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.

REPLY BRIEF OF APPELLANTS

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

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REPLY TO APPELLEES' STATEMENT OF THE CASE AND FACTS

For purposes of completeness, Plaintiffs submit the following additional statements in response to Defendants' Statement of the Case and Facts:

In response to Defendants' statement that the Florida Legislature appropriated "*more* than was necessary to reach the constitutional targets," (Answer Brief 3) (emphasis in original), Plaintiffs state that the Department of Education estimated the following number and percentage of individual classrooms in traditional schools would exceed the constitutional class size maximums for the 2010-2011 school year:

> 100,440 classrooms or 32.43 % in prekindergarten through grade 3;
>
> 77,607 classrooms or 28.59 % in grades 4 through 8; and
>
> 56,564 classrooms or 37.02 % in grades 9 through 12.

(R1:48.)

In response to Defendants' statement that between 2003 and 2009, school districts spent about $2 billion in class size funds for non-class size purposes (Answer Brief 3),[1] Plaintiffs state that there has been no contention that any school district that had not met the class size requirements spent its allocation of class size funds for another purpose. Plaintiffs further state that Florida law expressly

[1] Plaintiffs do not believe this point is relevant to any argument in this proceeding, but provide the Court with additional related information for purposes of completeness.

permitted school districts which had met the constitutional maximums to use class size reduction operating categorical funds for any lawful operating procedure, with priority given to increasing salaries of classroom teachers. *See* § 1011.685, Fla. Stat. (2003-2008).

REPLY ARGUMENT

For all of its twenty-two pages, Defendants' answer brief fails to address the crux of Plaintiffs' argument: that the trial court erred in finding that Amendment 8's ballot title and summary advise the voter "the Legislature is *still* obligated to provide the funding to meet the class size approved by the voter" because the ballot summary fails to inform voters that there is any *existing* obligation to fund the class size levels currently specified in the Florida Constitution. Due to this omission, the ballot summary does not disclose to voters the significant effect Amendment 8 will have upon their existing right to have the Florida Legislature make adequate provision to meet the existing classroom size goals specified in Article IX, Section 1 of the Florida Constitution. Plaintiffs reassert this argument it in its entirety but do not repeat it here in the interest of brevity.

Rather than defending the correctness of the judgment below, Defendants repeat the arguments they made in the trial court even though none of these arguments were adopted by the trial court. For the reasons set forth below,

Plaintiffs respectfully submit this Court should reject these arguments just as the trial court implicitly did.

Defendants' First Argument: Funding Is Not a Chief Purpose of Either Article IX, Section 1 of the Florida Constitution, or Proposed Amendment 8

Defendants remarkably contend that the chief purpose of the existing class size provisions in Article IX, Section 1(a) of the Florida Constitution is solely to assign numeric class size levels and not to establish a funding obligation for those class size levels. (Answer Brief 14-16.) Equally remarkable is Defendants' contention that the chief purpose of Amendment 8 is solely to change the calculation of these numeric class size levels to provide school districts "flexibility to avoid burdensome and disruptive choices that could adversely affect student learning," but not to modify the State's existing funding obligation. These arguments were not addressed in the trial court's final judgment, and are conclusively refuted by the plain language of these provisions as well as their history.

The Florida Constitution has long required the State of Florida to make adequate provision for a uniform system of free public schools. Art. IX, § 1, Fla. Const. In 1996, a coalition of Florida School Boards challenged the adequacy of school funding under the provisions of Article IX as it then existed. In *Coalition for Adequacy v. Chiles*, 680 So. 2d 400 (Fla. 1996), the Supreme Court determined

that the Constitution did not then contain appropriate standards defining what was required for the "adequacy" funding requirement to be measured and met. In 1998, in response to the *Coalition* decision, the Constitutional Revision Commission proposed, and the people of Florida adopted, amendments to Article IX which established standards for determining the adequacy of funding public education. *Bush v. Holmes*, 919 So. 2d 392, 406 (Fla. 2006).

In 2002, the people of Florida again amended Article IX imposing further objective funding requirements on the State. The 2002 "Class Size Amendment" which resulted in the current language in Article IX, Section 1(a), directs the State to provide funding to pay for smaller classes for Florida's public school children:

> . . . . 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 school year, there are a sufficient number of classrooms . . . .
>
> . . . . *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. Beginning with the 2003-2004 fiscal year, *the legislature shall provide sufficient funds* to reduce the average number of students in each classroom by at least two students per year . . . .

Art. IX, § 1, Fla. Const. (emphasis added).

When this Court reviewed the 2002 amendment for compliance with the single subject and ballot clarity requirements, the Court found that 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 (2002) (emphasis added). Furthermore, the Court agreed with the proponents of the amendment that "only the Legislature, in the manner in which it provides funding for school classrooms, will be required to act as a result of this amendment." *Id.* at 584. In effect, the Class Size Amendment prescribed additional funding requirements—additional standards for determining the adequacy of funding public schools. The Class Size Amendment imposed a funding obligation on the Legislature to make adequate provision to pay for smaller classes in order to meet the numeric class size goals expressed in Article IX, Section 1(a), 1-3.

Defendants' attempts to characterize the 2002 amendment as unrelated to funding based upon the shorthand titles used by the sponsor and the Court (Answer Brief 15) are unpersuasive in light of the provision's plain language. Furthermore, for purposes of understanding the chief purpose of an amendment, the title cannot be read in isolation; the ballot summary and title must be read together. *Advisory Opinion to Attorney Gen. re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996) (quoting *Advisory Opinion to the Attorney General re: Limited Casinos*, 644 So. 2d 71, 75 (Fla.1994)). The ballot summary for the 2002 Class Size Amendment strongly emphasized the funding component of the amendment:

> Proposes an amendment to the State Constitution *to require that the Legislature provide funding* for sufficient classrooms so that there be a maximum number of students in public school classes for various grade levels; requires compliance by the beginning of the 2010 school year; *requires the Legislature, and not local school districts, to pay for the costs associated with reduced class size*; prescribes a schedule for *phased-in funding* to achieve the required maximum class size.

Amendment to Reduce Class Size, 816 So. 2d at 581.

If the existing provisions of Article IX, Section 1(a) were framed solely as a free-standing constitutional right to have class sizes not exceed certain levels, or even to require school districts to provide for certain class sizes, then Defendants' characterization of Amendment 8 as relating solely to "flexibility" would be plausible. But as the history and text of Article IX, Section 1(a) make clear, the class size limitations in that section are not free-standing requirements; they are inextricably linked with the state legislature's obligation to fund them. These provisions cannot be decoupled—funding is at the heart of both the existing class size provision and Amendment 8's proposal to change them. This Court should reject Defendants' arguments to the contrary, as the trial court implicitly did.

Defendants' Second Argument: Article IX, Section 1 Does Not Set a "Specific Level of Funding"

Defendants seem to contend that because Article IX, Section 1 does not assign a specific dollar or percentage amount the State must allocate toward

meeting the constitutionally-specified class size levels, then this provision cannot or does not impose a funding requirement upon the State. (Answer Brief 16-18.) The trial court did not adopt this view; nor should this Court.

Article IX, Section 1(a) of the Florida Constitution unequivocally imposes an enforceable obligation on the Florida Legislature to fund public schools at a level sufficient to meet the specified classroom levels. The fact that the constitution imposes the funding requirement in the form of target classroom sizes, instead of specific dollar or percentage amounts, does not diminish the significance of the state's obligation or the right of the citizens to seek to enforce it. As discussed above, the class levels contained in Article IX, Section 1(a) establish a floor for determining the adequacy of funding public schools. A constitutional right need not have specific numbers assigned to it in order to be enforceable; otherwise, Floridians would never be able to challenge an eminent domain action for failing to provide "full compensation" or challenge a fine for being "excessive." *See* art. X, § 6, Fla. Const.; *id.* art. I, § 17.

Defendants' assertion that "no set funding requirements exist" in Article IX, Section 1(a) (Answer Brief 16) is based upon a misreading of this Court's decision in *Amendment to Reduce Class Size*. In addressing the opponents' argument that the Class Size Amendment violated the single subject requirement because it would substantially alter or perform multiple functions of state government, the

Court distinguished the challenged amendment from those which specified a certain amount or percentage of the budget to be spent. *Amendment to Reduce Class Size*, 816 So. 2d at 583-84; *compare Advisory Opinion to the Attorney Gen. re Requirement for Adequate Public Education Funding*, 703 So. 2d 446 (Fla. 1997) (finding initiative petition violated single subject requirement by requiring at least 40% of total appropriations to be spent on public education, because it would substantially alter the legislature's discretion to make appropriations among the vital functions of state government). The Court also found the 2002 Class Size Amendment would not intrude upon the functions of the local school board, because the amendment did not require the legislature to meet its funding obligation by building new schools. *Id.* at 584-85. Instead, the amendment allowed the legislature flexibility in meeting the classroom levels "and places the obligation to ensure compliance on the Legislature, not the local school boards." *Id*. at 585.

These indisputable and unremarkable findings—that the 2002 Class Size Amendment does not specify a certain amount or percentage of the budget to be spent and does not require the legislature to meet its funding obligation by building new schools—in no way diminish or lessen the significance of the funding requirement in Article IX, Section 1.

Defendants' additional contention that Floridians have no ongoing right to state funding of class size limits under the Article IX, Section 1 of the Florida Constitution (Answer Brief 17), not adopted by the trial court, is flawed for two reasons. First, it ignores the requirement the legislature "make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that . . . ." This means the beginning of the 2010 school year is the *start date* when the legislature must ensure the class size objectives of section 1(a) are met; it is not an end date. Second, Defendants' expectation that the funds needed to reduce class sizes by two students per year would "cease once the goal is reached" ignores the reality that the goal has not been reached. (R1:48.) For both of these reasons, it is beyond dispute that the Florida Legislature has a present obligation to fund public schools at a sufficient level to meet the class size specifications in Article IX, Section 1 of the Florida Constitution. This funding obligation is sufficiently "specific" or "set" that it must be disclosed to Florida voters when they are asked to vote to weaken it.

Defendants' Third Argument: The Effect of Amendment 8 on Funding is Speculative

Plaintiffs argued below that the effect of Amendment 8 upon the existing funding obligation in Article IX, Section 1 could be determined as a matter of law from the face of amendment. (R1:75.) Defendants argued, to the contrary, that Plaintiffs had the burden of proving as a matter of fact that Amendment 8 would

cause a reduction in the legislature's funding obligation to public schools. (R1:42-43.) The trial court rejected Defendants' argument on this point, finding there was no genuine issue of material fact that would preclude the granting of either party's motion for summary judgment. (R1:93.) Nevertheless, on appeal Defendants challenge Plaintiffs' description of the effects of the Amendment as "wholly speculative and unsupported." (Answer Brief 19.)

Plaintiffs maintain that no evidence is required to show that the relaxed class size standards proposed by Amendment 8 will require less state money to accomplish than the existing state constitutional standards. Of course, the legislature remains free to exercise its discretion to spend *additional* funds on public schools; but it is clear from the text of the amendment that the constitutional funding floor which the legislature is obligated to comply with will be lowered by Amendment 8.

To place this drop in floor in perspective, Plaintiffs calculated the percentage of students in each classroom that can increase under Amendment 8: by 17% for students in prekindergarten through third grade (from 18 to 21 students), by 23% for students in fourth through eighth grade (from 22 to 27 students), and by 20% for students in ninth through twelfth grades (from 25 to 30 students). In calculating these percentages, Plaintiffs do not assert that every classroom will reach the maximum number of students. Rather, Plaintiffs offer these calculations

purely as a means of demonstrating the extent to which Amendment 8 may reduce the funding obligation that currently exists in Article IX, Section 1. The actual dollar or percentage change in actual funding that would result from implementation of Amendment 8 would depend upon a variety of factors. But it is not at all speculative—in fact it is a certainty—that the floor which the legislature is *obligated* to spend to reduce class size levels would be reduced by Amendment 8.

Defendants' Fourth Argument: A Ballot Title and Summary Need Not Disclose an Amendment's Fiscal Impact

Defendants ask this Court to adopt a black letter rule that the fiscal impact of a proposed constitutional amendment need never be disclosed in the ballot title and summary for a legislatively-proposed amendment. (Answer Brief 20-21.) The trial court declined to lay down such a rule; so too should this Court.

It is well settled that a ballot title and summary for any proposed amendment, whether proposed by initiative, joint resolution, or commission, must give fair notice of changes to existing constitutional provisions so the voter can understand what she is voting upon. *E.g.*, *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982); *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000); *Florida State Conf. of NAACP Branches*, No. SC10-1375, slip op. at 11 (Fla. Aug. 31, 2010). Contrary to Defendants' arguments, this obligation is not somehow reduced or eliminated in

circumstances where the change to the existing provision relates to funding. Such a rule would render ineffectual the accuracy requirement in article XI, section 5 of the Florida Constitution and section 101.161(1), Florida Statutes.

None of the authorities cited by Defendants support the adoption of such a rule. In *Smith v. Coalition to Reduce Class Size*, 827 So. 2d 959 (Fla. 2002), the Court found unconstitutional a statute requiring a fiscal impact statement to be placed on the ballot for every amendment proposed by initiative. Subsequent to *Smith*, the people of Florida adopted article XI, section 5(c) of the Florida Constitution, to require a financial impact statement for all amendments proposed by initiative. Neither *Smith* nor its successor constitutional provision are relevant to the circumstances of the present case, in which the chief purpose and effect of the proposed amendment is to reduce the level or "floor" of State funding current guaranteed in the constitution.

Defendants' remaining cases are no more on point. The accuracy of the ballot title and summary was not challenged at all in *Advisory Opinion to the Attorney General re Repeal of High Speed Rail Amendment*, 880 So. 2d 624, 628 (Fla. 2004) ("no party argues that the present ballot title and summary are infirm"), much less was there a specific contention that the ballot language failed to disclose the effect of the amendment upon an existing constitutional funding obligation. Likewise in *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982), there was no issue of

funding or failure to disclose a financial impact upon an existing funding obligation.

The effect of Amendment 8 upon the funding obligation in Article IX, Section 1 is more than a "possible outcome" that would "clutter and undercut the ability and usefulness" of the ballot summary. It would not require a lengthy or complicated explanation to disclose to voters that they have an existing right in the Florida Constitution to require the State to make adequate provision for public schools to meet the existing class size targets, and that Amendment 8 would weaken this right by raising the maximum permissible class levels and converting current class level maximums to school wide averages. The fact that a summary need not explain the complete details of a proposal at great and undue length does give drafters of proposed amendments leave to ignore the importance of the ballot summary or to fail to provide meaningful information necessary to communicate what the electorate is being asked to vote upon. *See Smith v. Am. Airlines*, 606 So. 2d 618, 621 (Fla. 1992).

Finally, contrary to Defendants' contention, Plaintiffs do not assert the ballot summary for Amendment 8 must disclose that local school districts are not responsible for funding class size requirements. As argued throughout this case, Plaintiffs contend the ballot title and summary are defective for failing to disclose that the *State* is presently obligated to fund the existing class size levels. It cannot

be assumed that all voters know the present class size obligations are required to be funded at the state level. *Id.* at 621 (summary defective for assuming voters had extensive understanding of subject matter of amendment). A voter who mistakenly believes the current class size obligations must be funded by the local school district will mistakenly be concerned about the financial effect of the existing amendment on the voter's local schools and on the voter's own property tax bill. On the other hand, a voter who is informed that both the existing and the proposed class size levels must be funded by the Florida Legislature, and that the class levels proposed in Amendment 8 will result in a reduction of State funding, is fully informed of the "true meaning, and ramifications" of the amendment. *Armstrong v. Harris*, 773 So. 2d 16, 18 (Fla. 2000).

CONCLUSION

Wherefore, 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,

/s/
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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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