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.

REPLY BRIEF OF APPELLANTS

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RESPONSE TO THE STATEMENT OF THE CASE AND FACTS

Appellants decline to accept Appellees' statement of the case and facts because that statement injects arguments not relevant to the issues on appeal, such as the merits of the ballot summary and the timing of the changes to the summary. As Appellees have noted, the ballot summary is "no longer in dispute . . . [and] has not been challenged in this appeal." (AB.1, 2.) Appellants rely on the statement of the case and facts in their Initial Brief. [1]

ARGUMENT

I. The Text of Amendment 9 Should Appear on the Ballot

With the purpose of proposing a constitutional amendment – not a ballot summary – the Florida Legislature approved the text of Amendment 9 by a supermajority of each house. (R.6 ¶9; R.12; T.37.) The four sponsors (and no less than sixty-three (63) co-sponsors) had several weeks to deliberate the text of the amendment; five analyses of that text were drafted before adding the summary. (R.50-52, 103-04; T.32-37; AB.1-2.) Appellees do not argue that the text of Amendment 9 is defective in any way. (IB.7; AB.1 (accepting facts); AB.18 n.3.) To the contrary, Appellees concede that the text of the amendment accurately

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[1] This brief will use the same citation format as the Initial Brief. All emphases are supplied. References to the Answer Brief shall be by "AB." followed by the appropriate page number(s). References to the Initial Brief shall be by "IB." followed by the appropriate page number(s).

informs voters of the decision they must make, the only requirement of ballot language. (AB.15-16, 18 n.3.)

Appellees make several specific contentions in their Answer Brief that must be addressed. First, Appellees cannot and do not cite any case that holds the Court lacks the authority to order that the text of an amendment be placed on the ballot in lieu of the ballot summary. Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992), did not hold that this Court lacked such authority, despite Appellees' expansive interpretation. (AB.3, 6.) This Court, *sua sponte*, inquired as to its "authority to independently rewrite the ballot summary to conform to the statute." Id. There was also a discussion of the possible desirability of a legislative change "to empower the Court to fix fatal problems with ballot summaries." Id.

Appellants, however, are not asking this Court to **rewrite**, **fix** or otherwise edit the ballot summary to **conform** to section 101.161(1).[2] Appellants instead seek to have the text of Amendment 9 placed on the ballot **in lieu of** the summary – the authority this Court exercised just three elections ago, over a decade after the Smith decision. See ACLU of Fla., Inc. v. Hood, Case No. SC04-1671 (Sept. 2,

[2] The Smith decision also predates the 2000 amendment to section 101.161 under which the Legislature removed the reference to "an explanatory statement . . . of the chief purpose of the measure" for amendments proposed by means of a joint resolution. (IB.11-12.)

2004). Voters would be presented with only the language chosen by the Legislature.[3]

Appellees' conjecture that the Legislature would not have wanted Amendment 9 to appear on the ballot without the summary (a summary that is not required by constitutional or statutory law) belies a misunderstanding of the amendment process and is foreclosed by Hood. (AB.4-5; T.35, 37.) See Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956) ("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."). The language of the amendment is what would appear in the Florida Constitution (if approved by the voters). The Legislature's decision to submit Amendment 9 to the people was not made on a whim. Moreover, the Legislature participated as *amicus curiae* below, advocating for the remedy sought by Appellants.

Appellees also cite to Justice Overton's concurrence in Askew v. Firestone, 421 So. 2d 151, 157 (Fla. 1982). Concurrences are not the findings or holdings of

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[3] Regardless, the statements in Smith as to this Court's authority to rewrite or fix a ballot summary to conform to the statute, statements made in an entirely different context, may very well be *dicta*. See Smith, 606 So. 2d at 621 ("[n]either party argues that this Court has the authority"); see also Cont'l Assurance Co. v. Carroll, 485 So. 2d 406, 408 (Fla. 1986) (anything beyond the holding of a case is *dicta* and "cannot function as ground-breaking precedent").

the Court. See Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980) ("A concurring opinion does not constitute . . . the basis of the ultimate decision"); see also Lendsay v. Cotton, 123 So. 2d 745, 746 (Fla. 3d DCA 1960) ("A concurring opinion has no binding effect as precedent; such an opinion represents only the personal view of the concurring judge"). Moreover, Justice Overton's concurrence suggested a legislative change "to correct misleading ballot language . . . [and allow] sufficient time to change the language." Askew, 421 So. 2d at 157. Appellants seek no such **corrective** relief here. Rather, Appellants seek the same remedy exercised in Hood, placement of the text of Amendment 9 on the ballot.

Likewise, there was no need for an amendment to section 101.161(1) to explicitly authorize the use of the text of the amendment in lieu of the ballot summary after the Hood decision. The Legislature was well aware of this Court's order in Hood, especially since it participated in that proceeding as *amicus curiae*. See generally Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004) ("The Legislature is presumed to know the judicial constructions of a law when amending that law.").

Appellees next attack Hood as meaningless. (AB.7-8.) This Court clearly can rely upon its own decisions. See generally Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist., 434 So. 2d 310, 313 (Fla. 1983) (noting that counsel can "refer to such a [unpublished] decision and thereby suggest to the court how it previously

viewed the proposition"). Moreover, this Court is not obligated to issue a written opinion. See R.J. Reynolds Tobacco Co. v. Kenyon, 882 So. 2d 986, 988-89 (Fla. 2004). In Hood, this Court indicated in a summary order that it did not issue an opinion because the election had already taken place. See Hood, Case No. SC04-1671 (Dec. 22, 2004).

Moreover, Hood was decided subsequent to all of the remedy cases cited by Appellees, cases that this Court was undoubtedly aware of when it ordered the remedy that Appellants now seek.[4] Appellees certainly cannot suggest that this Court ignored its own precedent when reaching the unanimous decision in Hood. Finally, Hood does not "overrule or recede from the Court's holding in Smith" (if there was any such holding) but instead deals with a different remedy. (AB.8.)

Third, Appellees argue that a ballot summary is required by section 101.161(1), Florida Statutes. (AB.9.)[5] Appellants discussed this issue at length in their Initial Brief, including the crucial 2000 statutory amendment. (IB.11-12.) Appellants would further note that the only statutory reference to a ballot summary

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[4] Appellants in the Hood case filed a motion for rehearing and/or clarification on January 6, 2005, arguing that this Court's decision "cannot be reconciled with Smith." By a January 13, 2005 Order, the motion was stricken as unauthorized.

[5] Appellants concede that there is no constitutional requirement for a ballot summary. (AB.8-9.)

is for an "amendment proposed by initiative." See Ch. 2004-33, § 5, Laws of Fla. (adding this language). Plainly, this case does not involve an initiative.

Appellees provide no support for their statement that the Legislature "has provided a ballot summary . . . [i]n every instance since 2000." (AB.11, n.2) Even if that statement is accurate as a matter of practice, it says nothing as to whether the Legislature is legally **required** to provide a ballot summary, much less a summary that does not mirror the text of the amendment. Appellees' argument fails to recognize that the Legislature's practice of providing a summary is merely "for the convenience of the voters" rather than pursuant to any legal requirement. (R.137.)

Likewise, the passing reference to the existence of ballot summaries in the cases cited by Appellees (several of which were proposed by different methods) does not somehow create a statutory requirement for ballot summaries in this context. (AB.10-11.) Even accepting Appellees' own logic, if the ballot summary is "synonymous and interchangeable" with the substance of the amendment (AB.10.) and if the text of Amendment 9 accurately informs voters of the decision they must make, as Appellees concede (IB.7; AB.1, 18 n.3; T.9-10), there is no practical need for a summary. Appellees have conflated the accuracy requirement with the purported requirement for a ballot summary.

Indeed, "accuracy" on the ballot is the applicable requirement for all proposed amendments, including in this context. (AB.13, 15-16.) The text of

Amendment 9 accurately informs voters "what the amendment does and what the amendment doesn't do." (T.9.) The amendment's text already contains clear and unambiguous language (the only applicable statutory requirement) and there is no need for any further explanation that might be provided by a summary.

Appellees next claim that "[t]he process of amendment by joint resolution is no more worthy of deference than is the process of amendment by any other constitutional method." (AB.14, 12). This position is emphatically rejected by the applicable precedent, including cases cited in the Answer Brief. (AB.12-14; IB.9-10, 13-14.) Appellees then make a tortured argument that the outcome in Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646 (Fla. 2004), is "persuasive authority" for the proposition that the Court is powerless to place the text of the amendment on the ballot in lieu of the ballot summary. (AB.13-15.) This argument is unavailing for several reasons. To begin with, that case did not involve a joint resolution. Id. at 647 (proposal "through citizen initiative"). In addition, there is no indication that any party raised a remedy argument in that case, which makes sense because the opinion predates Hood. Likewise, Justice Bell's concurrence does no more than note the "irony" of the outcome, especially since the ballot summary could have used the amendment's text. Id. at 654.

Finally, Appellees' statement that the suggested remedy "would give the legislature license to insert all manner of misleading or deceptive political rhetoric in its ballot summaries with impunity" is an unfair recasting of the remedy sought by Appellants. (AB.18.) The summary for Amendment 9 would not appear on the ballot. (R.149, 151.) Appellants seek only to have the unchallenged and admittedly accurate text of the amendment appear on the ballot, a remedy already recognized in this context and an appropriate outcome given the deference owed to legislative enactments. (T.9-10; IB.7; AB.1, 18 n.3.)

Regardless, removing defective ballot summaries is not a "sanction" against the proposed amendment's proponents for drafting errors, especially where there is no requirement for a ballot summary. (AB.16, 18.) Contrary to Appellees' position, ballot challenges are designed to protect, not disenfranchise, voters. 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. Likewise, Appellees' rehashing of non-issues related to the ballot summary is a red herring that merely distracts from the sole and meritorious issue on appeal – whether the unchallenged text of Amendment 9 may appear on the ballot in lieu of the summary, a remedy already approved by this Court. (AB.16-19.)

CONCLUSION

Appellees have offered no principled basis for their continued opposition to the text of Amendment 9 being placed on the ballot in furtherance of the people's inherent right to judge its merits. See Art. I, § 1, Fla. Const.; see also Art. XI, § 5, Fla. Const. Appellants seek to have the Court apply the exact remedy as in ACLU of Fla., Inc. v. Hood, Case No. SC04-1671 (Sept. 2, 2004). Only the unchallenged, admittedly accurate words chosen by the Legislature would be presented to the voters. 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 12th day of August 2010 by U.S. mail and e-mail to Mark Herron, E. Gary Early, and Albert T. Gimbel, Messer, Caparello & Self, P.A., P.O. Box 15579, Tallahassee, Florida 32317-5579.

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Russell S. Kent

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the font used in this Reply 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