IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case number SC18-1339
LT numbers 1D18-3361; 1D18-3362; 1D18-3363
2018 CA 001270; 2018 CA 001342

COUNTY OF VOLUSIA, etc., et al.

Appellants,

v.

KENNETH DETZNER, etc. et al.

Appellees.

INITIAL BRIEF OF APPELLANTS, COUNTY OF VOLUSIA ET AL.

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PRELIMINARY STATEMENT

References to the record on appeal are designated ("R. "). Appellants, County of Volusia, Philip T. Fleuchaus, and T. Wayne Bailey, collectively will be referred to as Volusia.

STATEMENT OF THE CASE AND FACTS

Article XI, section 2, of the Florida Constitution provides for a constitution revision commission to occur every twenty years that may propose a revision of the constitution or any part of it. The commission concluded its work and transmitted its final report to the secretary of state on May 9, 2018. (R. 011-102.) The report included eight proposed revisions for referral to the voters. Among those was revision 5, renumbered for placement on the ballot as revision 10. (R. 048-058.)

The text of the amendments proposed by revision 10 is as follows:

> ARTICLE III
> LEGISLATURE
>
> SECTION 3. Sessions of the legislature.—
>
> …
>
> (b) REGULAR SESSIONS. A regular session of the legislature shall convene on the first Tuesday after the first Monday in March of each odd-numbered year, and on the second ~~first~~ Tuesday after the first Monday in January ~~March, or such other date as may be fixed by law,~~ of each even-numbered year.
>
> …

Sections 4 and 11 of Article IV of the State Constitution are amended to read:

ARTICLE IV
EXECUTIVE

SECTION 4. Cabinet.—

…

g) The governor as chair, the chief financial officer, the attorney general, and the commissioner of agriculture shall constitute the agency head of the Department of Law Enforcement. The Office of Domestic Security and Counterterrorism is created within the Department of Law Enforcement. The Office of Domestic Security and Counterterrorism shall provide support for prosecutors and federal, state, and local law enforcement agencies that investigate or analyze information relating to attempts or acts of terrorism or that prosecute terrorism, and shall perform any other duties that are provided by law.

SECTION 11. Department of Veterans' ~~Veterans~~ Affairs.—The legislature, by general law, shall provide for a ~~may provide for the establishment of the~~ Department of Veterans' ~~Veterans~~ Affairs and prescribe its duties. The head of the department is the governor and cabinet.

…

ARTICLE VIII
LOCAL GOVERNMENT

SECTION 1. Counties.—

…

(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 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.

…

(g) SELECTION AND DUTIES OF COUNTY OFFICERS.—

(1) Except as provided in this subsection, the amendment to Section 1 of this article, relating to the selection and duties of county officers, shall take effect January 5, 2021, but shall govern with respect to the qualifying for and the holding of the primary and general elections for county constitutional officers in 2020.

(2) For Miami-Dade County and Broward County, the amendment to Section 1 of this article, relating to the selection and duties of county officers, shall take effect January 7, 2025, but shall govern with respect to the qualifying for and the holding of the primary and general elections for county constitutional officers in 2024.

…

The ballot title and summary for revision 10 are as follows:

CONSTITUTIONAL REVISION
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.

Volusia filed a complaint against Secretary of State Kenneth Detzner on June 7, 2018, (R. 011-102.), challenging the ballot title and summary for revision 10; and seeking a declaration that they failed to meet the constitutional standard for accuracy incorporated into section 101.161, Florida Statutes, and a judgment striking the revision from the ballot. The court consolidated the Volusia case with one filed by Broward County against the secretary and the department of state, filed on June 19, 2018, that likewise challenged the ballot title and summary for revision 10 (R. 204-05.); and subsequently granted intervention by Miami-Dade County. (R. 855-57.)

The Florida Association of Court Clerks; the Florida Association of Tax Collectors; and Anne Gannon, Palm Beach County Tax Collector intervened as

defendants. (R. 103; 112; 119.) The Florida Sheriff's Association appeared as amicus curiae. (R. 653.)

The court heard motions for summary judgment by all original and intervening parties on August 3, 2018; and entered an order granting final summary judgment to the defendants on August 9, 2018. (R. 976-81.) The order found that the ballot title and summary complied with section 101.161, Florida Statutes, and should be included on the ballot. Volusia, Broward, and Miami-Dade timely appealed on August 10, 2018. (R. 982-92; 993-1004; 1005-1016.) On joint suggestion by the parties that the case is one of great importance and requires immediate resolution by this Court, the district court of appeal certified that the case is one of immediate importance. The Court accepted jurisdiction on August 14, 2018.

SUMMARY OF THE ARGUMENT

The ballot summary and title for revision 10 do not clearly and unambiguously explain its true chief purposes: its main effects. Any statement of chief purpose must include the consequence of substantial modification of Florida constitutional provisions or elimination or diminution of Florida constitutional rights. A restrictive statement, such as that here, must include all main effects.

The revision 10 ballot language fails in four ways to meet these requirements for an informative ballot. First, it does not apprise the state voter that voters of every

county have the right under article VIII, section 1(d), by referendum to approve a county charter or special law to provide for any of five named offices to be chosen in another manner or to be abolished; and that this right is to be eliminated. The ballot language meanwhile implies that the revision is establishing a right to vote for the named offices that already exists or that it is protecting that right from danger of elimination.

Second, the ballot language does not plainly inform the voter that article VIII, section 1(c), provides that a county charter cannot be amended or repealed without the approval of the county voters in an election specially called for that purpose; and that the intended effects of the revision are to nullify the prior exercise of referendum rights of charter county voters; to require the re-creation of offices already abolished by them and to reverse the transfer of duties already approved by them, all without the required approval of county voters.

Third, the ballot language fails to describe clearly that the revision supersedes article VIII, section 6(c) of the 1968 constitution and the provisions of the 1885 constitution that it preserves; that it abrogates the right of Miami-Dade voters under article VIII, section 11(3) of the 1885 constitution to not have their charter amended without their vote; and that it restores offices they have abolished.

Fourth, in its restricted focus on charter county ability, the ballot language fails to explain that a main effect of the revision is to remove the same power of the legislature; and implies that the revision has narrow application.

The ballot summary fails its informative purpose in yet other ways. It textually describes the stated purpose for county government in an ambiguous manner that in one reading elicits an emotional appeal; and visually disguises the main effects for county government among those for state government. Its baffling truncated presentation of bundled amendments does not enable the voter to make an overall intelligent decision.

The ballot language also misleads the voter regarding its chief purpose. It does not adequately describe the ambiguous sweep of the measure and its effect on existing county charters. It fails to impart that the revision effectively will reverse prior county referenda. If the Court finds that the ballot language does adequately describe its retroactive impact, but the revision is not construed to have that effect, then the ballot language does not deliver what it says it will. The ballot language inadequately discloses its constitutional impacts, as summarized above. It announces that the revision will remove a county charter ability; but does not tell that it will remove an equivalent special law power applicable to non-charter counties; and implies that the revision has more limited impact than it does. It wrongly asserts to create a state office of domestic security and counterterrorism that already exists;

and presents a false choice to the voters for the combination that renders their consent unreliable and invalid.

ARGUMENT

Standard of Review

For this Court to strike revision 10 from the ballot, it must determine that the ballot title and summary are clearly and conclusively defective. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). The issue is a pure question of law, to be reviewed de novo. Id.

INTRODUCTION

Article XI, section 5(a), Florida Constitution provides that a proposed amendment or revision to the constitution is to be submitted to the electors. "Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity." Armstrong v. Harris, 773 So. 2d at 12 (emphasis in original). This necessity for accuracy is applicable to all constitutional proposals. Id. at 14. The constitutional requirement has been codified in section 101.161, Florida Statutes, which provides that the ballot summary shall be an explanatory statement of the chief purpose of the amendment. Id. at 12. "[P]roposal of amendments to the Constitution is a highly important

function of government, that should be performed with the greatest certainty, efficiency, care and deliberation." Askew v. Firestone, 421 So. 2d 151 (Fla. 1984) (quoting Crawford v. Gilchrist, 59 So. 963, 968 (Fla. 1912)).

"What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." Armstrong, 773 So. 2d at 13 (emphasis omitted) (quoting Askew v. Firestone, 421 So. 2d at 154-55); and at 15 (quoting Grose v. Firestone, 422 So. 2d 303, 305 (Fla. 1982), quoting Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954)). "[L]awmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." Armstrong, 773 So. 2d at 14 (quoting Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976)). "A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose." Roberts v. Doyle, 43 So. 3d 654, 659 (Fla. 2010). "[T]he gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." Armstrong, 773 So. 2d at 16. "The applicability of this requirement also is simple: It applies across-the-board to all constitutional amendments, including those proposed by the Legislature." Id.

The Court is to consider two questions: (1) "whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written misleads the public." Florida Department of State v. Florida State Conference of NAACP Branches, 43 So. 3d 662, 667 (Fla. 2010) (internal quotation marks and citations omitted). "This evaluation also includes consideration of the amendment's 'true meaning and ramifications.'" Id. (quoting Armstrong, 773 So. 2d at 16, quoting Askew, 421 So. 2d at 156). When part of "[t]he problem … lies not with what the summary says, but, rather, with what it does not say[,]" Askew, 421 So. 2d at 156, analysis of the two questions overlaps as it does in the following discussion.

I. The Ballot Title and Summary Do Not Provide Fair Notice of the Chief Purposes of the Revision.

A. The summary misstates the chief purposes of the revision and does not tell its constitutional effects.

Revision 10 is a compilation of five specific, unrelated amendments to the constitution: one to article III, two to article IV, and two to article VIII. The ballot title and summary state the chief purpose of the proposed amendments to article VIII to be that the revision "[e]nsures election" of the five named offices "in all counties" [and] "[r]emoves county charters' ability to abolish, change term, transfer duties, or eliminate election of these offices." "In evaluating an amendment's chief purpose,

a court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's main effect." Armstrong, 773 So. 2d at 18.[1]

The five named offices are elected by county voters pursuant to article VIII, section 1(d) unless those same county voters have approved by charter referendum under section 1(c) or by special act referendum under section 1(d),[2] for the offices

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[1] See also, Askew, 421 So. 2d at 156 (analyzing effect of legislatively proposed amendment to replace two-year ban on lobbying with one that would allow lobbying upon filing of financial disclosure; concluding that, "The change to subsection 8(e) is as stated, but the stated change is only incidental to the true purpose and meaning of section 8 in its entirety.").

[2] Article VIII, sections 1(c) and (d), of the constitution currently provide as follows:

> (c) GOVERNMENT. Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose. (Emphasis supplied.)
>
> (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. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county

not to be elective. A certain main effect of the revision will be to abolish the constitutional right of electors of any county, charter or non-charter, to vote on a county charter or special law proposing structural change. A potential main effect of the revision will be to nullify structural change approved by charter referendum without the vote of charter county electors guaranteed to them by section 1(c).[3] Whether this potential is realized will depend on judicial construction of the application of the revision to existing county charter provisions, [4] more fully

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commissioners, auditor, recorder and custodian of all county funds. (Emphasis supplied.)

[3] The constitution does not explicitly require a referendum to approve the amendment or repeal of a special law adopted pursuant to article VIII, section 1(d), where that special law is not also a county charter.

[4] The Court may construe the substance of the revision as part of its determination whether the ballot summary is informative and accurate. Compare Advisory Opinion to the Attorney General Re: Use of Marijuana for Certain Medical Conditions, 132 So. 3d 786, 799 (Fla. 2014) (reviewing operative portion of amendment text to determine whether ballot summary misleading; stating that, "When reviewing constitutional provisions, the Court follows principles parallel to those of statutory interpretation.") (citations omitted), with Advisory Opinion to the Attorney General Re: Voter Control of Gambling in Florida, 215 So. 3d 1209, 1215-16 (Fla. 2017) (declining to address argument that amendment should be placed on the ballot because amendment unclear whether it would apply retroactively and have an effect on currently legal gambling; reasoning that the ambiguity was in the text, not the ballot summary).

"A new constitutional provision prevails over prior provisions of the Constitution (a) if it specifically repeals them or (b) if it cannot be harmonized with them. Nevertheless it is settled that *implied repeal of one constitutional provision by another is not favored,* and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify

addressed in issue II. Regardless whether the reach exceeds the grasp of the revision, the extinguishment of a constitutional right of county voters to make this choice is one of its true chief purposes.

The right of county voters under article VIII, section 1(c) and (d) to determine their preference for county structure, and to have the county charter amended or repealed only upon their approval is no small matter of Florida law. The constitution begins, "All political power is inherent in the people…." Article I, section 1, Florida Constitution. The inclusion in the 1968 constitution of those portions of article VIII, sections 1 (c), (d), and (e),[5] allowing variance of county organization in regard to the named offices or a county commission, were part of the culmination of a broader historical trend toward home rule. [6] The goal of the revision for the named county

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an existing provision, *the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated."* Advisory Opinion to the Attorney General in Standards for Establishing Legislative District Boundaries, 2 So. 3d 175, 190 (Fla. 2009) (emphasis by the court) (construing proposed amendment; harmonizing proposed amendment with existing constitutional requirement for contiguity; quoting Jackson v. City of Jacksonville, 225 So. 2d 497, 500-01 (Fla. 1969)).

[5] Art. VIII, sec. 1(e), Fla. Const. ("Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners….")

[6] A staff analysis prepared by commission staff recognized that "through amendments [to the 1885 Constitution], in particular the enshrinement of home rule authority in the 1968 Florida Constitution, with the authorization of county charters, the method of selection and duties of some county constitutional officers in some counties changed." (R. 809.) This statement is true but incomplete. The general

offices is a restoration of the 1885 Florida Constitution without any of the amendments that authorized local variance by special law.

The circuit court order concluded that it was clear to any "reasonable voter from the combined words of the ballot summary that if passed, the amendment would require in the future all five listed offices in all 67 counties to be elected to the same terms and with the same duties"; and that "[t]he average voter would 'connect the dots' that removal of these rights under the charter would by necessity mean that the voters could not vote to exercise these prohibited rights." (R. 980.) The order does not adhere to this Court's direction for evaluation of the ballot statement for a chief purpose of an amendment.

The Court has opined repeatedly that language must identify to the voter existing constitutional provisions to be substantially modified; and notify the voter

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allowance of the 1968 constitution for structural home rule upon county voter approval of a county charter or special law was accompanied by comprehensive authorization for home rule regulatory governance, either directly by the constitution through charter adoption, pursuant to VIII, sections 1(c) and (g); or indirectly by legislative grant in general or special law, pursuant to article VIII, section 1(f). Comparable to section 1(f), section 1(d) confers upon the legislature the special law power to propose for every county that the named offices to be selected in another manner or be abolished; and for the voter of any county to approve such change in a non-charter referendum. If the special law power of section 1(d) had no application to non-charter counties and their voters, it would have been unnecessary for that section to require approval by vote of county electors. Section 1(c) already requires a vote of the county electors for a charter action that section 1(d) authorizes.

of the negative effect on existing constitutional rights. It consistently has stricken ballot language that failed to inform voters that the proposal would (1) abolish or diminish a Florida constitutional right provided by a section that is the subject of an express amendment. Askew, supra; Armstrong, supra; (2) substantially alter or modify an existing constitutional provision that is not being expressly amended;[7] or

[7] See e.g. Advisory Opinion to the Attorney General re 1.35% Property Tax Cap, Unless Voter Approval, 2 So. 3d 968, 967 (Fla. 2009) (failure to inform voter that measure would repeal article VIII, section 9(b); Florida Department of State v. Slough, 992 So. 2d 142, 149 (Fla. 2008) (striking ballot proposal by taxation and budget reform commission because misleading, in part because it implied that amendment solely would address school property taxes where other portions of the constitution also would have been amended); Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 899-900 (Fla. 2000) (per curiam) (summarizing that Court has repeatedly held that ballot summaries which fail to mention constitutional provisions that are affected and do not describe general operation of proposed amendment must be invalidated); Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So. 2d 1304, 1311 (Fla. 1997) (ballot summary misleading for failure to inform of impact of initiative on sections of articles VII other than those set forth; and of elimination of ten mill cap); Advisory Opinion to Attorney General re Fish and Wildlife Conservation Commission, 705 So. 2d 1351, 1355 (Fla. 1998) (ballot summary for initiative petition that did not explain that power to regulate marine life lay solely with the legislature; and that such power would be removed); Advisory Opinion to the Attorney General re: Stop Early Release of Prisoners, 642 So. 2d 724, 726 (Fla. 1994) (failure to disclose effect on article IV, section 8(c), allowing legislature to establish parole and probation commission). Cf. Advisory Opinion to the Attorney General – Limited Political Terms in Certain Offices, 592 So. 2d 225, 228 (Fla. 1991) (finding ballot summary not invalid for failure to indicate a prior

(3) both substantially alter or modify an existing constitutional section that is not being expressly amended, and abolish or diminish constitutional rights provided by the section that is impliedly affected. NAACP, supra. The Court also has held use of restrictive language in the ballot description of principal effects of an amendment must include all material effects. It thus has stricken ballots that used restrictive language, but omitted a description of one of multiple main effects. [8]

In Askew, noted above, the Court struck from the ballot a legislatively proposed amendment for failing to disclose the diminishment of the constitutional right to know an official's interest, and a protection against corruption and conflicting interest. Id., 421 So. 2d at 156. The ballot summary tracked the text of the amendment but did not inform the voter of its effects.

In Armstrong, the Court reasoned that the main effect of a legislatively proposed amendment was to nullify the longstanding prohibition of the Florida Constitution against cruel or unusual punishment applicable to all criminal

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lack of term limits; observing that it was not a "situation in which the ballot summary conceals a conflict with existing provision").

[8] See Slough, 992 So. 2d at 148-49 (observing that if ballot summary and title are restrictive, all provisions beyond such limits are not included; striking amendment from ballot because one of its main effects not disclosed); Roberts v. Doyle, 43 So. 3d at 659-61 (finding ballot summary for legislatively proposed amendment for additional homestead exemption to be both uninformative and inaccurate because of omissions and ambiguity).

punishments; and that its ballot summary nowhere mentioned or even hinted at this effect. Instead, the summary described that the amendment "... preserve[d] the death penalty, and permitt[ed] any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to the United States Supreme Court interpretation of the Eighth Amendment…." The Court observed that the ballot would not even tell the voter that the word "or" would be changed to "and," and that this was a significant change by itself." Id. at 18. [9]

In NAACP, the Court reviewed the ballot summary for another legislatively proposed amendment, this one to create a new section to establish "standards for the legislature to follow in legislative and congressional redistricting…." (capitalization removed). Noting that Armstrong had "invalidated a constitutional amendment because the ballot language failed to inform the voters that the provision would alter an existing provision in the Florida Constitution," the NAACP Court found the ballot before it to be similarly deficient and affirmed the circuit court judgment. The Court

[9] Cf. Florida Education Association v. Florida Department of State, 48 So. 3d 694, 703 (Fla. 2010) (denying challenge to amendment modifying constitutional classroom size mandate; stating that Armstrong and Askew had struck proposed amendments "for failing to describe that they would *diminish* an existing constitutional right"; characterizing requirement that legislature "make adequate provision" for "sufficient funds" for classrooms to be constitutional rights; concluding that under proposed amendment Floridians would have same right as before) (emphasis supplied).

analyzed that if the discretionary standards proposed by the amendment were not to be subordinated by any other provisions of article III, as stated by the amendment text, then it must follow that other provisions of article III may be subordinated to the discretionary considerations in the amendment. Id. at 668. "This clearly alters the contiguity requirement currently contained in article III, section 16(a), of the constitution." Id. at 668-69. "[N]either the text of the amendment nor the explanatory statement proposed by the Legislature makes this fact clear." Id. at 669.

NAACP observed further, "[n]owhere does the ballot language inform the voter that there is currently a mandatory contiguity requirement in article III, and nowhere does the language inform the voter that the contiguity requirement could be deleted by" the amendment. Id. at 669. That the amendment would allow the legislature to nullify the mandatory nature of the contiguity requirement, placing it on a par with other discretionary considerations for redistricting, "should have been clearly and unambiguously stated in the ballot language. Failing this clear explanation, the voters will be unaware of the valuable right – the right to have districts composed of contiguous territory – which may be lost if the amendment is adopted." Id. The Court affirmed the judgment striking the measure "because the ballot language fails to inform the voter of the chief purpose of Amendment 7 and the effect it will have on the existing, mandatory constitutional provisions in article III." Id.

The revision 10 ballot language fails the constitutional imperative to be informative of its main effects. The ballot language does not clearly and unambiguously disclose that voters in all 67 counties have a valuable right under article VIII, section 1(d), to determine in a charter or special law referendum whether any of the five offices will be chosen in another manner or abolished. The extinguishment of this right of county voters is a primary effect, thus a chief purpose, of the revision for county government. Rather, the ballot language insinuates that the revision establishes or protects the right to vote for the named offices that already exists. The Court should not be asked to assume that voters are informed of the right they are asked to surrender, when the commission considered it to be necessary that they be induced by promise of another.

The ballot language does not clearly and unambiguously disclose that an intended main effect of revision 10 is to implicitly but substantially modify article VIII, section 1(c); that charter county voters have a constitutional right to approve an amendment or repeal of their county charter in a special election called for that purpose; and that the revision potentially will nullify the referendum protection that section 1(c) guarantees, and negate the prior exercise of the referendum right it secures. Knowledge that a provision of the Florida Constitution explicitly protects this county voter right, and understanding that the revision implicitly will

subordinate that provision and abrogate the referendum right that it protects, is not a reasonable expectation of the voter – particularly one in a non-charter county.

The ballot language does not clearly and unambiguously tell the voter that the revision expressly overrides article VIII, section 6(e),[10] and thus substantially impacts article VIII, section 11 of the 1885 constitution. The ballot does not apprise the voter that the revision extinguishes rights of Miami-Dade voters preserved under section 11(1) to abolish the named constitutional officers; and to consolidate and transfer their functions; and that it potentially invalidates in pertinent part their right

[10]Article VIII, section 6(e) of the constitution is as follows:

> SECTION 6. Schedule to Article VIII.—
>
> …
>
> (e) CONSOLIDATION AND HOME RULE. Article VIII, Sections 9, 10, 11, and 24 of the Constitution of 1885, as amended, shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article. All provisions of the Metropolitan Dade County Home Rule Charter, heretofore or hereafter adopted by the electors of Dade County pursuant to Article VIII, Section 11, of the Constitution of 1885, as amended, shall be valid, and any amendments to such charter shall be valid; provided that the said provisions of such charter and the said amendments thereto are authorized under said Article VIII, Section 11, of the Constitution of 1885, as amended.
>
> …

under section 11(3) to not have their charter amended without their approval.[11] These also are main effects and chief purposes of the revision. Florida common knowledge no longer includes a statewide corporate memory of the unique constitutional status of Miami-Dade County, if it ever did. [12]

Finally, the ballot clause, "[r]emoves charter counties' ability, etc." does not clearly and unambiguously impart that the revision also removes legislative power under article VIII, section 1(d) to propose by special law for every county, charter or non-charter, that the five named offices be selected in another manner or abolished

[11] Article VIII, section 11(1) of the 1885 constitution provides that, "The electors of Dade County, Florida, are granted power to adopt, revise and amend from time to time a home rule charter of government for Dade County, Florida[….]" Section 11(1)(f) provides that the charter "May abolish and may provide a method for abolishing from time to time all offices provided for in Article VIII, Section 6 of the Constitution or by the Legislature, … and may provide for the consolidation and transfer of the functions of such offices …." Section 11(3) provides that "Such Charter once adopted, may be amended only by the electors of Dade County...." (emphasis supplied).

[12] The circuit court did not address directly the NAACP obligation to inform the voter of charter county voter rights under article VIII, section 1(c) of the 1968 constitution and section 11(3) of the 1885 constitution, to not have their charter amended or repealed without their approval. In the absence of the required disclosure of these rights, detailed knowledge of those peculiar to certain counties hardly can be regarded as common. Cf. 1.35% Property Tax Cap, Unless Voter Approval, (failure to disclose repeal of millage limitation). The ballot is required to show voters a picture of the puzzle that does not leave out major pieces.

and duties transferred.[13] The restrictive modifier "charter counties" of the object "ability" excludes removal by the legislature through special law; and conveys an impression that the revision affects only certain counties. The prior clause, "[e]nsures, etc." is ambiguous; appropriately can be understood to be an emotional appeal; does not refer to legislature; and thus reliably provides no clarifying aid. Even if this prior clause could be ascribed just one straightforward meaning, it does not encompass the effect of the revision on legislative power. The ballot summary omission of this restriction of legislative power contrasts with its inclusion of the chief purposes of the revision's other amendments to restrict legislative discretion under article III for the department of veterans affairs and legislative session dates. The ballot summary likewise needs to identify removal of legislative power under article VIII as a main effect. It beggars belief that the average Florida voter should know that this legislative power exists for both charter and non-charter counties and is to be eliminated.

[13] The duties of clerk as ex officio clerk to the board of county commissioners, auditor, recorder, and custodian of all county funds still may be transferred pursuant to special law approved by vote of the county electors, or pursuant to article V, section 16.

The constitution revision commission may have found it difficult to adequately state the multiple principal effects of the revision with required brevity, given that it chose to combine amendments. That does not excuse its failure.[14]

B. The summary uses impermissible political rhetoric.

The Court has condemned "[p]olitical rhetoric in a ballot title and summary that invites an emotional response from the voters as opposed to providing only a synopsis of the proposed amendment." Florida Department of State v. Mangat, 43 So. 3d 642, 648 (Fla. 2010) (quoting Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment, 926 So. 2d 1229, 1238 (Fla. 2006)). " 'The court has repeatedly stated that 'ballot summary should tell the voter the legal effect of the amendment, and no more.' " Mangat, 43 So. 3d at 648 (quoting Evans v. Firestone, 457 So. 2d 1351, 1355 (Fla. 1984)).

The ballot summary clause "[e]nsures, etc." does not merely inform of the legal effect of removal of charter county ability to make prohibited change. Ambiguity is a factor in the determination of whether a ballot summary is

[14] Smith v. American Airlines, Inc., 606 So. 2d 616 (Fla. 1992) (striking ballot summary amendment proposed by taxation and budget reform commission; recognizing that the seventy-five word limit prevents summary from revealing all details or ramifications; emphasizing that "word limit does not give drafters leave to ignore importance of the ballot summary and provide an abbreviated, ambiguous statement in the hope that this Court's reluctance to remove issues from the ballot will prevent us from insisting on clarity and meaningful information").

impermissible political rhetoric.[15] The words "ensures" and "all" also are reasonably understood as emotional appeal because they imply a threat to vote for the named offices. See Advisory Opinion to Attorney General re Rights of Electricity Consumers Regarding Solar Energy Choice, 188 So. 3d 822 (Fla. 2016) (determining emotional appeal of words from context).

The constitution already assures the right to elect the named officers. Only if county voters approve either a county charter or a special law that provides either for selection in another manner or abolishment are such officers not elected. The next clause, "[r]emoves, etc.," leaves unidentified the source of the threat: a referendum of county voters. Voters should not have to quell the emotional response that the summary invites and sift through the constitution to find that the only threat is themselves.

C. The summary combines the chief purpose of the revision for county government among those for state government to obscure it.

[15] See Mangat, supra (finding ambiguous statement "mandates that don't work," to be political rhetoric because ballot summary did not describe what health care mandates were at issue or how they did not work); and Advisory Opinion to Attorney General – Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994) (finding "save" to invite emotional response in part because of implication that Everglades were lost or in danger of being lost and text of amendment clearly stated purpose was to restore to original condition; concluding that on basis of emotional language, voter could be misled as to the contents and purpose of amendment).

The limitation of article XI, section 3 of the constitution, that an amendment "shall embrace but one subject and matter directly connected therewith," pertains to one proposed by initiative. Thus, it seems that the constitution restricted the commission in whether and how to combine constitutional subjects[16] only by sound discretion and good faith, [17] Crawford v. Gilchrist, supra, and by the two part ballot accuracy requirement. The commission was not legally free to hide the ball. The drafters gave the phrase new meaning. The deliberation appropriate to constitutional revision gave way to contrivance in subject grouping and ballot arrangement.

The ballot summary for revision 10 describes the nominal chief purposes of the revision non-sequentially, so that the measure for county government is obscured from view between three measures for state government. Unsurprisingly, there is no decision that holds the commission cannot do this. No previous drafting has been so brazen. Yet this effort to effectively hide the summary for county government from ready notice surely is a factor for the Court to consider in whether the ballot title and summary fairly informs the voter. Reversing A.A. Milne's imagery, perhaps the

[16] See Gilchrist, 59 So. at 964, 967-68, stating that amendment to be performed with "greatest certainty, efficient, care and deliberation"; recognizing that it is the right of the people to amend their constitution.

[17] See Fine v. Firestone, 448 So. 2d 984, 988 (Fla.1984) ("The legislative, revision commission, and constitutional convention processes of sections 1, 2 and 4 all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal.")

drafters intended for the voter to think it was Winnie-the-Pooh hovering under the honey tree, not this black cloud.

No matter if ordered correctly, the inclusion in this manner of three amendments for state government with two unrelated ones for county government structure resulted in a ballot that the state voter should not reasonably be expected to understand. The necessity for ballot language to be informative exists regardless of the source of the constitutional proposal, Armstrong, supra; and stands independently from the single subject requirement.

The ballot grouping of two appealing amendments, a veterans' department and an office of domestic security and counterterrorism; and a benign amendment, legislative session dates, effecting minor change on isolated aspects of state government, masks the major mutation that the revision proposes for county government and denies the voter a fair opportunity to understand the choice to be made. The ballot summary begins with the attraction of a department of veterans affairs that at least it admits already exists, though implying it might not but for the revision. ("Requires legislature to retain department of veterans affairs.")[18] The ballot summary ends with the enticement that the revision will create an office of

[18] Cf. Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 898 (Fla. 2000) (ballot summary misleading for negative implication that government currently practicing discrimination).

domestic security and counterterrorism. ("Creates office of domestic security and counterterrorism within department of law enforcement.") With only a slightly different name, and essentially the same named duties, the Florida Domestic Security and Counter-Terrorism Intelligence Center, created in 2001 by section 943.0321, Florida Statutes, already exists within that department. [19] This last claim crossed a line that the Court's decisions have drawn definitively to condemn misleading omission. Apparently to achieve brevity, the drafters omitted qualifying words that might have made the statement correct. [20] The shortsighted economy of words injects a toxic premise that fatally infects the entire ballot with a false choice.

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[19] Compare proposed art. IV, sec. 4(g) ("provide support for prosecutors and federal, state, and local enforcement agencies that investigate or analyze information relating to attempts or acts of terrorism or that prosecute terrorism, and shall perform any other duties that are provided by law"), with sec. 943.0321(2)(c), Fla. Stat. ("Provide support and assistance to federal, state, and local law enforcement agencies and prosecutors that investigate or prosecute terrorism, as defined in s. 775.30").

[20] Compare Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation, 656 So. 2d 466, 469 (Fla. 1995) (ballot summary misleading because suggests necessary to prohibit casinos but failed to inform voter that most already prohibited by statutes), and Evans v. Firestone, 451 So. 2d 1357 (Fla. 1984) (holding that ballot summary misled when it stated proposed amendment would "establish" citizens' right in civil actions that already existed in summary judgment procedural rule), with Advisory Opinion to the Attorney General re Rights of Electricity Solar Energy Choice, 188 So. 3d 822, 832 (Fla. 2016) (distinguishing Evans; holding that summary not misleading because it explicitly claimed to "establish[ ] a right *under Florida's Constitution*" and constitution did not provide specific right for electricity consumers that was to be created; adding that neither did any Florida statute establish such a right) (emphasis in original).

The Court's observation a decade ago regarding a misleading ballot summary is entirely apropos for one that also is uninformative. Justice Lewis wrote that,

> [i]n recent years, advantageous but misleading "wordsmithing" has been employed in the crafting of ballot titles and summaries. Sponsors attempt to use phrases and wording techniques in an attempt to persuade voters to vote in favor of the proposal. When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot—regardless of the substantive merit of the proposed changes. Indeed, the use or omission of words and phrases by sponsors, which become misleading, in an attempt to enhance the chance of passage, may actually cause the demise of proposed changes that might otherwise be of substantive merit. If a sponsor—whether it be a citizen-initiative group, commission, or otherwise—wishes to guard a proposed amendment from such a fate, it need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous. The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions.

Slough, 992 So. 2d at 149.

Article XI, section 2 of the constitution does not prohibit the commission from combining subjects on the ballot. However, article XI, section 5 prohibits the commission from propounding a ballot whose combination disguises and confuses

the amendments; and hinders the voter from casting an intelligent ballot. The Court told it so.

D. The title does not aid in fairly informing the voter.

"[T]he ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." Slough, 992 So. 2d at 148 (quoting Advisory Opinion to the Attorney General re Florida's Amendment to Reduce Class Size, 816 So. 2d 580, 585 (Fla. 2002)). The revision 10 ballot title does not assist the summary in the task required. The title uses more descriptive words, "state government," to refer to changes in articles III and IV, pertaining to the legislature and executive. In contrast, the ballot title reverts to the more general heading of article VIII, "local government," to refer to changes that affect solely county government. The ballot title identifies article and section numbers, but not the particular subsections to be expressly overridden or implicitly modified. It is impossible to know from reading the ballot title and summary that at least prospectively it expressly overrides article VIII, section 6(e); that at least potentially, revision 10 impliedly but substantially alters article VIII, section 1(c) of the 1968 constitution and section 11(3) of the 1885 constitution; and that with certainty, it removes legislative power under article VIII, section 1(d).

II. The Ballot Title and Summary Mislead By Ambiguously Describing the Sweep of the Revision; By Failing to Disclose its Constitutional Impacts; By Saying it Will Create a State Office That it Does Not; and By Not Saying That it Will Remove Legislative Power That it Does.

Revision 10 expressly makes only two changes to article VIII: an amendment to section 1(d); and the addition of a new section 6(g) in the schedule. The revision does not expressly repeal, amend, override, or refer to article VIII, section 1(c), that says a charter "shall be adopted, amended, or repealed only upon vote of the electors of the county in a special election called for that purpose." The revision says that "[n]otwithstanding section 6(e) of this article, a county charter may not abolish, etc." The revision does not say that charter changes previously made are negated; or that constitutional offices already abolished must be re-established.

From proposed section 6(g) in the schedule, the Court might conclude that by implication article VIII, section 1(c) of the 1968 constitution; and article VIII, section 11(3) of the 1885 constitution, have been substantially modified or partially repealed. Then again, maybe not. The schedule amendment is a transition provision subject to repeal by the legislature under current section 6(g). The Court appears never to have decided the effect of a transitory stipulation in the determination whether there has been an implied modification of a permanent, substantive

provision of the Florida constitution. A certainty is that the revision is ambiguous and requires judicial construction.[21]

Revision 10 should be construed to have the same exclusively prospective effect for county government that it does for state government. This understanding

[21] One ambiguity that will require construction is as follows. The last sentence of article VIII, section 1(d), as changed by revision 10, will refer only to county charters, not to special laws. Under article VIII, section 1(c), the legislature may provide for charters by either general or special law. The legislature presumably retains its power in article III, section 11(a) (1) of the constitution to legislate by special law regarding election, jurisdiction, or duties of officers in chartered counties. See generally School Board of Palm Beach County v. Winchester, 565 So. 2d 1350 (Fla. 1990) (upholding special act for non-partisan election of school board in charter county). If the legislature does retain such article III special law power, then to the extent it overlaps the power that the legislature has had under article VIII, section 1(d), that is to be removed, an effect of the revision will be to eliminate the referendum on a special law that the latter section has required, and thus to eliminate county voter rights. This effect is untold by the ballot summary.

On the other hand, if revision 10 implicitly will restrict the legislature's article III special act powers for chartered counties with regard to the officers named in article VIII, section 1(d), then the ballot language has not told the voter of this effect on an existing constitutional provision that is not expressly amended. The Court could regard these alternative potential effects as secondary, thus making construction of this aspect of the revision unnecessary for disposition in this case. However, the omission from the ballot summary of either alternative supports the proposition that overall it is not an informative and accurate synopsis.

would be consistent with the present tense verbs[22] in the entire ballot summary;[23] the general presumption that legislation operates prospectively, particularly so since retroactive application to counties would destroy existing rights;[24] and the disfavor

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[22] Cf. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521, 525-26 (Fla. 1973) (discussing presumption that the legislature intended a statute to have prospective effect only; observing no intention for retroactive effect in statute to limit right of entry for mining to twenty years because every verb used in it is in the present or future tense). For the use of verb tense in the construction of statutes, see generally Robert C. Farrell, *Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions*, 40 Loy. U. Chi. L. J. 79-225 (2008) (discussing reliance of United States v. Jackson, 480 F. 3d 1014 (9th Cir. 2007) upon Gwaltney of Smithfield, Ltd. v. Chesapeake Foundation, Inc., 484 U.S. 49, 59 (1987) ("the undeviating use of present tense strongly suggests that the harm sought to be addressed …lies in the future, not the past."); and federal Dictionary Act, 1 U.S.C. §1 (2000) ("in determining the meaning of any Act of Congress, unless the context indicates otherwise…words used in the present tense include the future as well as the present" to construe federal criminal statute).

[23] See also Benjamin v. Tandem Healthcare, Inc., 998 So. 2d 566, 570 n. 3 (Fla. 2008) (using ballot summary as aid in construction of constitutional amendment because indicative of voter intent; stating that "ballot materials are one source from which the voters' intent and the purpose of the amendment can be ascertained"). See also, e.g., Edwards v. Thomas, 229 So. 3d 277, 285-86 (Fla. 2017) (using ballot summary as *aid* in construction of constitutional amendment because indicative of voter intent); Graham v. Haridopolos, 108 So. 3d 597, 605 (Fla. 2013) (same); and Florida Hospital Waterman, Inc. v. Buster, 984 So. 2d 478, 488-89 (Fla. 2008) (same).

[24] See Florida State Conference of NAACP Branches, 43 So. 3d at 672 (Canady, C.J., dissenting) (opining that since proposed amendment did not expressly repeal contiguity requirement already in constitution, any ambiguity in proposal should be resolved to harmonize amendment with existing contiguity requirement to give both effect and avoid implied repeal); see also State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983) (construing applicability of article I, section 12, mandating conformity

applicable to a construction of implied repeal.[25] If revision 10 has solely prospective effect, then proposed article VIII, section 1(d) is harmonized with section 1(c) and with section 6(e) whose override is not disclosed in the title; no prior county referenda are nullified; and no charters are amended or repealed without a special election of county voters called for that purpose. If revision 10 has solely prospective effect, then proposed article VIII, section 6(g), can be understood to meaningfully preclude county charters from making prohibited changes in the election prior to the effective date; and to redundantly require an election of the named offices. But revision 10 would not impliedly abrogate the substantive right of county voters to amend or repeal their charter. There is no clear intent shown for the revision to have a retroactive effect that unavoidably causes the ballot language to be misleading. In contrast, a construction of solely prospective effect favors allowance of the revision on the ballot, if it were not for the other deficiencies in the ballot language that block its way.

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of exclusionary rule to interpretation of fourth amendment of United States Constitution, after its adoption; summarizing "that it is a well-established rule of construction is that in the absence of clear expression to the contrary, a law is presumed to operate prospectively"; "rule applies with particular force to instances where retrospective operation of the law would impair or destroy existing rights").

[25] Wilson v. Crews, 34 So. 2d 114, 117-118 (Fla. 1948); Board of Public Instruction of Polk County v. Board of Commissioners of Polk County, 50 So. 574, 575-76, (Fla. 1909).

If the Court concludes that revision 10 must be construed to operate retroactively, then the ballot language misleads by omission regarding this effect. The ballot title and summary do not disclose that there is any retroactive impact upon either article VIII, section 1(c); or upon section 6(e). The present tense verb "removes" does not inform state voters that they would nullify prior charter decisions by county voters; and require the restoration of offices that those voters have abolished.

But if the Court finds that the ballot language adequately informs state voters of an intention to reverse prior referenda; and based on applicable principles of construction, concludes that the revision does not abrogate prior county voter approval of special law or charter provisions, then the ballot title and summary overstate the sweep of the measure. [26] No matter whether revision 10 invalidates prior county referenda, the ballot title and summary as written fail to disclose that the revision will eliminate the constitutional rights of county voters under article VIII, sections 1(c) and (d) of the 1968 constitution, and article VIII, section 11(1)(f)

[26] In seeming contradiction, the circuit court order stated that it was unnecessary to resolve whether the revision would have retrospective effect because it was clear from the ballot summary that it would. (R. 980.) If the revision does not negate prior charter referenda, then by the circuit court's view, the ballot summary will have promised more than it delivered. The order also did not address whether the revision misleads regarding the removal of state legislative power or the creation of a state executive office.

of the 1885 constitution, to determine aspects of county government structure. Purposefully or not, the ballot language is misleading regarding counties and their voters.[27]

Exacerbating this scope problem, the ballot language misleadingly omits that it removes legislative power under article VIII; and invalidly claims that a state office of domestic security and counterterrorism is a new creation of the revision when, as has been discussed, that is not so.[28] The voter who hopes to achieve greater security, but is forced to choose whether to tolerate a restriction on home rule, thus by subject combination is given a false alternative that renders the entire ballot defective. The Court has not allowed such ambiguity, non-disclosure, and misstatement in the ballot description of principal features of the revision; and stratagem in their mixture. The following cases illustrate.

In Roberts v. Doyle, supra, the Court affirmed a circuit court judgment that struck from the ballot a legislative proposal to provide an additional homestead exemption. The circuit court had found the ballot summary of a chief aspect of the

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[27] In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994) (finding ballot summary misleading because voter might conclude from summary that the amendment would restrict existing laws when in fact the amendment would restrict power to enact or adopt any law in the future; that omission of such material information is misleading and precludes voters from being able to cast their ballot intelligently).

[28] See n. 22, supra.

amendment was misleading in two material respects: first, the ballot language omitted an effective date and thus did not provide notice that only property purchased after the date specified in the amendment would be eligible for the exemption; second, the ballot summary contained a discrepancy in terms from the amendment, which resulted in ambiguity. The Court agreed that for these revisions, the ballot language would have been confusing to the average voter. It added that the ballot title and summary also misled because the proposed additional exemption was not available to a person whose spouse had owned a principal residence in the prior eight years. This omission materially clouded eligibility for the additional exemption. "Voters may [have] be[en] misled into believing that they qualify for the additional exemption when they do not or conversely believe they do not when they do." Id. at 669.

Akin to the Doyle ballot summary, the revision 10 clause "[r]emoves charter counties' ability, etc." omits legislative power; and at least is ambiguous, if not affirmatively misleading, regarding whether the scope of the revision would nullify the prior exercise of that ability in voter referenda. The plural possessive "counties'" further misleads because it implies that charters can cause one of the specified actions without the approval of county voters.

In NAACP, supra, the Court found, as had the circuit court, that the ballot title and summary failed not only to explain the loss of the valuable constitutional right

to mandatory contiguity of legislative districts, but that they misled the voter regarding the true purpose and effect of the amendment. "While purporting to create and impose standards upon the Legislature in redistricting, the amendment actually [would have] eliminate[d] actual standards and replace[d] them with discretionary considerations." Id. at 669.

As Justice Pariente said in concurrence,

> [i]t should hardly be a controversial proposition that voters must be able to case an intelligent and informed voter on the proposed constitutional amendment and understand whether the proposed amendment adds to their existing rights, alters existing rights, or dilutes existing rights provided to them by their constitution.

Id., 43 So. 3d at 670.

Similar to the amendment in NAACP, revision 10 eliminates the valuable constitutional referendum right of all county voters by for a county charter or special law to determine aspects of county government structure; and if construed to impliedly modify article VIII, section 1(c), will nullify charter county voters' rights. Yet the ambiguous clause "[e]nsures election in all counties," reasonably may be understood by the average voter to imply either that the revision establishes in the constitution a right to vote for the named offices that already exists in article VIII, section 1(d); or protects a right that is in danger of elimination.

In 1.35% Property Tax Cap, Unless Voter Approved, supra, the Court struck from the ballot an initiative petition providing a cap on taxes above a percentage of

the highest taxable value of the property. The Court found the ballot summary misled in three ways. First, the exception for taxes "approved by voters" failed to inform the voter of exceptions provided by the amendment. Second, the summary stated that general law would provide for distributions of revenue from parcels that "have reached" the limit, whereas the amendment provided for legislative distribution when revenues "exceed" the 1.35% cap. Id. at 975. The defective summary thus "omit[ted] material facts necessary to make [it] not misleading"; and it "differ[ed] in material respects from the amendment itself." Id. at 975-76. Third, the summary did not inform the voter that the measure would repeal an existing constitutional provision, article VII, section 9(b). That section sets a millage cap on authorized local taxes that may not be exceeded, except by a referendum in specified circumstances. The terms mill and millage used in that section did not appear in the ballot summary, the Court recognized.

Summarizing the need of the ballot language to explain the effect on existing constitutional provisions, the Court said that,

> [i]n *Fine v. Firestone,* 448 So.2d 984, 989 (Fla.1984), we noted that "an initiative proposal should identify the articles or sections of the constitution substantially affected. This is necessary for the public to be able to comprehend the contemplated changes in the constitution." *Id.* at 989. We further noted that it is important so that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations. *See id.; see also [Advisory Opinion to the Attorney General re] Tax Limitation I,* 644 So. 2d [486] at

> 490 n. 1 [Fla. 1994] ("Identifying an existing section of the constitution that is affected is also important with regard to the clarity requirement of section 101.161."). The ballot summary in this case does not fairly inform the voters of the substance and effect of this amendment. *See Askew v. Firestone*, 421 So.2d 151, 156 (Fla.1982) ("The problem, therefore, lies not with what the summary says, but rather with what it does not say.").

Property Tax Cap, 2 So. 3d at 976.

Analogous to the Property Tax Cap summary, the revision 10 ballot language does not inform the state voter that the revision has the certain prospective purpose to substantially affect provisions of the constitution that it does not identify: article VIII, section 1(c) and article VIII, section 6(e); and a potential but uncertain retroactive effect to eliminate a referendum right. The revision 10 ballot text omits material facts necessary for it not to be misleading: the elimination of article VIII legislative power for both charter and non-charter counties; and the rights of county voters to be eliminated, nullified, or both.

In Slough, supra, the Court affirmed a final judgment striking from the ballot an amendment proposed by the taxation and budget reform commission. The ballot title was "eliminating state required property tax and replacing with equivalent state revenues to fund education" (capitalization removed). The Court approved the conclusion that the ballot language was misleading for two reasons.

First, the ballot title referred to a chief aspect of the amendment, a requirement for an equivalent hold harmless amount of state revenue, but the title and summary

failed to disclose a limitation on the duration of that mandate. "This would [have] le[ft] the voter with an impression that the amendment would accomplish something permanent and continuing that it would not." Id. at 148. Second, the title implied that the amendment solely would address school property taxes, when other portions of the constitution that do not address school property taxes also would have been amended. The summary informed that the amendment would have "[l]imit[ed] annual increases in assessment for non-homestead property." But the summary, when read together with the title, did not clearly and unambiguously disclose a primary effect of the amendment to also limit increases in assessments for non-school funds. "Therefore, voters would likely have be[en] misled or confused with regard to the actual impact of proposed amendment 5." Id. at 149.

The measures proposed by the constitution review commission, like those of the legislature, are entitled to a deferential standard of review. But like the taxation and budget reform commission, the deference to be given to the constitution review commission "is not boundless, for the constitution imposes the strict minimum requirements that apply across the board." Armstrong, 773 So. 2d at 14. Similar to the amendment considered in Slough, the ballot synopsis for revision 10 is misleading. It fails to disclose a primary effect of the revision of elimination of legislative power under article VIII and its effects upon other constitutional provisions.

In Armstrong, supra, the Court found that the ballot title and summary both hid the ball, as discussed previously; and flew under false colors. The proposed constitutional change was from a prohibition of cruel "or" unusual punishment to that of cruel "and" unusual punishment. The ballot summary stated that the amendment would "[r]equire[] construction of the prohibition against cruel and/or unusual punishment to conform to United States interpretation of the Eighth Amendment." The implication was that the amendment would promote the rights of Florida citizens through the rulings of the United States Supreme Court. Id., 773 So. 2d at 17. Yet, "the proposed amendment effectively [would have] str[uck] the clause from the constitutional scheme," so that "the organic law governing cruel and unusual punishments in Florida would consist of a floor (i.e. the federal constitution) and nothing more." Id.

Armstrong explained that in Traylor v. State, 596 So. 2d 957 (Fla. 1992), the Court had addressed precisely this scenario:

> Under the federalist principles expressed above, *where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election.* Cf. People Against Tax Revenue Mismanagement v. County of Leon, 583 So. 2d 1373, 1376 (Fla.1991) *("This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.").*

> *Traylor* at 962–63 n. 5 (emphasis added). In the present case, a citizen could well have voted in favor of the proposed amendment thinking that he or she was protecting state constitutional rights when in fact the citizen was doing the exact opposite-i.e., he or she was voting to nullify those rights. (Footnote omitted.)

Armstrong, 773 So. 2d at 17-18.

Revision 10 in part involves home rule, not federalism. Nonetheless, the ballot language fails to inform of the loss or restriction of an important state constitutional right of county voters, while giving the impression that it creates a right to vote for named officers that already exists.

The Court disapproved the ballot language for four amendment initiatives in Bar Government from Treating People Differently Based on Race in Public Education, supra. The title of one is shown in the case style. Two others substituted "public education" with "public employment" and "public contracting." The fourth proscribed different treatment in all three named activities based on sex instead of race. Finding that the ballot summary did not clearly and unambiguously inform the chief purpose of the amendment, the Court summarized as follows:

> Although significant detail regarding implementation and speculative scenarios may be omitted, this Court has repeatedly held that ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated (emphasis supplied).

Id. at 899-900.

Addressing ballot language that also misled, the Court reiterated that "the problem lies not with what the summary says, but rather with what it does not say." Id. at 898, quoting Advisory Opinion of the Attorney General re Term Limits Pledge, 718 So. 2d 798, 804 (Fla. 1998); and Askew, 421 So. 2d at 156. "Consequently, the ballot titles [we]re defective because of the misleading negative implication that no such constitutional provision addressing differential treatment currently exists, and for the negative implication that the government is presently practicing discrimination." Bar Government from Treating People Differently, 778 So. 2d at 898. Justice Shaw concurred in the plurality opinion, but wrote separately to explain his view why the ballot titles and summaries were misleading. The intended effect of the amendments was "clear: They would stop government from pursuing any programs that would promote the rights of a discrete class (e.g. minorities and women) in the enumerated areas. Nothing in the ballot titles and summaries notified the voter of this effect – just the opposite." Id. at 904.

The revision 10 ballot language implies that there is a need to guarantee the right of election of the five named county offices, an assurance already provided by the constitution unless county voters by referendum have decided to provide for choice in another manner. The language conceals that the revision eliminates the constitutional right of the county voter under article VIII, sections 1(c) and (d) to

make this choice; and tramples the rights of the county voter under sections 1(c) of the 1968 constitution, and 11(3) of the 1885 constitution, to not have their home rule charter amended or repealed without their approval, meanwhile implying to the state voters that the revision establishes and protects a different voting right of their own.

In Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission, supra, the Court found an initiative ballot summary to be misleading that would "unify" the Marine Fisheries Commission and the Game and Fresh Water Fish Commission, but did not inform that the amendment would remove the power to regulate marine life that belonged solely to the legislature which it had delegated to the Marine Fisheries Commission and to the Department of Environmental Protection. The Court relied upon Askew, supra, and ruled that the ballot summary was misleading for what it did not say.

Like that in Fish and Wildlife Conservation Commission, the ballot language here misleads by failing to inform the voter that it would remove legislative power under article VIII that could be exercised in any county, not just charter counties as the ballot language implies, with approval of the voter.

The Court found three ballot titles and summaries for initiative petitions to amend the constitution all to be misleading in Advisory Opinion To the Attorney General Re People's Property Rights Amendments Providing Compensation for Restricting Use May Cover Multiple Subjects. Advisory Opinion Re Voter

Approval Required for New Taxes. Advisory Opinion to the Attorney General Re People's Property Rights Amendments, supra. The summary for the first, People's Property Rights Amendments, referred to the "owner" of real property, but did not define that term. This in turn made the term "people" in the title confusing because it was unclear whether it included corporate entities.

The ballot language for the second, Voter Approval Required for New Taxes, was misleading because (a) the definition in the summary of new taxes did not distinguish between an increase in money paid and the tax rate; (b) the lack of a more complete definition of exemption would not enable the voting public to readily understand the difference between exemption and immunity from taxation; (c) the failure of the summary to inform the impact of the initiative on sections of article VII other than those set forth; and (d) the failure of the summary to inform the voter that the ten mill cap would be eliminated.

The title and summary for the third, Property Rights: Compensation for Unfair Value Loss, was defective for reasons similar to the first. The absence of definitions for "common law nuisance" and "losses in fair mark value, which in fairness should be borne by the public," caused uncertainty in the petition. Thus the summary was not stated in the clear and unambiguous language that is required.

Equivalent to the ballot summary of these three initiative petitions, the ballot language for revision 10 too ambiguously describes its scope. The verb "[r]emoves"

is restrictive in verb tense and meaning. It implies future elimination. It does not convey an intent for the revision to nullify prior voter referenda; and to require re-establishment of constitutional offices. Like the summary of Voter Approval Required for New Taxes considered second by the court, the ballot text for revision 10 does not make known its impact on other constitutional sections, in this case article VIII, section 1(c) and section 6(e).

In Casino Authorization, Taxation and Regulation, supra, the Court found the ballot title and summary to be misleading for three reasons. First, the summary stated that the voters may authorize casinos at locations "on riverboats, commercial vessels within existing pari-mutual facilities and at hotels." Yet the amendment text allowed casinos in the much broader statutory term "transient lodging establishments." Second, the summary stated that casinos could be authorized "on board stationary and non-stationary" riverboats and U.S. registered commercial vessels. Because the amendment did not require a riverboat to be a floating vessel, the summary did not accurately describe the text. Third, the summary suggested that the amendment was necessary to prohibit casinos, "This amendment prohibits casinos unless approved by the voters," but failed to inform the voter that most types of casino gambling were prohibited by statute. Citing Askew, supra, the Court again found that the problem was not what a summary said, but what it did not say.

Parallel to the language in Casino Authorization summary, the revision 10 ballot text fails the requirement to be informative and accurate because of both what it says and what it does not say. It says that it removes ability of charter counties to take certain actions with regard to five named offices, implying a limited effect; it does not say that it remove the same power of the legislature for any county. It says that it will create an office of domestic security and counterterrorism; it does not say that essentially the same entity already exists.

In Stop Early Release of Prisoners, supra, the Court found misleading the ballot title and summary for an amendment "to ensure that state prisoners serve at least eighty-five percent of their sentence [sic]." Id. at 725. The text of the proposed amendment itself clearly stated that this would not be true in the cases of pardon and clemency, provided for by article IV, section 8. "The proposal amendment will not deliver to the voters of Florida what it says it will," the Court said. Id. at 727. Second, the plain language of the amendment would have "substantially modified" article IV, section 8(c) of the constitution, without expressly repealing it. Id. at 726. That section allowed the legislature to establish a parole and probation commission with power to grant paroles or conditional releases. The proposed amendment essentially would have eliminated the commission's primary powers and would have abolished parole and conditional release in the vast majority of cases. "However, nothing in the ballot summary mention[ed] this collateral consequence of the

amendment." Id. at 726. Because the proposed amendment violated the ballot summary requirements imposed by Florida law, it could not appear on the fall ballot for that year.

Related to the Stop Early Release of Prisoners ballot deficiency, the revision 10 ballot summary misleads the voter on the effect of the revision for counties whose charters already have abolished, transferred the duties, changed the length of term, or established another method of selection of any of the named offices. If, as Volusia contends, the ballot language does not clearly inform that the revision will have retroactive effect, it is fatally deficient. If the Court finds instead that the revision 10 ballot language does sufficiently convey an intention to nullify a prior county referendum that has taken one of those actions, but that the revision does not override such votes, the revision will not have delivered what the ballot summary said it would.

In Save Our Everglades, supra, noted previously for impermissible rhetoric, the Court also found that the ballot summary misled, in part because by using the phrase "to help to pay," it gave the impression that entities other than the sugarcane industry would be sharing the expense of Everglades cleanup. "The [amendment] text impli[ed] just the opposite – it calls for the levying of a fee on the first processors of sugarcane exclusively. A voter perusing the summary could well be misled on this point." Id. 636 So. 2d at 1341.

The revision 10 ballot, like that in Save Our Everglades, does not clearly and unambiguously describe its scope. The verb "removes" has a restrictive meaning and implies prospective effect, misleading the state voter regarding what may be the effect of the revision on prior county referenda.

The oft-repeated observation of Askew v. Firestone, supra, that the ballot language problem was what it did not say, indeed is apt here. The ballot description misled by not telling voters that the amendment was intended to end an absolute lobbying ban that already existed, rather than to create a new one as it implied. The Court thus concluded that the amendment impermissibly flew "false colors." Id. 421 So.2d at 156.

Revision 10 likewise is sailing to the ballot while flying false colors, unless the Court blocks the course that has been set. The ballot language lacks overall the clear and unambiguous description of the sweep of the revision that is required for the state voter to give informed approval.

CONCLUSION

The ballot language for revision 10 is clearly and conclusively defective. It is so because the constitution revision commission disregarded what this Court in it decisions had told it about requirements for accuracy. The combination of these four amendments does not conform to the truth in packaging standard set out in Armstrong, supra, and followed uniformly in this Court's decisions on amendments

from any source. All four of the combined amendments were not described fully and accurately. The absence of a single subject rule in article XI, section 2 of the constitution is not a license to logroll by illusion. A referendum on the revision would be unreliable and a nullity. The Court should reverse the judgment below and order that revision 10 be stricken from the November 6, 2018, general election ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document as appearing above was electronically filed on August 22, 2018, through the eDCA online e-filing portal and a true and correct copy was transmitted to the parties as detailed in the service list below via email.

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I certify that the lettering in this brief is *Times New Roman 14-point Font* and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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