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' REPLY BRIEF

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

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I. IN LARGE PART, RESPONDENTS' ARGUMENTS MISAPPREHEND THE CONTROLLING LEGAL STANDARD.

Throughout their brief, Respondents urge this Court to inquire why individual CRC commissioners voted for Amendment 13, Resp. Br. 14, 19; to attribute to the CRC the amici's perceived policy motives for supporting Amendment 13, *id.* at 15–16; to compare Amendment 13's ballot language to that of prior successful amendments, *id.* at 21–23, 46; to compare Amendment 13's final ballot language to prior drafts, *id.* at 32–33, 40–41; and to speculate what the CRC could have included had it chosen to write a longer summary, *id.* at 49–50. These arguments misapprehend the controlling legal standard.

Under Article XI, Section 5 of the Florida Constitution and section 101.161(1), Florida Statutes, the question is not whether the 1998 CRC, Respondents, this Court, or anyone else could have drafted (or did draft) a potentially better (or longer) ballot title and summary. Nor is it whether prior drafts of the language under review were better than the final. 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. (emphasis added); *accord Askew v. Firestone*, 421 So. 2d 151, 154–55 (Fla. 1982). This requires analysis of only the final ballot language and the proposed amendment, not prior drafts of the ballot language or ballot language for prior

amendments.

This Court likewise is not tasked with determining the policy motives that may have prompted the proposal. In resolving ballot-language challenges, this Court asks two—and only 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)) (emphases added). This Court has made plain that, in answering these questions, a proposal's "chief purpose" consists only of its "legal effect," and not the "political motivation" animating the proposal. *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984); *accord Fla. Educ. Ass'n*, 48 So. 3d at 701 (requiring disclosure of "the amendment's true *effect*" (emphasis added; quotation marks omitted)); *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000) (same). It also has concluded that "the ballot summary is not required to . . . explain in detail what the proponents hope to accomplish." *Advisory Op. to the Att'y Gen. re Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 585 (Fla. 2002) (quotation marks omitted).

Because the chief purpose of Amendment 13 consists of only its legal effect, not the perceived policy motivations that may have prompted it, the perceived "intent of the framers," Resp. Br. 14—even assuming it could be discerned from

individual commissioners' hearing statements rather than from the text of the amendment itself[1]—is irrelevant. Even more problematic is Respondents' argument that outside groups' "statements" and perceived policy "motivations" should be attributed to the CRC. *See* Resp. Br. 15, 16. As Respondents acknowledge, it was the CRC that "proposed," "drafted," and "approved" Amendment 13 and its accompanying ballot language. Resp. Br. 1, 7. If the policy motives of the drafter are irrelevant, *see Evans*, 457 So. 2d at 1355, the policy motives of outside groups are even more so.

In sum, this Court should disregard Respondents' repeated invitations to address questions and matters that, under the controlling legal standard, are not relevant to this case. It should answer only the questions that are before it: whether the ballot title and summary for Amendment 13, as written, disclose the proposal's

[1] Respondents speak of a singular "intent of the framers," Resp. Br. 14, but multi-member, deliberative government bodies have no singular "intent" other than to enact or adopt the legal text at issue. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 392–93 (2012) (explaining that "collective intent" of a legislature "is pure fiction"; such a body's "collective psychology is a hopeless stew of intentions"; and "the final language that passes into law" is "all [that the members] have agreed on").

Indeed, contrary to Respondents' argument, "general rules of statutory construction," Resp. Br. 14, lend them no help, as "[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." *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012). Because they appear to concede that the text of Amendment 13 is not ambiguous, *see* Resp. Br. 14, they cannot ask this Court to look beyond the text.

chief purpose and are not misleading. For the reasons given in Petitioners' opening brief, as well as in this reply brief, it should conclude that the ballot language satisfies this standard and approve the amendment for placement on the ballot.

II. RESPONDENTS FAIL TO SHOW THAT AMENDMENT 13'S PREFATORY STATEMENT HAS LEGAL EFFECT AND FAIL TO JUSTIFY DEPARTURE FROM THIS COURT'S PRECEDENT.

Respondents mount a two-pronged defense of the trial court's conclusion that the ballot language should be faulted for declining to address Amendment 13's prefatory statement. First, they contend that the prefatory statement has independent legal effect. Second, they urge this Court to depart from decades of precedent making clear that ballot language "should tell the voter the legal effect of the amendment, and no more." *Evans*, 457 So. 2d at 1355. Neither argument is persuasive.

A. Respondents cite no case holding that a "fundamental value" statement is legally effective. They primarily rely on ballot language for prior amendments; namely, the ballot language for the 1998 CRC's education-article amendment and the 2002 pregnant-pigs amendment. Resp. Br. 21–23. As already explained, this Court is not tasked with determining which proponent wrote the better ballot language.

In any event, the 2018 CRC had ample reason to chart the course that it did. Unlike the 1998 CRC and the proponents of the 2002 pregnant-pigs amendment, the 2018 CRC had the benefit of this Court's ruling in *Bush v. Holmes*, which indicates

that "fundamental value" prefatory language has no legal effect because only a "mandate" specifying "*how* the state is to carry out" the mandate is legally operative. 919 So. 2d 392, 405 (Fla. 2006). In *Holmes*, this Court repeatedly stressed that it was enforcing the education article's "mandate" for "a uniform system of free public schools"; not once did it purport to enforce its mandate-less "fundamental value" statement. *See id.* at 398, 405, 407, 408, 412. Respondents do not argue otherwise. Resp. Br. 26. And given this intervening development in Florida constitutional law, the 2018 CRC appropriately chose to advise voters of the operative mandate that Amendment 13 seeks to establish—a ban on dog racing in connection with wagering—and not to clutter the ballot with a summary of prefatory language lacking any independent legal effect.

Nor do Respondents offer any persuasive argument that Amendment 13's introductory statement is enforceable under the standard set forth in *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960). True, *Gray* "did not involve a ballot summary." Resp. Br. 27. But it is undisputed that *Gray* addressed the question whether constitutional language has legal effect—and that question is of central relevance here, because ballot language must disclose only a proposed amendment's "legal effect." *Evans*, 457 So. 2d at 1355. And although *Gray* "recognized that even constitutional provisions which were not self-executing could be supplemented by" legislation, Resp. 27, Respondents offer no response to Petitioners' argument that Amendment

13's fundamental-value statement cannot affect the Legislature's powers because the Legislature already possesses the authority to enact animal-welfare legislation of the type Respondents describe. *Compare* Pet. Br. 21 n. 4 (compiling example statutes) *with* Resp. Br. 24 (speculating impacts on similar policy areas).

Respondents assert that "the use of 'animals' in" Amendment 13's introductory statement "indicates a much broader application than the subsequent clauses specifically relating to greyhounds; therefore, the declaration of a fundamental value as to all animals cannot be deemed prefatory." Resp. Br. 28. But the debate here is not about the *breadth* of Amendment 13's "fundamental value" statement; it is about its *effect*. Petitioners do not dispute that the statement speaks of a fundamental value of "animals." Rather, they dispute whether that statement has any legal effect.

On that score, Respondents speculate about a "potential effect on other Florida business ventures (e.g., horse racing, dog breeding, and zoos) and educational pursuits by Florida universities (e.g., the use of animals in conducting research)." Resp. Br. 24. But Respondents point to no "mandate," *see Holmes*, 919 So. 2d at 405, or "rule," *see Gray*, 125 So. 2d at 851, in Amendment 13 that addresses these policy areas. The sole mandate relating to animals that Amendment 13 contains is a ban on dog racing in connection with wagering. Thus, voters are fully advised of Amendment 13's only operative legal effect with respect to animals. The ballot

language need not say more. *See Evans*, 457 So. 2d at 1355.

Even putting aside the "fundamental value" statement's lack of independent legal effect and the State's existing authority to enact animal-related policy, and even assuming *arguendo* that the proposed amendment "*might* . . . be utilized in the future" in certain ways, R. 19 (complaint) (emphasis added), or could have a "*potential* effect on other Florida business ventures," Resp. Br. 24 (emphasis added), "might" is not the test for what the title and summary must include. "'[T]he title and summary need not explain every detail or ramification of the proposed amendment.'" *Florida's Amendment to Reduce Class Size*, 816 So. 2d at 585 (quoting *Advisory Op. to the Att'y Gen. re Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d 972, 975 (Fla. 1997)). "In other words, 'the ballot summary is not required to include all *possible* effects . . . nor 'to explain in detail what the proponents hope to accomplish.'" *Id.* (quoting *Advisory Op. to Att'y Gen. re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996) (emphasis added)). Instead, the ballot title and summary need only "adequately disclose[ ]" "the primary purpose of the amendment." *Florida's Amendment to Reduce Class Size*, 816 So. 2d at 585–86. Because the primary purpose of the amendment—ending dog racing in connection with wagering by 2020—is fully disclosed in the ballot title and summary, the ballot language fully complies with section 101.161(1).

B. In the end, Respondents dispute that "voters should only be advised of the

legal effect of the proposed amendment," Resp. Br. 26, arguing by implication that they must be advised of legally inoperative provisions. This Court's precedent forecloses that alternative argument. For decades, this Court has maintained that a proposal's "chief purpose" consists only of its "legal effect," and "[t]he ballot summary should tell the voter the legal effect of the amendment, and no more." *Evans*, 457 So. 2d at 1355; *accord 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).

Despite the clarity and consistency with which this Court has articulated this principle, Respondents ask this Court to depart from it, and to disregard *Evans*' clear pronouncement on the ground that it was "arguably" dicta. Resp. Br. 25. *Evans* cannot be dismissed so easily. While *Evans* employed the rule that "[t]he ballot summary should tell the voter the legal effect of the amendment, and no more" to invalidate a ballot summary, it was nonetheless the rule that *Evans* employed to dispose of the case. 457 So. 2d at 1355. In other words, *Evans*' statement cannot be dismissed as mere "dicta"—it formed a basis for this Court's decision. And this Court has repeatedly employed *Evans*' principle as the rule of decision in other cases both upholding and invalidating ballot language. *See, e.g.*, *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 648 (Fla. 2010); *Advisory Op. to Att'y Gen. re Fla. Marriage Protection Amend.*, 926 So. 2d 1229, 1238 (Fla. 2006).

What Respondents really seek, then, is a departure from this Court's precedent. But they cite no case that has invalidated ballot language for declining to address a proposal's prefatory, legally inoperative statement. At best, they can rely only on cases *approving* ballot language that advised voters of such statements. *See Advisory Op. to the Att'y Gen. re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597 (Fla. 2002). But that is no support for the notion that ballot language *must* address such statements. Indeed, this Court has approved ballot language that *declined* to address them. *See Advisory Op. to Att'y Gen.—Limited Marine Net Fishing*, 620 So. 2d 997, 997, 999 (Fla. 1993) (approving ballot language that omitted the proposal's introductory statement that "[t]he marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations"). And where prefatory statements can be considered political or editorial, this Court has relied on *Evans* to hold that the ballot language *cannot* address them, even where it accurately quotes and paraphrases them. *See Advisory Op. to the Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Comprehensive Land Use Plans*, 902 So. 2d 763, 771 (Fla. 2005).

In sum, this Court has repeatedly reaffirmed and relied upon the principle that "[t]he ballot summary should tell the voter the legal effect of the amendment, and no more." That principle is precedent, it has logical application here, this Court has

approved ballot language that similarly declined to address a legally inoperative prefatory statement, and Respondents fail to justify a departure from these decades of precedent.

III. RESPONDENTS' CONCESSIONS PRECLUDE THEIR ARGUMENT THAT AMENDMENT 13 WILL CHANGE THE CONSTITUTIONAL STATUS QUO, AND THIS COURT'S PRECEDENT FORECLOSES THEIR ARGUMENT THAT BALLOT LANGUAGE MUST DISCLOSE ABROGATION OF STATUTES.

Respondents initially characterize article X, section 23 as a provision "to allow slot machines *in pari-mutuel facilities*," Resp. Br. 38 (emphasis in original), and they contend that it contains a "requirement that greyhound facilities in Miami-Dade County and Broward County must continue to operate a pari-mutuel facility to maintain a slot machine license." Resp. Br. 44. But they later "agree" with Petitioners that "Article X, Section 23 does not set any freestanding constitutional ceiling for slot machine licensing that would prohibit the legislature from expanding the scope of slot-machine gaming in Florida and/or allow slot machines in facilities that conduct no pari-mutuel activities." Resp. Br. 45. In other words, Respondents concede that, notwithstanding article X, section 23, the Legislature could enact a statute tomorrow that would "permit standalone slot machines in Miami-Dade County and Broward County." Resp. Br. 45. They observe merely that the Legislature "has not chosen to" do so. *Id.* (emphasis omitted).

Respondents' concession that article X, section 23 does not prohibit

"decoupling" legislation is correct. As Petitioners have explained, Pet. Br. 24–26, that existing constitutional provision merely established the power of Broward and Miami-Dade Counties to authorize slots and placed constraints on *that* authority alone. It imposes no freestanding, statewide "coupling" requirement for slots. To the extent it imposes any "coupling" requirement, it imposes one only for Broward's and Miami-Dade's power to authorize slots through county-wide referendum. Amendment 13 will not undo the votes of those counties' voters; nor will it remove or expand those counties' power to authorize slots in pari-mutuel facilities. In other words, should Amendment 13 be approved by the voters, Broward and Miami-Dade Counties will retain their power to authorize slots by county-wide referendum; that power will continue to be constrained by the conditions set forth in article X, section 23; and the prior votes they held to authorize slot machines will not be undone. In short, Amendment 13 will not, as Respondents contend, "convert[ ] the authorization" that article X, section 23 granted to the two counties. Resp. Br. 40.

Respondents' agreement regarding the scope of article X, section 23 precludes their argument that Amendment 13 would usher an undisclosed "change in the constitutional status quo." Resp. Br. 37. If, as they concede, article X, section 23 does not prohibit "decoupling" by legislation, then it imposes no freestanding, constitutional "coupling" requirement that Amendment 13 could abrogate. In any event, this Court has held that "'[t]he possibility that an amendment might interact

with other parts of the Florida Constitution is not sufficient reason to invalidate the proposed amendment.'" *In re Advisory Op. to Att'y Gen. ex rel. Local Trustees*, 819 So. 2d 725, 730 (Fla. 2002) (quoting *Advisory Op. to the Att'y Gen.—Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1128 (Fla. 1996)).

All this is not to say that Amendment 13 will leave Florida law unchanged. But its impact will be on *statutes*, rather than on the Constitution. Citing these statutes, Respondents observe that, to engage in other gaming activities, greyhound pari-mutuel facilities must conduct racing. Resp. Br. 17–18 (citing §§ 551.102, 551.104, 849.086(5)(a), Fla. Stat.). They contend that by abrogating them, Amendment 13 will mark "a substantial change to existing Florida law." Resp. Br. 18; *see also id.* at 36–37 (arguing that Amendment 13 would abrogate these statutes).

Respondents' argument—that ballot language for proposed constitutional amendments must advise voters of the statutes they would supersede—is foreclosed by this Court's precedent and runs contrary to common sense. Multiple times, this Court has rejected the argument that ballot language should be stricken for declining to "disclose the effect that the proposed amendment would have on existing statutory law." *Local Trustees*, 819 So. 2d at 731 (citing *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415 (Fla. 2002)). Voters are presumed to know that the policy areas addressed in proposed amendments often are "currently governed by" various statutes. *Id.* Moreover, "it

would be virtually impossible to indicate within the word limit of the ballot summary all the ramifications the proposed amendment would have on" existing statutory law. *Id.*; *see* Pet. Br. 30. In any event, doing so would be unnecessary. Florida's voters have the common sense to understand that constitutional amendments will supersede any inconsistent statutes. *See* Pet. Br. 29.

In the end, Respondents complain that, if Amendment 13 passes, "slot machines at existing pari-mutuel facilities in Miami-Dade and Broward Counties" will continue, notwithstanding the ban on greyhound racing. Resp. Br. 40. Even assuming the ballot language needed to advise the voters of this fact, it does so in clear and unambiguous language: "Other gaming activities are not affected." Respondents' arguments to the contrary are unavailing.

IV. RESPONDENTS' CONCESSION THAT THE BALLOT TITLE CANNOT BE ISOLATED PRECLUDES THEIR ARGUMENT THAT IT IS MISLEADING, BUT IN ANY EVENT, RESPONDENTS FAIL TO REBUT THE ORDINARY MEANING OF "DOG RACING."

Focusing on the title "ends dog racing," Respondents contend that "the implied effect of Amendment 13 is the elimination of dog racing in Florida in its entirety—including all commercial and recreational races, whether associated with wagering or not . . . ." Resp. Br. 29. That "individuals and business[es] will be permitted to continue to race dogs both recreationally and commercially, so long as no persons are wagering on the outcome of the race," they observe, is "evidenced by the text of Amendment 13." *Id.* But it is also evidenced by the text of the ballot

summary, which correctly tells voters that Amendment 13 will end "dog racing *in connection with wagering*"—a "*gaming* activit[y]." *See* Pet. Br. 14.

Indeed, Respondents agree "that the Court must read the ballot title and summary together in determining whether the ballot information properly informs the voters." Resp. Br. 30. This concession is compelled by this Court's precedent, *see, e.g.*, *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 804 (Fla. 2014) (collecting cases that have "reaffirmed numerous times" the "proposition that the ballot title and summary must be read together" (quotation marks omitted)), and should foreclose Respondents' argument that voters will be misled by the title. *See* Pet. Br. 13–14.

In any event, even when viewed in isolation, the title is not, as Respondents contend, a "false statement," Resp. Br. 30. The ordinary meaning of "dog racing" entails wagering. *See* Pet. Br. 15–17. And voters need not be "walking encyclopedias," Resp. Br. 31, to understand this ordinary meaning; they need only share the understanding of "dog racing" that Respondents have themselves expressed and endorsed, both in their affidavit attached to their summary-judgment motion and on their website. *See* Pet. Br. 16–17 & n.2 (citing R. 219, 220, 598, 601).

Notwithstanding their arguments in briefing, Respondents have acknowledged elsewhere that the ordinary meaning of "dog racing" entails wagering. *See id.* And appropriately so. As Petitioners have explained, news articles

and other publicly circulated materials repeatedly employ the unmodified phrase "dog racing" to describe the racing of greyhounds in connection with wagering. *See* Pet. Br. 15–16 & n.1 (compiling examples). This Court should look to such material as persuasive and primary evidence of the phrase's ordinary meaning. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 795, 828 (2018) (arguing that the ordinary meaning of legal texts should be derived from "corpus linguistics"—the objective, "empirical" practice of reviewing "naturally occurring language," including "newspapers," as direct evidence of ordinary meaning); *see also People v. Harris*, 885 N.W.2d 832, 838–39 & n.29 (Mich. 2016) (employing corpus linguistics to determine the ordinary meaning of a statutory term, and noting that corpus linguistics "is consistent with how courts," including the U.S. Supreme Court, "have understood statutory interpretation"); *id.* at 850–51 n.14 (Markman, J., concurring in part and dissenting in part) (commending the majority for its reliance on corpus linguistics, and performing the dissent's own corpus-linguistics analysis); *Craig v. Provo City*, 389 P.3d 423, 428 n.3 (Utah 2016) (commending a party for providing corpus linguistics-based argument on the ordinary meaning of a statutory term).

For their part, Respondents provide not one example of naturally occurring language (such as a newspaper or magazine), much less a report of usage (such as a dictionary or, yes, even an encyclopedia), that uses the unmodified noun phrase "dog

racing" to describe a non-betting, "recreational" activity. Resp. Br. 29. Indeed, an analysis of the Corpus of Contemporary American English[2] reflects that when the unmodified term "dog racing" is employed as a single noun phrase (e.g., "dog racing is illegal in most states") rather than as a noun and a present continuous verb (e.g., "look at that dog racing down the beach"), the meaning nearly always entails wagering. Searching the Corpus for "dog racing" yields 59 results, consisting mostly of news and magazine articles between 1990 and 2016.[3] From context, in nearly every instance in which "dog racing" is used as a single noun phrase and is not modified by the word "sled,"[4] it is used to describe a betting activity.

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[2] This corpus "is the largest freely-available corpus of English" and "contains more than 560 million words of text (20 million words each year 1990-2017)" that "is equally divided among spoken, fiction, popular magazines, newspapers, and academic texts." *See* https://corpus.byu.edu/coca/ (last visited Aug. 24, 2018).

The entire Michigan Supreme Court has searched this corpus—and relied upon the search results—when engaging in statutory interpretation. *See People v. Harris*, 885 N.W.2d 832, 838–39 & nn. 30, 33 (Mich. 2016); *see also id.* at 850–51 n.14 (Markman, J., concurring in part and dissenting in part) (commending the majority for its reliance "on the Corpus of Contemporary American English (COCA), a truly remarkable and comprehensive source of ordinary English language usage compiled by linguistic scholars" that allows courts to "access large bodies of real-world language to see how particular words or phrases are actually used in written or spoken English," and performing the dissent's own analysis of the corpus).

[3] These results can be viewed by entering "dog racing" without quotation marks in the Corpus's search box (available at https://corpus.byu.edu/coca/), clicking "Find matching strings," and clicking the "DOG RACING" link that the search generates.

[4] Counsel is unaware of any instance of "sled dog racing" in the State of Florida.

Thus, an empirical analysis of naturally occurring, modern American English confirms what Respondents themselves appear to have acknowledged outside their litigation position, and what in any event is apparent from the ballot summary's exposition of the title: the ordinary meaning of "dog racing" entails wagering. If this Court indulges Respondents' invitation to read the ballot title without the context of the summary, it should reject their attempt to dispute the ordinary meaning of "dog racing."

V. RESPONDENTS' ATTACK ON THE BALLOT SUMMARY NOT ONLY ASSUMES AN IGNORANT ELECTORATE BUT ALSO INVERTS AND DISTORTS THE SUMMARY'S LANGUAGE.

A. Respondents fault the ballot language for declining to "clarify the geographic limitations of Amendment 13 by stating that its prohibition only applies to races held '*in Florida*.'" Resp. Br. 34 (emphasis in original). Their argument wrongly assumes an ignorant electorate. As Petitioners have explained, "the ballot language summarizes a proposed amendment to the *Florida* Constitution," and voters need not be told that in voting on a proposed amendment to the Florida Constitution, they are voting on "what the law shall be in *Florida*, not outside it." Pet. Br. 17–18. Indeed, this Court has approved ballot summaries and titles that did not, as Respondents demand here, "clarify" that their proscriptions would apply only "in Florida." *See* Pet. Br. 18 n. 3.

Just as the ballot language need not specify that Amendment 13 will end

"Florida" dog racing in connection with wagering, it also need not specify that it relates to "live" racing. *See* Resp. Br. 34 (arguing that "the omission of the word 'live' from the ballot title and summary [is] material"). Voters have the common sense to know that those who wager on dog races wager on live events, not recordings or re-runs—a bet on a recording or re-run can hardly be considered a fair bet. Respondents' argument to the contrary fails to accord the presumption of "common sense and knowledge," *Tax Limitation*, 673 So. 2d at 868, to which the State's electorate is entitled. It is also inconsistent with this Court's admonition that "'the title and summary need not explain every detail or ramification of the proposed amendment.'" *Florida's Amendment to Reduce Class Size*, 816 So. 2d at 585 (quoting *Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So. 2d at 975).

B. Respondents' argument that the ballot language fails to tell voters Amendment 13 will not end "[w]agering in Florida on out-of-state greyhound races," Resp. Br. 34, a variation on their argument that the ballot language must tell them it "only applies to races held 'in Florida,'" *id.*, is similarly unpersuasive. As already explained, Florida voters will understand that a proposed amendment to the *Florida* Constitution will not prohibit racing in *other states*. Moreover, the ballot summary specifies that the proposed amendment will end "*dog racing in connection with wagering*," not "*wagering in connection with dog racing*," making clear 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. Respondents' argument to the contrary assumes the inverse of the language that will actually appear on the ballot. *See* Pet. Br. 19.

C. In advising voters that "[o]ther gaming activities are not affected," Amendment 13's ballot language exceeds applicable requirements by accurately summarizing what it won't do. *See* Pet. Br. 31–32. Nevertheless, Respondents argue that this statement is misleading "because gaming activities at greyhound pari-mutuel facilities will be affected," i.e., such activities "will be permitted to continue" notwithstanding the dog-racing ban, Resp. Br. 36; and because "a voter could easily and mistakenly believe" the statement "refers to other gaming activities at facilities operated by the Seminole Tribe of Florida or . . . at horse racing pari-mutuel facilities, and not the greyhound pari-mutuel facilities," Resp. Br. 41.

These arguments are irreconcilable. On the one hand, Respondents assert that other gaming activities at greyhound facilities *will* be affected, and on the other hand, they fault the ballot summary for failing to specify that its statement "[o]ther gaming activities are *not* affected" applies to gaming activities at greyhound facilities. Respondents cannot have it both ways.

In any event, both of Respondents' arguments fail because they distort the ballot summary and Amendment 13. Their first argument—that slot machines and

other similar activities *will* be affected because racing will end, Resp. Br. 36—neglects to acknowledge that voters are advised of this supposed "effect." The ballot summary, in its first sentence, discloses that Amendment 13 will end "dog racing in connection with wagering by 2020."

Respondents' second argument fares no better. The ballot language correctly advises, without qualification, that "[o]ther gaming activities are not affected." Voters thus will understand that the proposed amendment will end dog racing on which wagers are cast but will leave "[un]affected"—in other words, leave in place, *see* Webster's Third New Int'l Dictionary 2482 (2002) (defining "unaffected" as "unmoved")—"other gaming activities," among which most certainly are slot machines. There is no need to specify that "[o]ther gaming activities *at greyhound pari-mutuel facilities* are not affected"—the greater includes the lesser, and "[o]ther gaming activities" necessarily includes gaming activities that are already permitted at existing pari-mutuel facilities, including greyhound facilities. Indeed, the addition of the language that Respondents demand might have risked misleading Florida's voters. *See Holmes*, 919 So. 2d at 407 (relying on "[t]he principle of construction, 'expressio unius est exclusio alterius,' or 'the expression of one thing implies the exclusion of another'").

Respondents nonetheless assert that Florida voters might understand the ballot summary's unqualified statement to relate only to "gaming activities at facilities

operated by the Seminole Tribe of Florida or . . . horse racing pari-mutuel facilities." Resp. Br. 41. They provide no explanation why the voters might distort the summary's language in that manner, and crediting this speculative and unsubstantiated assertion could wreak havoc on this Court's ballot-language precedent. Voters should not be presumed to import qualifications that appear nowhere in the ballot language. If Respondents' contrary argument is adopted and voters may be presumed to distort ballot summaries by reading into them language that isn't there, it is difficult to see how a ballot summary could ever stand.

VI. RESPONDENTS' OBJECTION TO THE BALLOT SUMMARY'S USE OF THE WORD "COMMERCIAL" IS WAIVED AND MERITLESS.

In their answer brief, Respondents advance an argument that they did not raise in their summary-judgment motion: that the ballot summary is defective because it employs "[t]he term 'commercial dog racing,'" and this term "does not appear in the text of the amendment." Resp. Br. 30–31; *compare* R. 192–218 (summary-judgment motion omitting this argument). Because they failed to include this argument in their summary-judgment motion, Respondents waived their right to seek judgment in their favor on this basis. *See State Farm Mut. Auto. Ins. Co. v. Mashburn*, 15 So. 3d 701, 706 (Fla. 1st DCA 2009); *Williams v. Bank of Am. Corp.*, 927 So. 2d 1091, 1093 (Fla. 4th DCA 2006) (compiling cases); *Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So. 2d 61, 64 (Fla. 2d DCA 2005).

Regardless, this waived argument is meritless. A "discrepancy between the

terms used in the ballot summary and the text of the amendment" is problematic only where the discrepancy is "material and misleading and where the difference ha[s] legal significance." *Use of Marijuana*, 132 So. 3d at 805 (quotation marks omitted). "It is only if the difference between the two terms is legally significant, and this legal significance is not disclosed to the voters, that the use of different terminology will render the ballot summary affirmatively misleading." *Id.* at 805–06 (quotation marks omitted). Where different terms are "synonymous" or "virtually synonymous," by contrast, "voters could not reasonably be misled." *Advisory Op. to the Att'y Gen. ex rel. Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 897 (Fla. 2000). And this is so even where the "meanings are not precisely the same." *In re Advisory Op. to the Att'y Gen. English—The Official Language of Fla.*, 520 So. 2d 11, 13 (Fla. 1988).

The ballot title and summary must be considered together, *see Use of Marijuana*, 132 So. 3d at 803–04, and their terms and phrases must be read in the context of the surrounding text, *see Tax Limitation*, 673 So. 2d at 868. Thus, the phrase "commercial dog racing" cannot be viewed in isolation. Instead, the question is whether "commercial dog racing in connection with wagering" (the full phrase used in the ballot summary) has a legal meaning different from that of "rac[ing] [dogs] in connection with any wager for money or any other thing of value" (the full phrase used in the proposed amendment). The answer must be no.

"Commercial" means "of, in, or relating to commerce." Webster's Third New Int'l Dictionary 456 (2002). "Commerce," in turn, means "dealings between individuals or groups in society" or "the exchange or buying and selling of commodities." *Id.* Dog racing most certainly is "commercial" when done, as Amendment 13 recites, "in connection with any wager for money or any other thing of value." A "wager" is "something (as a sum of money) that is risked on an uncertain event" or "an act of betting," Webster's Third New Int'l Dictionary 2569 (2002), and "betting," in turn, means "to stake (money) on the outcome of an issue or the performance of a contestant," *id.* at 208. By its plain meaning, wagering is commercial, as it involves an exchange of money. Thus, dog racing, when done "in connection with any wager," is by definition "commercial."

Because "commercial dog racing in connection with wagering" (the ballot summary's phrase) is synonymous with "rac[ing] [dogs] in connection with any wager for money or any other thing of value" (the proposed amendment's phrase), "[t]he differing use of terminology could not reasonably mislead the voters." *English*, 520 So. 2d at 13.

* * *

In the end, Respondents fall back on a complaint that the CRC "could have used 58 additional words" but chose not to do so. Resp. Br. 49. But the controlling legal standard is not whether the CRC could have written a longer summary, or even

a better one. Rather, the only issue that this Court must decide is whether the ballot language discloses Amendment 13's chief purpose and does not mislead the electorate. For the reasons explained in this brief and in Petitioners' opening brief, it passes this standard. Amendment 13 is a simple proposed amendment, and it requires only a simple ballot title and summary. The voters are entitled to weigh its merits in the upcoming election, and this Court should allow them that opportunity.

CONCLUSION

For the foregoing reasons, as well as the reasons given in Petitioners' opening brief, 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 24th day of August, 2018, to the following:

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