalties and fines for paying directly or accepting direct payment for lawful health care services; and permit the purchase or sale of health insurance in private health care systems. Specifies that the amendment does not affect which health care services a health care provider is required to perform or provide; affect which health care services are permitted by law; prohibit care provided pursuant to general law relating to workers' compensation; affect laws or rules in effect as of March 1, 2010; affect the terms or conditions of any health care system to the extent that those terms and conditions do not have the effect of punishing a person or an employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or an employer for lawful health care services; or affect any general law passed by two-thirds vote of the membership of each house of the Legislature, passed after the effective date of the amendment, provided such law states with specificity the public necessity justifying the exceptions from the provisions of the amendment. The amendment expressly provides that it may not be construed to prohibit negotiated provisions in insurance contracts, network agreements, or other provider agreements contractually limiting copayments, coinsurance, deductibles, or other patient charges.

Appellees only challenged the three introductory phrases of the ballot summary, claiming that these phrases were "political rhetoric" and unconnected to the text of Amendment 9. (R.9 ¶13, R.29-30 ¶¶6-8, R.43-44 ¶¶18-19, R.48, ¶26; T.8-10.) None of these phrases are found in the amendment's text and Appellees have not challenged the text of Amendment 9 or the ballot title in any way.

SUMMARY OF THE ARGUMENT

The sole issue on appeal is whether the text of Amendment 9 should be placed on the ballot in lieu of the challenged summary. The trial court erred in holding that the only remedy for a defective ballot summary involves removal of the proposed constitutional amendment. Florida courts have an obligation to uphold legislative actions whenever possible, an obligation that would be fulfilled by the suggested remedy. Moreover, the Florida Legislature has neither a constitutional nor statutory duty to include a ballot summary for its proposed constitutional amendments. See Art. XI, §§ 1 and 5, Fla. Const.; see also §101.161(1), Fla. Stat. (2009). To the contrary, Article XI, Section 5(a) orders that the "proposed amendment . . . **shall** be submitted to the electors." The only applicable statutory requirement is that the "substance" of the amendment be printed on the ballot but the full text of Amendment 9 surely comprises its "substance." Moreover, the text of Amendment 9 does not contain the challenged language from the ballot summary. In the ACLU v. Hood case, the Court exercised its authority by ordering that the text of a proposed amendment be placed on the 2004 general election ballot in lieu of the summary, thus upholding the designated role of the Legislature. The Court should follow the same path here by reversing the trial court's decision and ordering that the text of Amendment 9 itself be placed on the November 2010 ballot in lieu of the challenged ballot summary.

ARGUMENT

I. Standard of Review

The Court's standard of review is *de novo* because the case presents a pure question of law. See Dep't of State v. Slough, 992 So. 2d 142, 147 (Fla. 2008). The sole issue raised by this appeal is whether to place the text of Amendment 9 on the ballot in lieu of the challenged ballot summary. The Court's "duty is to uphold [the Legislature's] action if there is any reasonable theory under which it can be done." Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956). In other words, if a legislative act is reasonably susceptible of any construction that will avoid invalidity, the Court is bound, by the respect due to a coordinate branch, to adopt that construction. See State v. Presidential Women's Ctr., 937 So. 2d 114, 116 (Fla. 2006); Fla. State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 656 (Fla. 1979).

II. The Text of Amendment 9 Should Appear on the Ballot in Lieu of the Ballot Summary

"The deliberative processes of the Legislature are surrounded by guarantees that the duly elected representatives of the people will know what they are doing when they act in their law-making role." Smathers v. Smith, 338 So. 2d 825, 828 (Fla. 1976). The Florida Constitution specifically empowers the Legislature to propose amendments for submission to the voters, by means of a joint resolution

"agreed to by three-fifths of the membership of each house." Art. XI, § 1, Fla. Const.; id. at § 5(a). As this Court noted over fifty years ago:

> The Legislature which approved and submitted the proposed amendment took the same oath to protect the Constitution that we did and our first duty is to uphold their action **if there is any reasonable theory under which it can be done.** This is the first rule we are required to observe when considering acts of the Legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.

Gray, 89 So. 2d at 790.

The power to judge the merits of any proposed amendment "is inherent in the people." Art. I, § 1, Fla. Const. Accordingly, Florida courts must exercise "extreme care, caution and restraint" before infringing on that right. Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). In other words, no amount of political disagreement is sufficient to keep a proposal from the voters, so long as the proposal is accurately presented on the ballot. See Advisory Op. to Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367, 368 (Fla. 2000) ("The Court's review . . . does not include an evaluation of the merits or the wisdom of the proposed amendment").

Article XI, Section 1 of the Florida Constitution empowers the Legislature to propose constitutional amendments for ratification by the voters pursuant to Article XI, Section 5. Neither of these provisions requires the inclusion of a ballot summary. Indeed, the text of Article XI, Section 5(a) of the Florida Constitution orders that the "proposed **amendment** … shall be submitted to the electors."

Section 101.161(1), Florida Statutes, requires that the "substance" of the amendment be printed on the ballot. Indeed, the 2000 legislative amendment to section 101.161 (1), Florida Statutes, recognized that the Legislature may elect to place the entire amendment on the ballot - rather than a summary. That section did -and does- require that the substance of an amendment be "printed in clear and unambiguous language on the ballot." Prior to 2000, that substance was "an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." § 101.161 (1), Fla. Stat. (1999). In Wadhams v. Bd. of County Comm'rs, 567 So. 2d 414, 416 (Fla. 1990), this Court construed explanatory statement to mean a summary and invalidated an amendment that had been placed on the ballot in its entirety.

In 2000, however, the Legislature amended Section 101.161 (1), Florida Statutes, to exclude legislatively proposed amendments from the requirement of an explanatory statement. See Ch. 2000-361, § 1, Laws of Fla. Thus, while the substance of a legislatively proposed amendment must still appear on the ballot in

clear and unambiguous language, the substance of the amendment need not be in the form of an explanatory statement or summary. The full text of Amendment 9 surely comprises its substance. The Legislature is not constrained by word limits and may place the entirety of the amendment on the ballot. See § 101.161(1), Fla. Stat. (2009); see also Sancho v. Smith, 830 So. 2d 856, 859 (Fla. 1st DCA 2002) (explaining that the 2000 amendment to section 101.161(1) exempts joint resolutions from the seventy-five (75) word limit).

Appellees recognized below that the "purpose of Article XI, Section 5 of the Florida Constitution and Section 101.161 . . . is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." (R.44 ¶20.) (internal quotations omitted). Voters must simply be informed of the "chief purpose" of the amendment without deception. See Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1236 (Fla. 2006). Indeed, voters "must be able to comprehend the sweep of each proposal."Advisory Op. to Att'y Gen. re Med. Liab. Claimant's Compensation Amendment, 880 So. 2d 675, 682 (Fla. 2004), quoting Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976).

Appellees conceded below that the actual text of Amendment 9 states exactly what it will and will not do. Indeed, at the final hearing, Appellees' counsel explained that "[w]hat the amendment does is, essentially, set forth in Paragraphs (a) and (b) of the proposed [amendment]" and "[w]hat the amendment

does not do [is] in (c)(1).” (T.9-10.) Counsel even read the text of each provision “in describing what the amendment does and what the amendment does not do.” (T.9.) Appellees cannot credibly argue that the text of Amendment 9 fails to accurately inform voters of the amendment’s chief purpose.

Furthermore, the actual text of the amendment does not contain any of the language that Appellees and the trial court found problematic in the ballot summary. Indeed, Appellees’ sole contention below was limited to the three introductory phrases in the ballot summary. (T.8-9; R.146-47.) Appellees emphasized throughout their papers that the three challenged phrases in the ballot summary are “unconnected” to the text of Amendment 9, arguing “[n]ot one of those concepts appears in the actual amendment either directly or by implication.” (R.48, ¶26.)

As noted by the Florida Legislature below, there is ample authority for Florida courts to strike portions of legislative enactments, just as courts may sever a problematic ballot summary from the amendment itself, where the amendment is the product of a joint resolution. (R.137 n.4, 140-41.) Indeed, when a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand, provided: (1) the infirm provisions can be separated from the remaining valid provisions; (2) the remaining provisions can independently accomplish the purpose; (3) the good and the bad features are not so inseparable in substance that

it can be said that the Legislature would have passed the one without the other; and, (4) the act is complete in itself without the invalid provisions. See, e.g., Fla. Hosp. Waterman, Inc. v. Buster, 984 So.2d 478, 493-94 (Fla. 2008).

The summary is severable from the joint resolution under this analysis, leaving the unchallenged text of Amendment 9. First, the summary can be separated from the text of Amendment 9, as they are independent. (R.14.) Second, the remaining text of the amendment demonstrates that the purpose of the joint resolution was to propose a constitutional amendment – "Amendment 9." (R.6 ¶¶9, 12.) Thus, the Legislature could have very easily passed the joint resolution without the challenged summary. Indeed, the Legislature argued below that the summary is merely "for the convenience of the voters" and is unnecessary here because the text of the amendment is short and accurately informs voters of its purpose. (R.137-38.) Finally, the ballot summary only attempts to "summarize" the text of the amendment, and thus, the amendment's text is complete in itself.

The Court has noted the "irony" that a summary's deficiencies "could easily have been avoided by simply submitting the actual amendment itself." Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646, 654 (Fla. 2004) (Bell, J., specially concurring). Indeed, using the entire text of the proposed amendment in a ballot summary has survived past challenges. See, e.g., Advisory Op. to 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) (finding "no basis to reject … since the entire amendment also serves as the summary"); see generally Marriage Prot. Amendment, 926 So. 2d at 1237; Med. Liab. Claimant's Compensation Amendment, 880 So. 2d at 679; Sancho v. Smith, 830 So. 2d 856, 859 (Fla. 1st DCA 2002).

In ACLU of Fla., Inc. v. Hood, 881 So. 2d 664 (Fla. 1st DCA 2004), the plaintiffs attacked a legislatively proposed amendment authorizing the Legislature to require parental notification prior to the termination of a minor's pregnancy. While the text of the amendment authorized the Legislature to require parental notification "notwithstanding" the minor's right of privacy under Article I, Section 23 of the Florida Constitution, the summary did not make the same disclosure. In a unanimous decision, this Court ordered that the full language of the amendment - including the reference to the constitutional right of privacy- appear on the ballot verbatim, thus avoiding a total invalidation of the proposed amendment. See ACLU of Florida, Inc. v. Hood, Case No. SC04-1671 (Sept. 2, 2004).[5] This

[5] Because the election was fast approaching, the Court issued its order two days after briefing and stated it would later publish an opinion. Id. Later, the Court decided that, with "the election . . . having been held on November 2, 2004, [the Court] has now determined that no opinion shall be issued." ACLU, Case No. SC04-1671 (Fla. Dec. 22,2004). The Court's December 22, 2004 order notes that the trial court's decision had been reversed and quashed.

procedure – employed by this Court just three elections ago – is also appropriate here. The Court does not have to remove the three challenged phrases or re-write the summary in any way. Instead, the ballot summary would be replaced with the text of Amendment 9 that Appellees concede accurately informs voters of the amendment's purpose, text that the Legislature has approved by a supermajority vote.[6] The voters would still be voting on a proposed constitutional amendment based only on the words chosen by the Legislature. Moreover, by not striking the proposal altogether, the Court would preserve the Legislature's express authority under Article XI, Section 1 of the Florida Constitution to present proposed amendments for consideration by the people.

Placing the text of Amendment 9 on the ballot cures the problem Appellees have identified as the basis for their lawsuit, namely voters possibly being misled by the challenged ballot summary language. The merits and wisdom of Amendment 9 are for the voters to decide. See Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking, 814 So. 2d 415, 421 (Fla. 2002) (whether the proposed amendment will achieve its purpose or is even necessary are issues for the voters to

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[6] Appellants would note that the ballot title was challenged in the Hood case. See Hood, 881 So. 2d at 665 ("According to plaintiffs, the ballot title and summary did not adequately communicate the effect of the proposed amendment"). There has been no such challenge here.

decide). There is simply no reason why ballot summary issues should foreclose the consideration of Amendment 9 by the voters, especially where there is no possibility of voters being misled. Ballot summary challenges are meant to protect, not disenfranchise, voters.

CONCLUSION

A republican form of government, separation of powers, and comity all counsel restraint in judicial invalidation of constitutional amendments proposed by the Legislature for approval by the voters. These principles also support the use of a remedy that does not frustrate the constitutional mandate that such proposed amendments "shall" be submitted to the voters of Florida at the next general election. Ballot summary challenges should not be used as a winner-takes-all contest to keep issues from voters, especially in the context of constitutional amendments proposed by the Legislature, the representative of the people of this state. Accordingly, the Court should follow the lead of Hood and reverse the order of the trial court, allowing the text of Amendment 9 to appear on the November 2010 general election ballot in lieu of the summary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail and e-mail on this 6th day of August 2010 to Barry Richard, Glen T. Burhans, Jr., and Bridget K. Smitha at Greenberg Traurig, P.A., 101 East College Avenue, Tallahassee, Florida 32301.

_____
Russell S. Kent

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the font used in this Initial Brief is Times New Roman 14 point, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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Russell S. Kent