SC18-1287

In the Supreme Court of Florida

DEPARTMENT OF STATE, AN AGENCY OF THE STATE OF FLORIDA, AND KEN DETZNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF FLORIDA,

Petitioners,

v.

FLORIDA GREYHOUND ASSOCIATION, INC., A FLORIDA CORPORATION, AND JAMES BLANCHARD, INDIVIDUALLY,

Respondents.

PETITIONERS' BRIEF

ON DISCRETIONARY REVIEW AND CERTIFICATION FROM THE FIRST DISTRICT COURT OF APPEAL
Case No. 1D18-3260

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STATEMENT OF THE CASE AND FACTS

On May 9, 2018, Florida's Constitution Revision Commission ("CRC") submitted eight proposed constitutional revisions to the Florida Secretary of State. *See* R. 223–74. Revision 8, which the Department of State renumbered for ballot placement as Amendment 13, addresses dog racing in the State of Florida. R. 273–74. Specifically, Amendment 13 is a proposal "relating to ending dog racing; creating new sections in Article X and Article XII of the State Constitution to prohibit the racing of, and wagering on, greyhounds and other dogs after a specified date." R. 273.

The full text of Amendment 13 reads:

> A new section is added to Article X of the State Constitution to read:
>
> ARTICLE X
>
> MISCELLANEOUS
>
> Prohibition on racing of and wagering on greyhounds or other dogs.–The humane treatment of animals is a fundamental value of the people of the State of Florida. After December 31, 2020, a person authorized to conduct gaming or pari-mutuel operations may not race greyhounds or any member of the *Canis Familiaris* subspecies in connection with any wager for money or any other thing of value in this state, and persons in this state may not wager money or any other thing of value on the outcome of a live dog race occurring in this state. The failure to conduct greyhound racing or wagering on greyhound racing after December 31, 2018, does not constitute grounds to revoke or deny renewal of other related gaming licenses held by a person who is a

licensed greyhound permitholder on January 1, 2018, and does not affect the eligibility of such permitholder, or such permitholder's facility, to conduct other pari-mutuel activities authorized by general law. By general law, the legislature shall specify civil or criminal penalties for violations of this section and for activities that aid or abet violations of this section.

A new section is added to Article XII of the State Constitution to read:

ARTICLE XII

SCHEDULE

Prohibition on racing of or wagering on greyhounds or other dogs.–The amendment to Article X, which prohibits the racing of or wagering on greyhound and other dogs, and the creation of this section, shall take effect upon the approval of the electors.

R. 273–74.

Accompanying the proposed amendment was the CRC-approved ballot title and summary which, under section 101.161(1), Florida Statutes, will appear on the November 2018 ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE X, NEW SECTION

ARTICLE XII, NEW SECTION

ENDS DOG RACING.–Phases out commercial dog racing in connection with wagering by 2020. Other gaming activities are not affected.

R. 274.

Respondents initiated suit, seeking to enjoin Petitioners from placing Amendment 13 on the ballot and claiming that the ballot language is defective. R. 9–23. The trial court (Gievers, J.), at the parties' request and in view of looming election deadlines, designated the case for priority status, imposed an expedited briefing schedule on cross-motions for summary judgment, and convened a final hearing shortly after briefing concluded. R. 86–119, 632, 672. On August 1, the court issued its final order granting Respondents' motion and denying Petitioners' motion, holding that the ballot language for Amendment 13 fails the applicable legal standard. R. 605–31.

The court concluded that the title and summary do not disclose the proposed amendment's chief purpose, which it considered to be "the 'fundamental value' of animal rights, and the 'decoupling' of other forms of gaming from pari-mutuel wagering on greyhound races"; and that the ballot language would mislead voters "into believing that the Amendment prohibits more activity than it, in fact, does." R. 620, 621. The court thus enjoined Petitioners "from placing [the] Amendment on the ballot for the November 2018 General Election." R. 629.

The next day, Petitioners appealed to the First District Court of Appeal. R. 635–38. On August 3, in view of approaching election deadlines and their desire for a timely and final resolution, the parties filed a joint suggestion for certification that the judgment under review concerns a matter of great public importance and

requires immediate resolution by this Court. They also jointly requested expedited treatment. The First District issued the requested certification on August 6, R. 8 (DE 59), and this Court accepted jurisdiction on August 7, ordering expedited briefing and scheduling the case for oral argument on August 29.

SUMMARY OF ARGUMENT

This Court has long maintained that the amendment process is "the most sanctified area in which a court can exercise power," and a proposed amendment should be submitted to the electorate unless its ballot language is "clearly and conclusively" defective. Because the ballot language at issue in this case fully informs the electorate of the proposed amendment's chief purpose and is not misleading, Florida's voters have a right to consider its merits and cast their vote. The trial court's ruling to the contrary must be quashed.

I. Under well-established precedent, ballot language must inform voters of the proposed amendment's chief purpose, and that chief purpose consists *only* of the amendment's legal effect. As evidenced by its plain text, Amendment 13's operative legal effect is to end dog racing in connection with wagering by 2020. Because the ballot language, in simple and accurate terms, informs voters of that chief purpose, it satisfies the first requirement for validity. In concluding otherwise, the trial court erred by focusing on the proposed amendment's prefatory, legally inoperative "fundamental value" statement and by attributing a legal effect to the amendment—

a supposed alteration of article X, section 23—that it will not have.

II. In concluding that the ballot title "ends dog racing" will affirmatively mislead voters into believing that it will ban dog racing *not* connected to wagering, the trial court committed two independent errors. First, contrary to this Court's precedent, the trial court viewed the title in isolation instead of in conjunction with the summary. That misstep led the court astray, as the summary plainly indicates that the proposed amendment will end only a certain type of dog racing—that which is "in connection with wagering." When voters cast their ballots, they are presumed to read the title and summary together and thus cannot be misled in the manner that the trial court posited. Second, even when the ballot title is wrongly read in isolation, the ordinary meaning of the phrase "dog racing"—which voters are presumed to know—itself entails wagering. Indeed, Respondents are not in a position to dispute that ordinary meaning, as news postings on their own website employ the phrase "dog racing"—and their affidavit filed below employs the synonymous phrase "greyhound racing"—to describe a wagering activity.

In concluding that the ballot summary will mislead voters into believing that the proposed amendment will end wagering on out-of-state dog races, the trial court erred by failing to credit voters' common sense and by inverting the language that will actually appear on the ballot. Florida's voters understand that when they vote on a proposed amendment to the *Florida* Constitution, they are deciding what the

law shall be in Florida, not in other states. Thus, they will understand that Amendment 13 will not end dog racing in other states. Moreover, the ballot summary indicates, correctly, that Amendment 13 will end "dog racing in connection with wagering," not "wagering in connection with dog racing." Therefore, Florida's voters will understand, through common sense and reading the summary, that the proposed amendment will not prevent them from casting bets on races that occur in other states.

III. The trial court further erred in concluding that the ballot language contains material omissions. While the court asserted that the summary was defective for failing to address Amendment 13's prefatory "fundamental value" statement, it did not grapple with—much less rebut—Petitioners' argument that the statement has no independent legal effect. Nor could it have done so. Under this Court's precedent, to be judicially enforceable, a constitutional provision must contain "a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." Amendment 13's prefatory statement that "[t]he humane treatment of animals is a fundamental value of the people of the State of Florida" provides no such rule, and thus lacks independent legal effect. And because this Court has long held that "[t]he ballot summary should tell the voter the *legal effect* of the amendment, and no more," the ballot summary need not disclose Amendment 13's legally inoperative prefatory

statement.

The trial court also erred in concluding that Amendment 13 would alter article X, section 23 of the Florida Constitution. That existing constitutional provision empowered two counties to authorize slot machines by local referendum and placed constraints only on *that* authority of *those* counties; it sets no statewide constitutional ceiling for the authorization of slots through other lawful means and imposes no restriction on the Legislature's or the state electorate's authority over slot-machine policy. In other words, contrary to the trial court's conclusion, article X, section 23 establishes no freestanding, constitutional "coupling requirement" for slot-machine gaming but instead simply marks the boundaries of an authority for two counties that they have already exercised. Amendment 13, in turn, addresses only whether *existing* slot-machine licenses will be *revoked or not renewed* in light of the ban on dog racing. Because Amendment 13 addresses a question wholly distinct from that addressed by article X, section 23, there is no change in the constitutional status quo that the ballot language fails to disclose. Indeed, the ballot language exceeds applicable requirements by disclosing, correctly and in plain English, that "[o]ther gaming activities are not affected."

IV. In addition to its substantive errors, the trial court committed a methodological one: a failure to apply the correct legal standard. At least in part, the trial court relied on a comparison to prior draft ballot language, on hearing

statements by individual CRC members, and on a speculative inference of bad faith. But the only question presented in this case is whether the final ballot language that will go to the voters passes muster under the applicable legal standard. The court was not tasked with assessing whether prior drafts were better than the final, what individual CRC members may have said regarding their individual purposes in voting for or against the proposed amendment, or why the final language took the form that it took. And the CRC, as a governmental body charged with the solemn task of proposing amendments to the State's fundamental law, is entitled to a presumption of regularity and good faith. By considering matters extraneous to the issue presented and entertaining an unsubstantiated and irrelevant inference regarding the CRC's purported motives, the trial court failed to apply the correct legal standard.

LEGAL STANDARD AND STANDARD OF REVIEW

I. As a threshold matter, this Court's review of Plaintiffs' challenge is governed by two animating principles. First, the amendment process "is the most sanctified area in which a court can exercise power." *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958). Under the Florida Constitution, "[s]overeignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited *only* by those instances where there is an *entire* failure to comply with a *plain* and *essential* requirement of the organic law in

proposing the amendment." *Id.* (emphases added). Accordingly, a court must exercise "'extreme care, caution, and restraint before it removes a [proposed] constitutional amendment from the vote of the people.'" *In re Advisory Op. to Att'y Gen. re Authorizes Miami-Dade & Broward Cty. Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 522, 523 (Fla. 2004) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)).

Second, and relatedly, judicial review of the amendment process is extremely deferential. If "'any reasonable theory'" can support an amendment's placement on the ballot, it should be upheld. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). Compared to the deference owed legislative acts, this standard "is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval." *Id.* (quotation marks omitted). To that end, Florida courts are not to interfere with the amendment process "unless the laws governing the process have been 'clearly and conclusively' violated." *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 499 (Fla. 2002).

II. Section 101.161(1), Florida Statutes, codifies the standard for ballot titles and summaries of proposed constitutional amendments. Any such measure "submitted to the vote of the people" shall include a ballot title "not exceeding 15 words in length, by which the measure is commonly referred to or spoken of," and

a ballot summary, "not exceeding 75 words in length," that must explain "the chief purpose of the measure." § 101.161(1), Fla. Stat. (2017).

The purpose of the ballot title and summary is "to provide fair notice of the content of the proposed amendment." *Advisory Op. to the Att'y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). To satisfy section 101.161, Florida Statutes, they must "state in clear and unambiguous language the chief purpose of the measure," *Askew*, 421 So. 2d at 155, so that the proposed amendment does not "fly under false colors" or "hide the ball" as to its effect, *Armstrong*, 773 So. 2d at 16 (quotation marks omitted).

In assessing a proposed amendment's ballot title and summary, a court asks two questions: "First, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.'" *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010) (quoting *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008)).

III. Because this appeal concerns a legal determination whether the ballot language satisfies the applicable standard, this Court reviews the trial court's ruling *de novo*. *Slough*, 992 So. 2d at 147.

ARGUMENT

I. AMENDMENT 13'S CHIEF PURPOSE IS TO END DOG RACING IN CONNECTION WITH WAGERING BY 2020, AND THE BALLOT LANGUAGE FULLY ADVISES VOTERS OF THAT CHIEF PURPOSE.

This Court has made clear that ballot language need only, and should only, disclose a proposed amendment's "legal effect." *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). "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." *Id.* Stated another way, to discern an amendment's "chief purpose," courts must employ an "objective" test and look to the amendment's "main effect." *Armstrong*, 773 So. 2d at 18. Because Amendment 13's main legal effect is to end dog racing in connection with wagering by 2020, the ballot language fully advises voters of the proposed amendment's chief purpose.

The operative language of the amendment provides:

> After December 31, 2020, a person authorized to conduct gaming or pari-mutuel operations may not race greyhounds or any member of the *Canis Familiaris* subspecies in connection with any wager for money or any other thing of value in this state, and persons in this state may not wager money or any other thing of value on the outcome of a live dog race occurring in this state.

R. 273. In addition, the Amendment makes clear that it has no impact on other gaming activities. Specifically, it provides that the phase-out of dog racing in connection with wagering will not "constitute grounds to revoke or deny renewal of other related gaming licenses held by a person who is a licensed greyhound

permitholder on January 1, 2018, and does not affect the eligibility of such permitholder, or such permitholder's facility, to conduct other pari-mutuel activities authorized by general law." R. 273–74. The Amendment further requires the Legislature to specify by general law "civil or criminal penalties for violations of this section and for activities that aid or abet violations of this section." R. 274.

In clear and unambiguous language, the ballot title and summary for Amendment 13 convey the chief purpose of the proposal. First, the title provides a caption by which the Amendment is commonly spoken of: "ENDS DOG RACING." R. 274. Second, the summary explains the chief purpose of Amendment 13 by providing, correctly, that the proposal will "[p]hase[ ] out commercial dog racing in connection with wagering by 2020." *Id.* Third, the summary alerts voters that the phase-out of dog racing in connection with wagering will not affect "[o]ther gaming activities." *Id.* Read together, the title and summary convey to voters the chief purpose of the Amendment and allow for the casting of an informed vote.

Nonetheless, the trial court concluded that the proposed amendment has two other chief purposes—"the 'fundamental value' of animal rights, and the 'decoupling' of other forms of gaming from pari-mutuel wagering on greyhound races"—and that these purposes will not be disclosed on the ballot. R. 621. As more fully explained *infra* Part III, Amendment 13's prefatory "fundamental value" statement cannot be its chief purpose because it lacks any independent legal effect,

and "decoupling" cannot be its chief purpose because Amendment 13 does not have the impact that the trial court ascribed to it. Thus, the trial court erred in concluding that the ballot language fails to disclose the proposed amendment's chief purpose.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE BALLOT LANGUAGE IS AFFIRMATIVELY MISLEADING.

Notwithstanding its disclosure that Amendment 13 will end dog racing in connection with wagering by 2020 and leave other gaming activities unaffected, the trial court concluded that the ballot language is affirmatively misleading for two reasons. First, the court concluded that the ballot title will mislead voters "into believing that the Amendment prohibits more activity than it, in fact, does." R. 620. Second, the court concluded that the ballot summary would mislead voters into believing the proposal would "eliminate wagering on dog racing," R. 608, including "wagering in Florida on dog races taking place outside . . . Florida," R. 621. As explained below, both conclusions are incorrect.

A. The Trial Court Read the Ballot Title in Isolation and Failed to Acknowledge the Plain Meaning of "Dog Racing."

Focusing on the ballot title "ends dog racing" in isolation, the trial court concluded that it was misleading because "the actual text of the Amendment does not go so far," as the prohibition relates only to racing "in connection with wagering on the outcome of" dog races. R. 620. However, this Court has "reaffirmed numerous times" that "'[t]he ballot title and summary may *not* be read in isolation,'" but instead

"'must be read together in determining whether the ballot information properly informs the voters.'" *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 804 (Fla. 2014) (emphasis added) (quoting *Advisory Op. to Att'y Gen. re Voluntary Universal Pre–Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002)) (collecting cases). Indeed, reading the title or summary in isolation would make little sense, as they serve different functions. The title is simply a "caption . . . by which the measure is commonly referred to or spoken of," while the summary is "an explanatory statement . . . of the chief purpose of the measure." § 101.161(1), Fla. Stat. (2017). Reading the title or summary in isolation also would make little sense because the voters have both, and are presumed to have read both, when they cast their ballot. *See Slough*, 992 So. 2d at 149 (observing that the voters will have both the ballot title and summary in the voting booth, and concluding that they must be "read together").

The trial court's mistaken focus on the isolated title phrase "ends dog racing" led it astray. The ballot summary makes clear that it is only a certain type of "dog racing"—that which is "in connection with wagering"—that will be phased out by 2020. R. 274. Lest there be any doubt, the next sentence further indicates that the dog racing that the proposed amendment would end is a "gaming activit[y]." *Id.* This text ensures that voters will not mistakenly believe that the proposed amendment would relate to racing other than racing that is "in connection with wagering."

But even ignoring the summary's unambiguous indications that the proposed amendment relates only to dog racing in connection with wagering, and wrongly reading the ballot title in isolation, the ordinary meaning of the isolated term "dog racing" itself entails wagering. *See* 4 Encyclopædia Britannica 150 (2010) ("Dog Racing"), *available at* https://www.britannica.com/sports/dog-racing (last visited Aug. 15, 2018) ("Betting, *an essential feature* of dog racing in most countries, is by the pari-mutuel (totalizator) system." (emphasis added)). The average Florida voter would not interpret the isolated title phrase "ends dog racing" as prohibiting activities not associated with wagering, because voters understand ballot language in accordance with its ordinary meaning. *See Advisory Op. to the Att'y Gen. re Voter Control of Gambling*, 215 So. 3d 1209, 1216 & n. 1 (Fla. 2017) (rejecting a ballot-language challenge by looking to a dictionary and interpreting gambling terms according to their "plain meaning"); *In re Advisory Op. to the Att'y Gen. re Fla. Min. Wage Amendment*, 880 So. 2d 636, 642 (Fla. 2004) (rejecting a challenge to a ballot summary by looking to the dictionary definition of the term "inflation" for its "plain meaning").

Respondents are not well-positioned to argue otherwise. The term "dog racing" is common throughout the press and the industry and is used to describe greyhound racing upon which wagers are cast.[1] Even the Florida Greyhound

[1] *See, e.g.*, Godwin Kelly, *Greyhound racing celebrates 70 years in Daytona*

Association—the lead plaintiff in this case—posts articles and press releases on its website that use the unmodified term "dog racing" to describe a "gambling" activity.[2] James Blanchard, the other plaintiff in this case and the president of the

Beach, Daily Commercial (July 20, 2018), http://www.dailycommercial.com/sports/20180720/greyhound-racing-celebrates-70-years-in-daytona-beach (quoting the owner of a Florida greyhound racing track where "[t]he stakes money is divided among the kennels that make the final" as saying "*[d]og racing* is a great business to be involved with" (emphasis added)); Samantha Putterman, *Proposal to ban greyhound racing in Florida advances*, Bradenton Herald (Dec. 1, 2017), https://www.bradenton.com/news/politics-government/state-politics/article187496498.html (referring to greyhound racing in connection with betting as "[t]he *dog racing* industry" (emphasis added)); Hoppy Kercheval, *Time for the state to give up on dog racing*, Metro News (Mar. 21, 2017), http://wvmetronews.com/2017/03/21/time-for-the-state-to-give-up-on-dog-racing/ (repeatedly referring to greyhound racing in connection with "betting" as "dog racing," and noting that "[j]ust six states have dog racing" and "[d]og racing is legal in only eight countries"); MyRacing, *Greyhound Tips*, http://myracing.com/free-greyhound-tips/ (site offering "free *dog racing* tips" and describing them as "greyhound racing *betting* tips" (emphases added)); Mark Sullivan, *Hare We Go Saturday's dog racing tips: Don't miss the best greyhound racing tips from champion tipster Mark Sullivan*, The Sun (June 30, 2018), https://www.thesun.co.uk/sport/horseracing/6657659/Saturdays-dog-racing-tips-best-greyhound-racing-tips/ (giving "*dog racing* tips" for those looking to cast "bets" on the outcome of live greyhound races (emphasis added)).

[2] *See, e.g.*, R. 598 (article posted on lead plaintiff's website and dated July 22, 2015, discussing "[w]hen *gambling* in Florida was limited to horse and *dog racing* and jai-alai" (emphases added)), *available at* http://www.floridagreyhoundassociation.com/single-post/2015/07/22/No-Casinos-Comments-to-Division-of-PariMutuel-Wagering (last visited Aug. 15, 2018); R. 601 (press release posted on lead plaintiff's website and dated October 3, 2014, describing "the Division of Parimutuel Wagering" as "the state agency which oversees the *dog racing* industry" (emphasis added)), *available at* http://www.floridagreyhoundassociation.com/single-post/2014/10/03/Greyhound-Protection-Bill (last visited Aug. 15, 2018).

Association, employed a synonymous term in his affidavit, stating that he is "personally engaged in the business of *greyhound racing*," R. 219 (emphasis added), and describing the Association's mission as "preserving live *greyhound racing* in Florida," R. 220 (emphasis added).

In sum, the trial court's conclusion that the title is misleading fails for two independently sufficient reasons: it wrongly ignores the ballot summary, and it fails to accord the term "dog racing" its ordinary meaning, which the voters must be presumed to know, and which Respondents are not well-positioned to dispute.

B. The Trial Court Inverted the Language of the Ballot Summary and Failed to Credit Voters' Common Sense.

The trial court next faulted the ballot language for a supposed failure to "make clear that wagering on the outcome of dog races which take place outside the State of Florida will not be affected." R. 621. In other words, in the trial court's view, the ballot language will mislead voters into believing that the proposed amendment will completely "eliminate wagering on dog racing," R. 608, including wagering on out-of-state races, R. 621. This conclusion failed to credit voters' common sense and assumed the inverse of the language that will actually appear on the ballot.

As an initial matter, the ballot language summarizes a proposed amendment to the *Florida* Constitution. Among the "common understanding and knowledge" that voters are presumed to possess, *Fla. Educ. Ass'n*, 48 So. 3d at 701, surely is that a state constitution regulates activity occurring within the state, and a proposed

amendment to "[p]hase[ ] out commercial dog racing in connection with wagering" would phase out such racing within the state, not outside it. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . '[T]he people of each State compose a State, *having its own government, and endowed with all the functions essential to separate and independent existence*[.]'" (quoting *Texas v. White*, 74 U.S. 700, 725 (1868)) (quotation marks omitted; emphasis and alteration added)). Thus, contrary to Respondents' argument below, the ballot language need not further "clarify the geographic limitations of Amendment 13 by stating that its prohibition only applies to races held '*in Florida*.'" R. 207 (emphasis in original). By virtue of its appearance on the ballot in Florida, Amendment 13 is presented as an amendment to the *Florida* Constitution, and voters understand that amendments to the Florida Constitution determine what the law shall be in *Florida*, not outside it.[3]

While voters have the common sense to understand that Amendment 13 would not prohibit out-of-state races, the ballot language makes clear that it would not

[3] Indeed, this Court has approved numerous ballot titles and summaries that did not specify that the proposed amendment would regulate only in-state activity. *See, e.g., In re Advisory Op. to Att'y Gen. ex rel. Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597 (Fla. 2002); *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415 (Fla. 2002).

prohibit wagering on such races. Voters will be told, correctly, that the proposed amendment will phase out "*dog racing in connection with wagering*," not that it will phase out "*wagering in connection with dog racing*." R. 274 (emphasis added). In other words, the summary correctly advises that racing—not wagering—is the chief prohibited activity. Thus, no reasonable voter will be misled into believing that the proposed amendment will prohibit wagering on out-of-state races. The trial court's contrary conclusion assumes the inverse of the language that will actually appear on the ballot and fails to credit the common knowledge that voters must be presumed to possess when they read that language.

* * *

In sum, when read in conjunction, as they must be, both the title and full summary—which (1) make clear that the proposal would amend only the Florida Constitution, (2) provide that "dog racing in connection with wagering," not "wagering in connection with dog racing," will be phased out by 2020, and (3) specify that "[o]ther gaming activities are not affected"—will not mislead voters into believing that the proposal would phase out dog racing not in connection with wagering or wagering on races held in other states.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT THE BALLOT LANGUAGE CONTAINS MATERIAL OMISSIONS.

The trial court faulted the ballot language not only for what it says, but also for what it does not say. In the court's view, the title and summary were required to

disclose Amendment 13's prefatory statement, as well as its supposed impact on an existing provision of the Constitution dealing with two counties' already-exercised power to authorize slot machines in certain pari-mutuel facilities. R. 621–28. As explained below, the ballot language suffers from no material omissions.

A. Because Amendment 13's Prefatory "Fundamental Value" Statement Lacks Independent Legal Effect, the Ballot Language Need Not Include It.

The trial court asserted that the CRC intended "to protect dogs from what the CRC majority viewed as inhumane treatment associated with dog racing," R. 622, and the court faulted the ballot summary and title for not including the proposed amendment's statement that "[t]he humane treatment of animals is a fundamental value of the people of the State of Florida," R. 623. However, under well-established precedent of this Court, ballot language "should tell the voter the legal effect of the amendment, and no more," and "[t]he political motivation behind a given change must be propounded outside the voting booth." *Evans*, 457 So. 2d at 1355.

Regardless why the "fundamental value" statement may have been included in Amendment 13, the ballot language cannot be faulted for declining to address the statement. That is because the proposed amendment's "fundamental value" statement has no independent legal effect, but instead wholly depends on the operative provisions that follow, and the title and summary—by fully informing voters of those operative provisions—more than suffice to place voters on notice of

the proposed amendment's legal effect.

Notably, while the parties had presented arguments on the issue, *see* R. 407–11, 557–63, 584–88, the trial court never concluded that Amendment 13's "fundamental value" statement has any legal effect, *see* R. 622–23. Indeed, such a conclusion would be difficult to reconcile with this Court's precedent. This Court has long held that a constitutional provision is judicially enforceable only if it "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). Amendment 13's "fundamental value" statement does not satisfy this test. To declare that "[t]he humane treatment of animals is a fundamental value of the people," R. 273, provides no judicially enforceable content. It contains no rule, much less one that is sufficient to render it judicially enforceable. In other words, it is a statement of purpose that lacks independent legal effect.[4]

[4] This Court has acknowledged that even though constitutional language may not be judicially enforceable, it may nonetheless be executed through legislation. *See Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (agreeing that the Florida Constitution's education article "committed the determination of 'adequacy' to the legislature"). This principle, however, does not help Respondents, as the Legislature already has authority to enact animal-welfare legislation. *See, e.g.*, § 379.3761, Fla. Stat. (2017) (regulating the exhibition and sale of wildlife); *id.* § 828.12 (prohibiting animal cruelty); *id.* § 828.121 (prohibiting simulated bullfighting exhibitions); *id.* § 828.125 (prohibiting the killing or aggravated abuse of horses or cattle); *id.* § 828.29 (regulating sale of dogs and cats). Thus, Amendment 13's prefatory "fundamental

More recent case law confirms this conclusion. In construing the only "fundamental value" language currently in the Florida Constitution, this Court has made clear that such language has legal effect only when accompanied by a "mandate" that "sets forth *how* the state is to carry out" the mandate. *Bush v. Holmes*, 919 So. 2d 392, 405 (Fla. 2006) (emphasis in original) (construing Art. IX, § 1(a), Fla. Const.). In *Holmes*, this Court repeatedly stated that it was enforcing the education article's "mandate" and "restriction on the execution of that mandate"; not once did it purport to enforce its freestanding fundamental-value statement. *Id.* at 406–07, 409–10, 412–13. Thus, *Holmes* makes clear, consistent with the general standard for enforceability outlined in *Gray*, that "fundamental value" statements lack independent legal effect, and courts may enforce only whatever operative provisions might accompany them.

Prefatory, legally inoperative statements of purpose are not unique to Florida's Constitution or to Amendment 13; they also appear in the federal Constitution. For example, the federal Constitution's preamble announces several purposes for the operative provisions that follow. U.S. Const. preamble; *see* R. 684 (argument by Respondents' counsel analogizing Amendment 13's "fundamental value" statement to the federal Constitution's preamble). However, the U.S. Supreme Court has long held that the preamble lacks any legal effect. *See Jacobson*

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value" statement could not confer any new authority on the Legislature.

v. Commonwealth of Mass., 197 U.S. 11, 13 (1905). Similarly, the Second Amendment contains both a prefatory clause announcing a purpose, and an operative clause codifying a judicially enforceable individual right. U.S. Const. amend. II. As the U.S. Supreme Court has concluded, the prefatory clause merely "announces a purpose," and "apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *District of Columbia v. Heller*, 554 U.S. 570, 577–78 (2008); *see id.* at 578 (looking to the Second Amendment's prefatory clause merely "to ensure that our reading of the operative clause is consistent with the announced purpose").

So, too, it is with Amendment 13's "fundamental value" prefatory statement. That statement announces a purpose, but it provides no judicially enforceable content. Here, the only legally operative provisions that appear in Amendment 13 are those that follow the prefatory fundamental-value statement; chiefly, a ban on dog racing in connection with wagering that takes effect after December 31, 2020, and provisions addressing the potential impact on other gaming activities. The ballot language fully discloses those operative provisions, and those provisions give rise to no ambiguity that the prefatory statement might clarify. The ballot language, therefore, satisfies the requirement that it "tell the voter the legal effect of the amendment, and no more." *Evans*, 457 So. 2d at 1355.

B. Because Article X, Section 23 Imposes No Freestanding "Coupling Requirement" for Slots, There Is No Change in the Constitutional Status Quo to Disclose.

As its last asserted defect, the trial court concluded that "the proposed Amendment will 'decouple' the ongoing licensing requirements for other gaming activities from the presently existing requirement that those gaming activities take place in a facility which currently conducts greyhound racing or wagering [on] greyhound racing." R. 627. In particular, the court concluded that Amendment 13 would alter "Article X, Section 23's coupling requirement" for slot machines. R. 625. For this proposition, the court primarily cited hearing statements by individual CRC members, rather than analyze the text of article X, section 23 and the text of Amendment 13. *See* R. 623–28. That failure to meaningfully engage the constitutional text led the court to commit reversible error.

A textual analysis of article X, section 23 and Amendment 13 demonstrates that they concern different subjects and have different sweeps. By its plain terms, article X, section 23 imposes no freestanding "coupling requirement" for slot machines and places no constitutional ceiling for the State's slot-machine policy. That existing constitutional provision relates only to *two counties'* power to authorize slot machines, an authorization that has already occurred, and places constraints only on *that* authority of *those counties*. Amendment 13, on the other hand, addresses a different question—whether slot-machine licenses *already* granted

pursuant to previous authorization will *be revoked or denied renewal* because of a failure to hold dog races—and does not impact the already-exercised ability of certain counties to authorize slots. Because Amendment 13 will not affect the constitutional status quo, there is no constitutional change to disclose.

That Amendment 13 might partially abrogate an existing statute does not render the ballot language defective. Voters understand that a constitutional provision will supersede any inconsistent statutes and regulations, and this Court has never required ballot language to list every statute, regulation, or other form of sub-constitutional law that a proposed amendment would abrogate (nor should it do so, given the word limitation for ballot summaries). In any event, the ballot language at issue here exceeds applicable requirements by advising, correctly and in plain English, that "[o]ther gaming activities are not affected."

1. Article X, section 23 was adopted in 2004. It empowered Miami-Dade and Broward Counties to hold county-wide referenda "on whether to *authorize* slot machines within existing, licensed parimutuel facilities . . . that have conducted live racing or games in that county *during each of the last two calendar years before the effective date of this amendment*." Art. X, § 23(a), Fla. Const. (emphases added). It relates to the two counties' authority "to authorize slot machines" within pari-mutuel facilities that had conducted races during the 2002 and 2003 calendar years—an authorization that, as Respondents acknowledged in their briefing below, has already

occurred. *See* R. 212. In other words, all that article X, section 23 did was empower two counties to authorize slots and place constraints on *that* authority of *those two counties*.

Amendment 13, on the other hand, deals with an entirely different question: the "grounds to *revoke* or *deny renewal* of other related gaming licenses" that have already been authorized. In particular, Amendment 13 provides that "[t]he failure to conduct greyhound racing or wagering on greyhound racing after December 31, 2018, does not constitute grounds to revoke or deny renewal of other related gaming licenses . . . ." R. 273–74. Amendment 13 has no impact on the already-exercised authority of Miami-Dade and Broward Counties to "authorize" slot machines, which is the subject of article X, section 23.

In addition, article X, section 23 imposes no requirement that pari-mutuel facilities in Miami-Dade County and Broward County (or elsewhere, for that matter) must continue to conduct racing in order to continue to have slot machines. Rather, it establishes the conditions precedent to the *counties'* original *authorization* of slot machines, requiring only that live races have been conducted in the 2002 and 2003 calendar years and that the facilities have been pari-mutuel facilities in 2004. Given their entirely different scope, Amendment 13 would have no impact on article X, section 23. Amendment 13 will not turn back time and retroactively deprive facilities of their pari-mutuel status in 2004 or nullify the races that they conducted in 2002

and 2003. The trial court thus erred by failing to appreciate the different scope of Amendment 13 and article X, section 23.

Caselaw supports the conclusion that article X, section 23 does not set any freestanding constitutional ceiling for slot-machine licensing in the State that Amendment 13 could abrogate. In *Florida Gaming Centers, Inc. v. Florida Department of Business & Professional Regulation*, the First District rejected a challenge to a statute that "expanded the scope of the entities authorized to conduct slot machine gaming in Florida." 71 So. 3d 226, 227 (Fla. 1st DCA 2011). The court reasoned that "[t]he Legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers," and the purpose of article X, section 23 was *not* "to limit slot machine gaming in Florida to certain facilities in Miami–Dade and Broward Counties." *Id.* at 228–29. In other words, the constitutional text "provides no indication that Florida voters intended to forever prohibit the Legislature from exercising its authority to expand slot machine gaming beyond those facilities in Miami–Dade and Broward Counties meeting the specified criteria." *Id.* at 229.[5]

[5] That the Legislature retains authority to expand and contract the licensing of slot machines in the State does not mean that local governments do. *See Gretna Racing, LLC v. Fla. Dep't of Bus. & Professional Reg.*, 225 So. 3d 759, 760 (Fla. 2017) (Gadsden County referendum purporting to authorize slot machines in pari-mutuel facilities "was not legally authorized"). "[I]n sweeping terms, slot machine gaming is permitted under tight restrictions as laid out by the Legislature in chapter 551," and "[n]othing in chapter 551 . . . grants any authority to regulate slot machine

Likewise, article X, section 23 imposes no constraint on the Legislature's (or the statewide electorate's) authority to allow slot machines in facilities that conduct no pari-mutuel activities. *See Div. of Pari–Mutuel Wagering Dep't of Bus. Reg. v. Fla. Horse Council, Inc.*, 464 So. 2d 128, 130 (Fla. 1985) ("[I]t is well established that the legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers."). Article X, section 23 does not speak to that authority, and Amendment 13, therefore, would not change the constitutional status quo. Because the proposed amendment will have no impact on counties' authority to authorize slots under article X, section 23, and because that provision imposes no freestanding "coupling requirement" for slot-machine gaming, the trial court erred in faulting the ballot language for declining to address it.

2. To the extent Florida law might impose a continuing, statewide "coupling requirement" for slot machines, as the trial court posited, *see* R. 625, it would appear not in article X, section 23, but rather in statute. *See* § 551.102(4), Fla. Stat. (2017) (defining "[e]ligible facility" for purposes of slot-machine licensing as a "licensed pari-mutuel facility," among other requirements). Of course, it is well within the Legislature's authority to expand or contract the licensure of slot-machine gaming within the State, so long as its legislation does not conflict with the Constitution. *See Fla. Horse Council, Inc.*, 464 So. 2d at 130. And as explained above, nothing in

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gaming to any county." *Id.* at 766.

article X, section 23—which deals with certain *counties'* authority to authorize slot-machine gaming—constitutionally limits slots to pari-mutuel facilities.

That Amendment 13 might abrogate, at least in part,[6] an existing statute, does not render the ballot language defective. Florida voters are presumed to have "a certain amount of common understanding and knowledge." *Fla. Educ. Ass'n*, 48 So. 3d at 701. That common understanding and knowledge includes the understanding that the Constitution of Florida is the State's fundamental law, and any statute or regulation to the contrary is void. *See So. Drainage Distribution v. State*, 112 So. 561, 568 (Fla. 1927) (observing that laws in conflict with the state Constitution "are null, void, and of no effect"). Voters don't need a ballot summary to inform them that a proposed constitutional amendment, if adopted, will supersede any conflicting statutes or regulations.

Moreover, counsel can locate no decision of this Court holding that ballot

[6] Any abrogation would be only partial. Like article X, section 23, section 551.102 embraces certain facilities that have conducted "live racing *or games*." § 551.102(4), Fla. Stat. (2017) (emphasis added); *see W. Flagler Assocs., Ltd. v. State*, 220 So. 3d 1239, 1241 (Fla. 3d DCA 2017). The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, has interpreted the statute to mean that a facility "that qualified as an eligible facility under the first clause of section 55[1].102(4), Florida Statutes" can remain a qualified facility even after "a change from offering greyhound racing to offering jai alai performances at the same facility." *See In re: Petition for Declaratory Statement, W. Flagler Assocs., Ltd.*, DBPR Case No. 2016-014603, final order at 6 (entered July 19, 2017); *see also* https://www.flrules.org/gateway/notice_Files.asp?ID=19220470 (notice of declaratory statement).

language must disclose to voters every statute, regulation, ordinance, or other species of sub-constitutional law that a proposed amendment might abrogate. Indeed, such a requirement would not only be unnecessary; it also would impose an inordinately high burden on the drafters of ballot summaries. By law, a ballot summary cannot exceed "75 words in length." § 101.161(1), (3)(a), Fla. Stat. (2017). A requirement that the ballot summary disclose not only the chief purpose of the measure, but also every statute, regulation, and ordinance that is inconsistent with the proposed amendment, would make this word limit unduly restrictive and defeat the purpose of a ballot "summary."

3. The trial court erred not only in concluding that Amendment 13 would alter article X, section 23, but also in faulting the ballot summary's phrase "[o]ther gaming activities are not affected." *See* R. 628. The ballot summary fully discloses the proposed amendment's lack of further impact on the status quo by correctly advising voters that Amendment 13 will not affect "[o]ther gaming activities." R. 274. Existing slot machines in licensed pari-mutuel facilities certainly are "gaming activities" "[o]ther" than "dog racing in connection with wagering," and voters are thus clearly told that existing slot machines will not be affected.

The trial court considered this language to be misleading. In its view, under Amendment 13, other gaming activities at pari-mutuel facilities *will* be affected because those activities will be allowed to continue notwithstanding the ban on dog

racing. *See* R. 628. This fails to accord with common usage and common sense. Allowing something to continue is the quintessential means of leaving something, as the ballot summary recites, "not affected."

What is more, the ballot language goes above and beyond applicable requirements. A ballot summary and title are not required to disclose what the proposed amendment *won't* do; they are required to disclose only what it *will* do. *See Fla. Educ. Ass'n*, 48 So. 3d at 701 (requiring disclosure of "the amendment's true *effect*" (emphasis added; quotation marks omitted)); *Armstrong*, 773 So. 2d at 16 (same); *Evans*, 457 So. 2d at 1355 ("The ballot summary should tell the voter the legal effect of the amendment, and no more."). Here, the ballot summary, by specifying that "[o]ther gaming activities are not affected," goes above and beyond applicable requirements because it *does* disclose what the amendment *won't* do.

In the end, the trial court appeared to fault the ballot language for using the common-sense shorthand "[o]ther gaming activities are not affected," rather than a long-form, highly technical explanation that Amendment 13 will allow certain pari-mutuel facilities' slot machines to continue notwithstanding its ban on dog racing, which racing was a condition precedent for two counties' prior authorization of slots in such facilities. *See* R. 623–28. But the ballot language "need not explain every detail or ramification of the proposed amendment." *Advisory Op. to Att'y Gen.—Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991). Indeed,

it need only provide a title and a *summary*, which need only disclose what the proposal *will* do, not what it *won't*. *See Fla. Educ. Ass'n*, 48 So. 3d at 701; *Armstrong*, 773 So. 2d at 16; *Evans*, 457 So. 2d at 1355. By accurately summarizing, in plain English, what Amendment 13 won't do, the ballot language exceeds applicable requirements.

IV. INSOFAR AS IT RELIED ON COMPARISONS TO PRIOR DRAFTS, HEARING STATEMENTS BY INDIVIDUAL MEMBERS OF THE CRC, AND AN INFERENCE OF BAD FAITH, THE TRIAL COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD.

In addition to the substantive errors discussed above, all of which require reversal on their own, the trial court's order suffers from a more fundamental methodological one: a failure to apply the correct legal standard. Under Article XI, Section 5 of the Florida Constitution and section 101.161(1), Florida Statutes, the question is not whether the proponent, the plaintiff, this Court, or anyone else could have drafted (or did draft) a potentially better ballot title and summary. Nor is it what individual members of the CRC stated during hearings, or speculation why the final ballot language appears as it does. Rather, the question before this Court is only whether the language *that will "appear on the ballot"* is "clear and unambiguous" and discloses "the chief purpose of the measure." § 101.161(1), Fla. Stat. (2017) (emphasis added); *accord Askew*, 421 So. 2d at 154–55. This requires analysis only of the final ballot language, not of prior drafts, and certainly not of hearing statements by individual members of the CRC. Moreover, even if the motivations of

the CRC were relevant—and they are not, *see Evans*, 457 So. 2d at 1355 ("The political motivation behind a given change must be propounded outside the voting booth.")[7]—the CRC, as a governmental entity that convenes only once every two decades to assume the solemn task of proposing revisions to the State's fundamental law, is entitled to a robust presumption of regularity and good faith.[8]

The trial court disregarded these controlling standards. It relied, at least in part, on a comparison to prior drafts of the ballot language, *see* R. 609 n.4, on hearing statements by individual members of the CRC, *see* R. 622–27, and on an unsubstantiated inference of "'trickeration,'" R. 609. To the extent that the trial court

[7] They also are not readily ascertainable. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 392 (2012) (explaining that "collective intent" of a multi-member, deliberative government body "is pure fiction"); *see also Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012) (observing that "[a] court primarily discerns legislative intent by looking to the plain text of the relevant statute" and secondarily by resolving ambiguity through resort "to the rules of statutory interpretation and construction").

[8] *See, e.g.*, *Porter v. State*, 160 So. 2d 104, 107 (Fla. 1963) ("The presumption is that those charged with administering the laws have properly discharged their duty, and against any misconduct on their part, until the contrary is made to appear," and the party claiming misconduct has "the burden of producing substantial evidence to support the charge." (quotation marks omitted)); *Fla. Nat'l Bank of Jacksonville v. Simpson*, 59 So. 2d 751, 757 (Fla. 1952) (observing that it is "a well recognized legal principle to presume that every official will perform or has performed the duties imposed upon him by law"); *Scott v. State*, 31 So. 244, 245 (Fla. 1901) (government officials "must be presumed to have discharged their duty, in the absence of allegations to the contrary").

rested its analysis on these extraneous matters and unsubstantiated inference, it reversibly erred by failing to apply the correct legal standard.

CONCLUSION

For the foregoing reasons, this Court should quash the order under review and approve the ballot title and summary for Amendment 13 for placement on the ballot.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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I certify that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-Filing Portal on this 15th day of August, 2018, to the following:

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