IN THE SUPREME COURT OF FLORIDA

Case No.: SC18-1339
Lower Tribunal No(s).: 1D18-3361; 1D18-3362; 1D18-3363;
372018CA001270; 372018CA001342

COUNTY OF VOLUSIA, ETC., et al.,

Appellants,

v.

KENNETH J. DETZNER, ETC., et al.,

Appellees.

ANSWER BRIEF OF FLORIDA ASSOCIATION OF COURT CLERKS, INC.

ON APPEAL IN THE SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA

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STATEMENT OF THE FACTS AND CASE

The Florida Constitution establishes five county offices: sheriff, tax collector, property appraiser, supervisor of elections, and clerk of court ("the constitutional officers"), all elected to terms of four years. Currently, however, by charter amendment or special law approved by vote of the electors of a county, the method of selection of the constitutional officers can be changed, and the office can be abolished altogether if all duties of the office prescribed by general law are transferred to another office.

In its Final Report, the 2018 Constitutional Revision Commission ("CRC") proposed a revision to Article VIII, section 1(d) of the Constitution. The revision, designated Amendment 10 on the ballot, states in pertinent part:

> (d) COUNTY OFFICERS. There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court~~; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office~~. Unless ~~When not~~ otherwise provided by ~~county charter or~~ special law approved by vote of the electors or pursuant to Article V, section 16, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds. Notwithstanding subsection 6(e) of this article, a county charter may not abolish the office of a sheriff, a tax collector, a property appraiser, a supervisor of elections, or a clerk of the circuit court; transfer the duties of those officers to another officer or office; change the length of the four-year term of office; or establish any manner of selection

other than by election by the electors of the county.

The ballot summary for Amendment 10 states:

> ARTICLE III, SECTION 3
> ARTICLE IV, SECTIONS 4, 11
> ARTICLE VIII, SECTIONS 1, 6
> STATE AND LOCAL GOVERNMENT STRUCTURE AND OPERATION.—
>
> Requires legislature to retain department of veterans' affairs. *Ensures election of sheriffs, property appraisers, supervisors of elections, tax collectors, and clerks of court in all counties; removes county charters' ability to abolish, change term, transfer duties, or eliminate election of these offices.* Changes annual legislative session commencement date in even numbered years from March to January; removes legislature's authorization to fix another date. Creates office of domestic security and counterterrorism within department of law enforcement.

(emphasis added to show portion of summary challenged in this action). Plaintiff filed this action in the Circuit Court of Leon County seeking an order removing the amendment from the ballot on the ground that the ballot summary is misleading. [R. 011-102] The court found that the summary accurately described the amendment and entered judgment for Defendants. [R. 133-175]

SUMMARY OF ARGUMENT

The arguments advanced by Appellants typify those commonly asserted in challenges to proposed constitutional amendments. While paying lip service to the Court's often repeated criteria for ballot summary analysis and high threshold for

removal of a proposal, Appellants fail to present any argument that meets that threshold.

The amendment does only two things: it ensures election of constitutional county officers in all counties, and it eliminates the ability to abolish the offices or change their duties or method of election through charter amendment. The ballot summary says exactly that. It does so unambiguously, with no material omissions.

It is unnecessary and would be misleading for the summary to tell voters that the amendment would abolish voters' right to make structural changes to county government or their right to home rule. The amendment would only make certain specific changes, and those are clearly delineated in the summary. It is not necessary to also explain ramifications that are implicit in the recited changes and that would be more of a political argument than an explanation of legal effects.

The summary statement that the amendment "ensures election" of constitutional officers "in all counties" is not misleading for failure to state that the constitutional officers are currently elected in counties that haven't changed the method by charter. The summary does not use terms such as "establish" or "create" that would suggest the amendment is creating any new right to elect the constitutional officers. The use of the term "ensures" is an accurate characterization since election of the constitutional officers can currently be changed by charter. The chief purpose of the amendment is to remove the option to

abolish or change the duties or method of selection of the constitutional officers by charter, and the summary clearly so states.

The cases cited by Appellants, *Askew, Armstrong,* and *NAACP,* were not removed because of the types of arguments advanced by Appellants. They were removed because they affirmatively hid the ball. This Court has taught that an amendment should not be removed simply because the summary might be misunderstood by a voter that has not made any effort to prepare before voting or that has read the summary carelessly. Rather, the Court has removed amendments when even a well-prepared and careful voter would not realize the chief purpose or true effect of the amendment without facts not generally known to the average voter.

Miami-Dade argues that the summary is misleading because it fails to inform voters that the amendment would undo changes already made in the exercise of its home rule powers. It is not apparent that the amendment would have such an effect because the language of the amendment doesn't address retrospectivity. To the extent that there is an ambiguity regarding the issue, the ambiguity is in the amendment, not the summary, and must be resolved in a post-election action. Even if the amendment did operate retrospectively as to some counties, it would not be necessary to explain it in the summary. Explaining the

impact on each individual county is not practicable and is the type of information more properly dealt with in the election campaign.

The summary contains no political rhetoric. The language Appellants call political, "ensures election" and "all counties," is necessary to properly explain the legal effects of the amendment. Appellants have suggested no alternative language that would avoid their perception of political rhetoric and still adequately describe the purpose and effect of the amendment.

Inclusion of the revision relating to the constitutional officers in the same summary as three other subjects does not render the summary too complicated for the average voter to understand.

ARGUMENT[1]

If there is one thing we have learned in the past fifty years, it is to appreciate the ingenuity of lawyers in devising creative ways to argue that virtually every ballot summary for a proposed constitutional amendment is misleading. The premise of most of those arguments is that the average voter has no obligation to become educated about the substance of a proposed amendment and is presumed to lack a reasonable amount of common understanding and knowledge. That is precisely the opposite of this Court's teaching. *See Voter Control of Gambling in Florida,* 215 So. 3d 1209 (Fla, 2017); *Roberts v. Doyle*, 43 So. 2d 654 (Fla. 2010).

[1] The standard of review is *de novo.*

If the arguments commonly made in many ballot summary challenges were sufficient, few if any proposals would ever make it to the ballot. In order to avoid that fate, and in an apparent and thus far unsuccessful effort to avoid an automatic challenge to almost every proposed amendment, this Court has erected high barriers to removal of a proposal from the ballot. A summary must be "clearly and conclusively defective." *User of Marijuana for Certain Medical Conditions*, 132 So. 3d 786, 795 (Fla. 2014), and courts are to use "extreme care, caution, and restraint" before denying the voters the right to be heard on a proposed amendment. *Askew v. Firestone,* 421 So. 2d 151, 156 (Fla. 1982). Many challenges, including the one at bar, approach the matter with the perspective that the amendment should be removed if there is any theory by which it can be argued that a voter might be misled. This Court requires that reviewing courts take the opposite perspective. The action of a legislative body proposing an amendment must be upheld if there is "any reasonable theory under which it can be done." *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000), quoting *Gray v. Golden,* 89 So. 2d 785, 790 (Fla. 1956).

This Court has thus built a barrier to removal of a proposed amendment that is one of the highest legal barriers recognized in Florida law. Appellants fail to clear that barrier. For the reasons set forth below, Amendment 10's ballot summary

accurately describes the chief purpose and material effects of the amendment and fully complies with Florida law.

I. The ballot summary accurately describes the chief purpose and effect of the amendment.

Amendment 10 would do two things:

(1) ensure that the constitutional officers in all counties would be filled by election; and

(2) eliminate the ability to abolish a constitutional office, transfer the duties of the office, or change the length of term of office by charter amendment.

That's all the amendment would do. And that is precisely what the ballot summary says it would do:

> Ensures election of sheriffs, property appraisers, supervisors of elections, tax collectors, and clerks of court in all counties; removes county charters' ability to abolish, change term, transfer duties, or eliminate election of these offices.

The summary states the main effects of the amendment, no material term of the amendment is left out of the summary, the summary is not vague or ambiguous, there are no hidden deceptions, and there is no language in the summary that is gratuitously political. No reasonable voter reading the summary would fail to understand the chief purpose and legal effects of the amendment.

II. The summary fairly explains the effect of the amendment on method of selection of the constitutional officers.

Appellants argue that the summary fails to tell voters the amendment would abolish the right of county voters to "vote on structural change" or that it eliminates their home rule powers. The language advocated by Appellants would be overbroad and misleading. The amendment would not abolish the right to vote on structural changes in county government or abolish home rule rights. The amendment would only eliminate the ability to make certain specific changes at the local level: the selection method and duties of the constitutional officers or abolishment of the offices. These changes are clearly stated in the summary and the law doesn't require that the effects be spoon-fed to voters by also mentioning ramifications that are implicit in the statement.

Having told voters that the amendment would ensure election of constitutional officers in all counties, and that election could not be changed by charter, it is unnecessary to also state the obvious − that voters would not be able to eliminate election of the officers in charter counties. Having told voters that the existence of the constitutional offices and the duties, and election of the constitutional officers would no longer be subject to change by charter, it is not necessary to state the obvious ─ that these charter powers would no longer exist.

What Appellants would like to see in the summary is not an explanation of its legal effect, but an argument as to why voters should vote against the

amendment. Appellants would like the summary to preach to voters that they should keep in mind that they will be giving up local control over the manner of choosing the constitutional officers if the amendment passes. That goes beyond explaining the legal effects of the amendment and constitutes the type of political rhetoric Appellants decry.

Appellants claim that voters will be misled by the summary statement that the amendment "ensures election" of the constitutional officers. Appellants argue that the summary suggests that the voters are being given something new when the "default rule" is that the officers are already elected. It wouldn't be accurate for the summary to say the constitutional officers are currently elected because not all of them are. Today, the constitutional officers are either elected or appointed, depending on whether a charter county exercises the option through its charter of appointing such officers. It wouldn't be practicable or necessary to list which counties elect and which appoint in the summary, and that would obscure the chief purpose of the amendment. The real purpose of the amendment is to eliminate the *option* to amend the charter to appoint, and the summary clearly so states.

The summary makes this clear when it says that the amendment "ensures election" of the officers "in all counties" and "removes county charters' ability to . . . eliminate election of these officers." The summary doesn't say that the

amendment would "establish" or "create" the right to vote, or any other similar words suggesting that the amendment would create a new right.[2]

In purported support of their arguments, Appellants cite *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000); *Askew v. Firestone,* 421 So. 2d 151 (Fla. 1982); and *Florida Dept. of State v. Florida State Conference of NAACP Branches,* 43 So. 3d 662 (Fla. 2010). Those cases are indeed significant, but not because they support Appellants' position. What is significant are the material distinctions between those cases and the case at bar. The three cases have a key element in common. The amendments in all of the cases would necessarily operate in concert with existing, undisclosed provisions to produce an effect not only different from, but the antithesis of, the purpose stated in the summary.

In *Armstrong*, the amendment would have changed the state constitution's prohibition of "cruel *or* unusual punishment" to the narrower "cruel *and* unusual punishment" found in the U.S. Constitution. The amendment would also have required that the Florida Constitution be construed in conformity with U.S. Supreme Court construction of the federal cruel and unusual punishment clause. The court struck the measure because the ballot summary did not inform the voter of the main effect of the amendment, which was to repeal Florida's prohibition

[2] Compare *Evans v. Firestone*, 451 So. 2d 1357 (Fla. 1984) (holding a ballot summary defective when it stated that the amendment would "establish" rights in civil actions that already existed.)

standard in favor of the less stringent federal standard. In addition, the wording of the summary gave the impression that its main effect was to preserve the death penalty, whereas the real effect would be to narrow application of the penalty.

In *Askew,* the ballot summary was equally devious. It stated:

> Prohibits former legislators and statewide elected officers from representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, unless they file full and public disclosure of their financial interests.

Askew, 421 So. 2d at 153. The statement was technically accurate, but it hid the real effect of the amendment that was its true purpose. At the time, legislators were already required to file financial disclosure and were absolutely prohibited from appearing before the legislature for two years after leaving office. While the ballot summary gave the impression that it was imposing new restrictions on lobbying, it was actually easing restrictions by removing the two-year bar.

The *NAACP* case also played a shell game with voters. The amendment included a hidden effect that would have eased legislative districting standards whereas the summary indicated that the amendment was strengthening the standards. The ballot summary stated that in the redistricting process,

> the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, *both without subordination to any other provision of article III of the State Constitution.*

NAACP, 43 So. 3d at 664 (emphasis added). What the summary did not say was that the phrase "without subordination to any other provision of article III" effectively repealed an existing constitutional provision that mandated that districts be contiguous, a main effect of the proposal.[3]

Askew, Armstrong, and *NAACP* involved what the Court has termed "hiding the ball." The Court has removed measures for defective summary on this and two other grounds: failure to mention a material element of the amendment, or an incorrect description of a material element. The current summary contains none of these defects.

As important as the reasons the Court has removed amendments are the reasons the Court has *not* removed amendments. The Court has consistently declined to remove amendments because of the potential that a voter who has made no effort to prepare before entering the voting booth, or who reads the summary carelessly, might misunderstand the legal effect of the amendment despite the accuracy of the summary. Rather, measures have been removed when, as in *Askew, Armstrong,* and *NAACP,* the summary is worded so that even a well-prepared and careful voter would not realize the chief purpose or true effect of the amendment

[3] Volusia cites numerous other cases that will not be discussed here, but all of them are equally distinguishable from the case at bar. In none of them did the court strike a proposed amendment with a summary as clear and accurate as the Amendment 10 summary.

without facts not generally known to the average voter. In short, the summary truly "hides the ball."

Amendment 10 contains no hidden deception and Appellants identify none. What Appellants cite ─ that the changes can be characterized as structural changes or reduction of some home rule powers ─ are not legal effects of the amendment, but ramifications that Appellants think might influence a voter if more prominently noted. That is the job of the advocates in the course of the election campaign, not of the ballot summary. The Supreme Court has made clear that the ballot summary does not have to explain every ramification of the amendment. *1.35% Property Tax Cap,* 2 So. 3d 968 (Fla. 2009); *Limited Political Terms in Certain Offices*, 592 So. 2d 225 (Fla. 1991).

Miami-Dade asserts that the ballot summary is deficient because it doesn't inform voters that the amendment would result in overturning changes Miami-Dade has made by exercise of its home rule powers. While Miami-Dade has unique circumstances, so do other counties, including Volusia and Broward, which have also made changes to their constitutional offices that would be affected by Amendment 10. If it were necessary to explain the impact of the amendment on every individual county that has made charter changes to its constitutional offices, the ballot summery would be unduly cumbersome and, to the extent it applies, it would be impossible to meet the 75-word limit imposed by section 101.161,

Florida Statutes. It is not necessary to describe the particular impact on individual counties because such an impact is not the chief purpose or main effect of the amendment. It is simply one ramification of the amendment that is appropriate for discussion during the course of the election.

Furthermore, the amendment does not state whether it would affect Miami-Dade's changes retrospectively. To the extent that there is an ambiguity in this respect, it is in the amendment, not the summary, and ambiguities in amendments cannot be resolved in the ballot summary. If a ballot summary attempted to do so, challengers would properly argue that the summary was misleading by stating a purpose of effect not found in the language of the amendment. Any ambiguity in the language of the amendment is a matter for judicial construction in a post-election challenge if the measure passes. It is beyond the scope of pre-election review. *Voter Control of Gambling in Florida,* 215 So. 3d at 1216 (Fla. 2017).

III. The ballot summary contains no political rhetoric.

Appellants' argue that the ballot summary contains political rhetoric designed to evoke an emotional voter response in favor of the amendment. This Court has criticized the use of political rhetoric in ballot summaries, but has shown no inclination to strike proposals on the basis of perceived political rhetoric alone. The Court itself noted this fact in *People Against Tax Revenue Mismanagement v. Co. of Leon,* 553 So. 2d 1373 (Fla 1991), a case involving a proposed amendment

to impose a tax to fund capital improvements. The ballot summary included the sponsor's campaign slogan and referred to the improvements as "critical." The Supreme Court rejected the argument that the proposal should be stricken because of the inclusion in the summary of political rhetoric:

> We agree that the use of a campaign slogan and the word "critical" reflect a slight lack of neutrality that should not be encouraged in ballot language. Government should never appear to be "shading" a ballot summary to favor one position or another. However, the fact that some questionable language appears on the ballot is not itself enough to invalidate an entire referendum. Rather, the reviewing court must look to the *totality* of the ballot language, as such language would be construed by a reasonable voter. We have held that a court may interfere with the right of the people to vote on referendum issues only if the language in the proposal is clearly and conclusively defective. [citation omitted] Typically we have overturned an election because of defective ballot language where the proposal itself failed to specify exactly what was being changed, thereby confusing voters.

Id. at 1375 (emphasis in original). A stringent political rhetoric test would likely prove judicially unmanageable as well as unnecessary since voters can be expected to recognize such rhetoric when they see it.

In any case, it is a stretch to say the complained-of phrases in the summary currently under review are questionable or lack neutrality. The terminology labeled political rhetoric by Appellants is the reference in the summary to "ensures election" in "all counties." The phrase accurately indicates what the amendment would do and is no more emotionally charged than any alternative terminology that would be necessary to fully explain the amendment. This Court's final assessment

in the above quoted discussion is apropos here: "It is not reasonable to conclude that the voters of Leon County were so easily beguiled by a few arguably non-neutral words, when the remainder of the ballot plainly stated that a 'yes' vote meant new taxes would be imposed." *Id.* at 376.

IV. The combination of multiple subjects in the ballot summary does not render the summary defective.

Appellants acknowledge that proposals by the Constitution Revision Commission are not subject to a single-subject limitation. Nevertheless, they argue that the summary is defective because the description of Amendment 10 is "obscured from view" by including it with descriptions of three other amendments so that a "voter cannot reasonably be expected to understand." Volusia Initial Brief, p. 26. The same argument could be made about any amendment that combines multiple subjects, which would effectively impose a single-subject restriction even though, as this Court has noted multiple times, the Constitution intends no such restriction.

Furthermore, the argument is premised on a truly dim view of the intelligence of the average voter. The argument is the equivalent of saying that early Americans reading the Bill of Rights would not have been able to understand the freedom of speech clause because it was "obscured from view between measures" relating to religion, assembly, and petitioning for redress of grievances. The contention presumes that the average voter has the reading ability and

attention span of a pre-school child. The Supreme Court requires the opposite presumption in analyzing a ballot summary. "This Court will presume that the average voter has a certain amount of common understanding and knowledge." *Roberts v. Doyle*, 43 So. At 659. That presumption no doubt includes the fact that the average voter can comprehend more than one subject in a short paragraph.

Conclusion

The Court is respectfully urged to affirm the decision below.[4]

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[4] The other subjects of Amendment 10 are not the focus of Plaintiffs' motions for summary judgment and are not addressed in this brief, but the Court Clerks submit the entire summary meets constitutional standards.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to the Clerk of the Court via Florida's efiling portal and served to the following by email on August 27, 2018:

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I hereby 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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