IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1784
Lower Tribunal Case Nos. 2010-CA-002537, 1D10-4808

THE FLORIDA EDUCATION ASSOCIATION, ANDY FORD, and LYNETTE ESTRADA, Appellants,

v.

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

INITIAL BRIEF OF APPELLANTS

On Review from the Circuit Court of the Second Judicial Circuit in and for Leon County

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STATEMENT OF THE CASE AND FACTS

The issue presented in this case is whether the ballot title and summary for proposed Amendment 8, which changes the level at which the Florida Legislature is obligated to fund public schools, gives voters fair notice of its chief purpose and effect.

During its 2010 legislative session, the Florida Legislature passed Senate Joint Resolution 2, which proposes to amend Article IX, Section 1 of the Florida Constitution, in pertinent part[1] as follows:

> ARTICLE IX
> EDUCATION
> SECTION 1. Public Education.—
> (a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010-2011 ~~2010~~ school year and for each school year thereafter, there are a sufficient number of classrooms so that:
> (1) Within each public school, the average ~~maximum~~ number of students ~~who are~~ assigned per class

[1] SJR 2 proposes additional changes to Article IX and some changes to Article XII which are not relevant to the current challenge.

to each teacher who is teaching ~~in public school classrooms for~~ prekindergarten through grade 3 does not exceed 18 students and the maximum number of students assigned to each teacher in an individual classroom does not exceed 21 students;

(2) Within each public school, the average ~~maximum~~ number of students ~~who are~~ assigned per class to each teacher who is teaching ~~in public school classrooms for~~ grades 4 through 8 does not exceed 22 students and the maximum number of students assigned to each teacher in an individual classroom does not exceed 27 students; and

(3) Within each public school, the average ~~maximum~~ number of students ~~who are~~ assigned per class to each teacher who is teaching ~~in public school classrooms for~~ grades 9 through 12 does not exceed 25 students and the maximum number of students assigned to each teacher in an individual classroom does not exceed 30 students.

The class size requirements of this subsection do not apply to extracurricular or virtual classes. Payment of the costs associated with meeting ~~reducing class size to meet~~ these requirements is the responsibility of the state and not of local school ~~schools~~ districts. ~~Beginning with the 2003-2004 fiscal year,~~ The legislature shall provide sufficient funds to maintain ~~reduce~~ the average number of students required by ~~in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of~~ this subsection.

(Exhibit A to Complaint.)[2]

[2] Appellants are unable to reference the specific volume and page numbers of the record as required by Rule 9.210(b)(3) of the Florida Rules of Appellate Procedure, because the index to the record was not yet available at the time Appellants' Initial brief was due to be filed.

SJR 2 proposed the following ballot title and summary language to be placed on the ballot:

CONSTITUTIONAL AMENDMENT
ARTICLE IX, SECTION 1
ARTICLE XII, SECTION 31

REVISION OF THE CLASS SIZE REQUIREMENTS FOR PUBLIC SCHOOLS.—The Florida Constitution currently limits the maximum number of students assigned to each teacher in public school classrooms in the following grade groupings: for prekindergarten through grade 3, 18 students; for grades 4 through 8, 22 students; and for grades 9 through 12, 25 students. Under this amendment, the current limits on the maximum number of students assigned to each teacher in public school classrooms would become limits on the average number of students assigned per class to each teacher, by specified grade grouping, in each public school. This amendment also adopts new limits on the maximum number of students assigned to each teacher in an individual classroom as follows: for prekindergarten through grade 3, 21 students; for grades 4 through 8, 27 students; and for grades 9 through 12, 30 students. This amendment specifies that class size limits do not apply to virtual classes, requires the Legislature to provide sufficient funds to maintain the average number of students required by this amendment, and schedules these revisions to take effect upon approval by the electors of this state and to operate retroactively to the beginning of the 2010-2011 school year.

The Florida Education Association, its president, Andy Ford, and Lynette Estrada, a parent of a child enrolled in a public school in Miami-Dade County ("Plaintiffs"), filed suit on July 23, 2010, seeking to enjoin the Department of State

and the Secretary of State from placing Amendment 8 on the ballot because the ballot language does not comply with Article XI, Section 5 of the Florida Constitution and Section 101.161(1), Florida Statutes. Plaintiffs alleged Amendment 8's ballot title and summary are misleading and fail to inform voters of the chief purpose and effect of the amendment, which is to dilute Floridians' constitutional right to require the current level of state funding needed to ensure that public school classrooms do not exceed specified class size goals. (Complaint 6-8.)

The trial court entered a scheduling order on August 6, 2010, setting forth a briefing schedule for cross motions for summary judgment and setting the final hearing for September 8, 2010. (Scheduling Order.) The briefing and hearing proceeded as scheduled, and on September 10, 2010, the trial court entered final summary judgment in favor of Defendants. (Final Summary Judgment.) The court concluded that the ballot title sufficiently "advise the voter that the Legislature is still obligated to provide the funding required to meet the class size approved by the voter if the amendment passes, and it clearly and unambiguously advises the voter of the new class size and attendant funding obligation." (Final Summary Judgment 8-9).

Plaintiffs appealed, and the First District Court of Appeal certified the case pursuant to article V, section 3(b)(5) of the Florida Constitution, as passing upon a

question of great public importance requiring immediate resolution by this Court. The Court accepted jurisdiction by order dated September 22, 2010.

SUMMARY OF THE ARGUMENT

All proposed amendments to the Florida Constitution, no matter their source, must be accurately represented on the ballot. In order to be "accurate" as defined by this Court's precedents, the ballot title and summary for a proposed amendment must disclose substantial effects upon existing provisions of the Florida Constitution, and must not be misleading either expressly or by omission.

Article IX, Section 1 of the Florida Constitution presently confers upon Floridians a right to have the Florida Legislature fund public education at a level sufficient to meet the maximum class size goals specified in that section. This constitutional provision establishes a base funding rate which the Florida Legislature is required to pay local school districts to attain and maintain the goal of smaller class sizes.

Amendment 8 would significantly alter the funding formula in Article IX, Section 1. It would raise the maximum number of students permitted in each class and impose class size limits for grade groupings based upon the school wide average instead of the number of students assigned per teacher. The significant effect upon the funding requirement in the existing constitutional provision is not

disclosed in Amendment 8's ballot summary. The summary wholly fails to inform voters that there is an existing legislative obligation to fund current class size levels; therefore, voters are not informed by the summary that the amendment will negatively affect the funding formula. Failure to give the voters notice of such an important effect upon the state constitution renders the ballot language defective.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews decisions involving the validity of a proposed constitutional amendment de novo. *Florida Dep't of State v. Fla. State Conf. of NAACP Branches*, No. SC10-1375, slip op. at 7 (Fla. Aug. 31, 2010) (citing *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000)).

II. THE TRIAL COURT ERRED IN FINDING THAT THE BALLOT TITLE AND SUMMARY OF AMENDMENT 8 PROVIDE VOTERS FAIR NOTICE OF THE AMENDMENT'S TRUE PURPOSE AND EFFECT.

A. Legal Standard

This Court has held that the Florida Legislature's constitutional authority to propose constitutional amendments for submission to the voters, *see* article XI, section 5, Florida Constitution, inherently requires that "the proposed amendment

be accurately represented on the ballot; otherwise, voter approval would be a nullity." *Roberts v. Doyle*, No. SC10-1508, slip op. at 3 (Fla. Aug. 31, 2010) (emphasis in original) (quoting *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000)). This accuracy requirement is codified in section 101.161(1), Florida Statutes.

Pursuant to these constitutional and statutory provisions, a ballot title and summary must provide a clear and unambiguous explanation of the amendment's chief purpose. *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982). The ballot language must disclose substantial impacts to existing provisions of the Florida Constitution. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 803-04 (Fla. 1998). The ballot title and summary cannot be misleading, either expressly or by omission. *Askew*, 421 So. 2d at 155-56.

Courts afford a measure of deference to the legislature in reviewing legislatively-proposed amendments. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000). 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." *Roberts v. Doyle*, No. SC10-1508, slip op. at 4 (Fla. Aug. 31, 2010) (quoting *Armstrong*, 773 So. 2d at 14). Thus, the deference to legislative enactments does not exempt legislatively-proposed amendments from application of the same standard applicable to all proposed amendments, *i.e.*, the ballot title and summary must "state in clear and

unambiguous language the chief purpose of the measure." *Askew*, 421 So. 2d at 154-55.

B. Chief Purpose and Effect of Amendment 8

The chief purpose of a proposed amendment is derived from objective criteria inherent in the amendment itself, such as the amendment's main effect. *NAACP*, No. SC10-1375 , slip op. at 8 (quoting *Armstrong v. Harris*, 773 So. 2d at 18). This evaluation includes consideration of the amendment's "true meaning, and ramifications." *Id.*

The Florida Constitution currently requires the legislature, as part of the State's "paramount duty" to provide a high quality system of public schools, to "make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that . . . the maximum number of students who are assigned to each teacher [does not exceed 18 students for prekindergarten through grade 3 . . . 22 students for grades 4 through 8 . . . and 25 students for grades 9 through 12]." Art. IX, § 1, Fla. Const.

This provision, added to the Florida Constitution in 2002, expressly and importantly requires that the maintenance of class size levels be funded by the state: "Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local school districts." *Id.*

Thus, Article IX, Section 1 of the Florida Constitution unmistakably confers upon Floridians a constitutional right to have the Florida Legislature fund public education at a minimum specified level sufficient to meet the maximum class size goals specified in that section. As this Court found in its review of the 2002 amendment which added these provisions, the "primary purpose" of the amendment was "the legislative funding of reduced classroom size." *Advisory Opinion to the Attorney Gen. re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 585 (Fla. 2002).

Article IX, Section 1 establishes a base funding rate which the Florida Legislature is required to pay to local school districts to attain and maintain the goal of smaller classes. Passage of Amendment 8 would significantly alter that funding formula by raising the maximum number of students permitted in each class by three students in prekindergarten through third grade, and five students in fourth through twelfth grades. As a result, the minimal base funding required to be provided would be reduced by 17% for students in prekindergarten through third grade, by 23% for students in fourth through eighth grade, and by 20% for students in ninth through twelfth grades. Additionally, Amendment 8 would impose class size limits for each grade grouping based upon schoolwide averages instead of the maximum number of students assigned to each teacher. By increasing the number of students that will be tolerated in Florida classrooms, Amendment 8 reduces the

level of funding Floridians are currently constitutionally entitled to have the State provide to public schools.

C. The Failure to Disclose the Effect of the Amendment on the Existing Constitutional Right to Legislative Funding of Maximum Class Sizes Renders the Amendment Invalid

In concluding that Amendment 8's ballot language complies with the accuracy requirement of section 101.161, Florida Statutes, the trial court found that the ballot summary "clearly and unambiguously advise[s] the voter that the Legislature is still obligated to provide the funding required to meet the class size approved by the voter if the amendment passes, and it clearly and unambiguously advises the voter of the new class size and attendant funding obligation." (Final Summary Judgment 8-9.)

Plaintiffs do not dispute that the ballot summary sufficiently discloses the change in class size calculations, and that it discloses a legislative funding obligation upon passage of the proposed amendment. Where the trial court erred, however, is in concluding that the ballot summary advises the voter that "the Legislature is *still* obligated to provide the funding to meet the class size approved by the voter." (*Id.* at 8-9) (emphasis added). The ballot summary wholly fails to inform voters that there is any *existing* legislative obligation to fund required class size levels; therefore, voters cannot possibly understand from the summary that

there is an existing constitutionally prescribed base funding formula, and how this amendment affects that formula. That effect is a substantial reduction of the base funding which the State is currently required to provide. Failure to give voters actual notice of such an important effect upon the state constitution renders the ballot language defective. *See Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (ballot summary was defective because it failed to disclose that amendment would eliminate constitutional prohibition against lobbying for two years after leaving public office); *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000) (ballot summary defective for failing to disclose that main effect of amendment was to nullify the Cruel or Unusual Punishment Clause in the Florida Constitution).

In *Askew*, the ballot summary accurately described the amendment as prohibiting former state officers from lobbying for two years after leaving office unless they fully disclosed their financial interests, but failed to disclose that the existing constitutional provision *entirely prohibited* such lobbying for two years—with no exceptions. 421 So. 2d at 153. Thus, this Court found that the ballot language did "not set out the chief purpose of the amendment so as to give the electorate fair notice of the actual change" in the constitutional provision wrought by the amendment. *Id.* at 155. The Court observed that if the proposal had been "a totally new provision," rather than an amendment to an existing provision, "its ballot summary and title would probably have been permissible." *Id.* at 156. The

problem was the summary failed to disclose that there was an existing ban on lobbying—a "vital concern"—and failed to give fair notice that the amendment would constitute an exception to this ban. *Id.*

As was the case in *Askew*, Amendment 8 does not write on a clean slate. It is not a first-time provision establishing the base rate of funding which the State will be required to provide local school districts. Rather, it is a reduction of the existing constitutional base rate. To comport with the constitutional and statutory accuracy requirement, the existence of the State's base funding obligation—a "vital concern"—as well as Amendment 8's effect upon this existing obligation, must be disclosed to the voter. As in *Askew*, the problem with Amendment 8 "lies not with what the summary says, but, rather, with what it does not say." 421 So. 2d at 156. *See also Florida State Conf. of NAACP Branches*, No. SC10-1375, slip op. at 11 (Fla. Aug. 31, 2010) ("Nowhere does the ballot language inform the voter that there is currently a mandatory contiguity requirement in article III, and nowhere does the language inform the voter that the contiguity requirement could be diluted by Amendment 7.").

This omission prevents voters from being sufficiently informed to cast an intelligent vote on Amendment 8. Because the ballot title and summary do not inform voters that the constitution currently requires the legislature to fund public schools at a base level necessary to satisfy the present class size requirements,

some voters are likely to believe that their local school districts are forced to fund the requirements. These voters may believe a favorable vote on the amendment is necessary to lessen the burden on local school districts or to avoid an increase in local property taxes. Neither do the ballot title and summary disclose to the voter that a favorable vote on Amendment 8 will result in a reduction of funding which the State is now constitutionally obligated to provide to local school districts. While a voter may be willing to vote for an increase in class sizes and agree to an averaging, as opposed to a per classroom head count (both effects mentioned in the ballot summary), that same voter may object to the state-required funding to their local schools being reduced (an effect not mentioned in the ballot summary). Indeed, not only is the funding reduction not disclosed, but the only mention of funding in the summary is that the "legislature shall provide sufficient funds to *maintain*" the average levels required by the amendment (emphasis added)—thus hiding from voters the fact that funding levels actually will be reduced from current levels.

To the extent the State argues that voters have an obligation to educate themselves about the existing constitutional provision, this Court has squarely rejected the notion that the availability of public information about a proposed amendment may serve as a substitute for an accurate and informative ballot summary. *Smith v. Am. Airlines*, 606 So. 2d 618, 621 (Fla. 1992) (summary was

defective where it assumed an extensive understanding of the subject matter of the amendment and required voters to infer a meaning that was not evident on the face of the summary itself).

It would not have been difficult or onerous for the legislature to prepare a ballot summary that discloses the chief purpose and effect of the changes proposed by Amendment 8. The present case is totally unlike *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982), where the Court rejected the challengers' claims of deficiencies of a ballot summary because the challengers "effectively [sought] an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects" and "[t]o satisfy their request would require a lengthy history and analysis of the law [and rule] . . . ." In the present case, it would have been a simple matter for the legislature to address the effect of the amendment on funding in the ballot summay. Instead it elected to "hide the ball" and conceal the fact that passage of Amendment 8 would result in a substantial diminution of the State funding which the present language requires. This significant omission impels the Court to remove the proposal from the ballot, regardless of the substantive merit of the proposal. *Florida Dept. of State v. Slough*, 992 So. 2d 142, 149-50 (Fla. 2008) (to guard against removal, a sponsor "need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to

disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous").

If, as this Court has repeatedly stated, the requirement of the ballot title and summary to clearly and unambiguously state the chief purposes and effects of a proposed constitutional is a "truth in packaging" requirement, *e.g.*, *Roberts v. Doyle*, No. SC10-1508, slip. op. at 3 (Fla. Aug. 31, 2010), then Amendment 8's title and summary miss the mark. The true effects and ramifications of the amendment upon the legislature's obligation to fund class size goals do not even appear in fine print. This omission would cause any vote by the electorate on Amendment 8 to be a nullity.

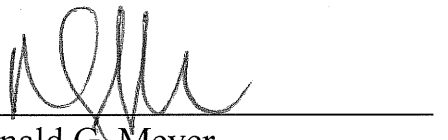
Because the ballots for the general election have been printed, the appropriate remedy if the Court deems the ballot language invalid is to provide notice at the polling places that the amendment has been ordered removed from the ballot and that votes cast for the measure will not count for its approval or rejection. (Appellants' Suggestion for Certification of Appeal to Florida Supreme Court, Appendix, Tab 2 at p. 2.).

CONCLUSION

The ballot title and summary of Amendment 8 fail to give voters fair notice of the chief purpose and effect of the amendment. Therefore, Plaintiffs respectfully request that this Court reverse the judgment of the trial court and direct

entry of judgment in favor of the Plaintiffs, instructing that votes cast for or against Amendment 8 will not be counted for approval or rejection of the amendment and that voters be given notice to this effect at each polling place.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief uses Times New Roman 14-point font in compliance with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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