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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.

REPLY BRIEF OF APPELLANTS, COUNTY OF VOLUSIA ET AL.

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ARGUMENT

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.

A certain true meaning and ramification of revision 10, a main effect with regard to counties, and thus a true chief purpose is to eliminate from the 1968 constitution an aspect of home rule: the right of county voters to decide whether the five offices named by article VIII, section 1(d), may by special act or charter be chosen in another manner, or abolished when the duties are transferred to another office.

This right belongs to the voter, just like the right to know an official's interest and the protection against corruption and conflicting interest that would have been diminished by the amendment in Askew v. Firestone, 421 So. 2d 157 (Fla. 1984); just like the right to maintain protections for criminal punishment that would have been eliminated by the amendment in Armstrong v. Harris, 773 So. 2d 10, 17-18 (Fla. 2000); just like the right to have contiguous legislative districts that would have been abrogated by the amendment in Florida Department of State v. Florida State Conference of NAACP Branches, 43 So. 2d 662 (Fla. 2010); and just like the right to adequate provision for sufficient funds for classroom size that the Court

acknowledged but found not to have been diminished by the amendment in Florida Education Association v. Florida Department of State, 48 So. 3d 694, 703 (Fla. 2010). The revision 10 ballot language does not inform the state voter that the revision will eliminate this county voter right under article VIII, section 1(d), as the Court's decisions have required.

Appellees proffer arguments that all are variations on a theme why these cases do not control here. All essentially amount to the notion that elimination of the right is an implicit consequence that should be understood and need not be explained. Armstrong instructs to the contrary that,

> *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.").*

Id. 773 So. 2d at 17-18. (quoting Traylor v. State, 596 So. 2d 957, 985, n.5 (Fla. 1992).

The ballot language for revision 10 gives the appearance of establishing or protecting a right to vote for the named offices that already exists for all counties under article VIII, section 1(d); and fails to inform the state voter of the consequence that the revision at least prospectively will eliminate the right of a county voter to

choose a different method of selection of the named offices or to abolish them and transfer their duties. The Court's decisions in Askew, Armstrong, and NAACP apply and control. In each, the ballot gave the appearance of creating a right, when the amendments respectively diluted, abolished, or subordinated an already existing state constitutional right. In all, the Court said that the ballot must make explicit the right to be diminished.

In 2000, state voters approved article V, section 10 of the constitution to provide local option for merit selection of circuit or county judges. The state voters allowed local voters to decide for themselves, even though no circuit or county voters yet have approved this option. Similarly, a state voter who could not imagine that he or she ever would vote not to elect the named offices in their county also might never knowingly vote to eliminate the right of the voters of another county to choose for themselves, if fairly informed that was the ballot choice being made.

The right of all county voters just discussed is afforded by article VIII, section 1(d), a section that is expressly amended by revision 10. The Court's decisions also dictate that the diminishment of Florida constitutional rights under a section that is not expressly amended also must be disclosed to the voter. NAACP, supra; and Advisory Opinion to the Attorney General re 1.35% Property Tax Cap, Unless Voter Approved, 2 So. 3d 968, 976 (Fla. 2009) (holding that ballot summary to be

misleading in part because it did not disclose implied repeal of millage cap of article VII, section 9(b) and referendum requirements to exceed such authorized millage).

Article VIII, section 1(c), of the 1968 constitution; and article VIII, section 11(3), of the 1885 constitution, guarantee county voters the right to not have the county charter amended or repealed. If the revision is construed, as it is apparently intended, to apply to existing county charters that have exercised the ability for an action that is to be prohibited, and to nullify those charter provisions which did so, then by implication it will have negated the rights of charter county voters under section 1(c) of the 1968 constitution and 11(3) of the 1885 constitution. There are only twenty county charters. It should not be assumed that state voters have any better definite understanding of the legal concept of a charter county than they would have had of the undefined term, "common law nuisance," found to provide uncertainty in the petition stricken from the ballot in 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 (Fla. 1997).

Even if the state voter were willing to prospectively nullify the county home rule option provided by article VIII, section 1(d), it does not follow that he or she would vote to nullify the prior exercise of that right, if the ballot decision included knowledge that a consequence of the revision will be to negate the constitutional

rights of county voters under section 1(c) of the 1968 constitution and section 11(3) of the 1885 constitution. A state voter very well might later think that he or she should have been told of this collateral effect on a constitutional right in order to make an intelligent decision. Of course, that is just what the Court has said must be done NAACP, supra; 1.35% Property Tax Cap, supra.

The Court similarly has required that ballot language must inform the voter of constitutional sections that are substantially impacted by an amendment, even if no Florida constitutional right is to be diminished (See Volusia Initial Br. 15-16 n.7 (collecting cases)). Neither the explicit override by the revision of article VI, section 6(e), with at least prospective effect; nor the implicit impact upon article VIII, section 1(c), if the revision negates prior charter referenda, are clearly and unambiguously described by the ballot to the state voter. Other than a footnote by the Secretary to be discussed later, Appellees collectively make little argument to justify this non-disclosure; or to explain why the Court's several decisions that impose the requirement do not apply. The requirement exists so voters will be able to understand the scope of the revision and the decision they are asked to make. The revision 10 ballot fails to be informative in this regard.

The Court has held that restrictive ballot language must identify all main effects of the revision. Slough, 992 So. 2d 142, 148-49 (Fla. 2010) (striking amendment from ballot because one of main effects not disclosed on ballot); Doyle,

43 So. 2d at 659-61 (finding legislatively proposed amendment to be uninformative and inaccurate because of omissions and ambiguity). The revision 10 ballot language describes five specific amendments in restrictive terms. In doing so, the ballot language does not clearly and unambiguously disclose removal of legislative special law power under article VIII, section 1(d), a power applicable to both charter and non-charter counties; and by specific reference to charter counties implies that the revision has no application to non-charter counties.

The Tax Collectors argue that this removal of legislative power simply is a detail of the procedural mechanism to ensure the stated purpose of the revision to ensure election of five named offices in all counties (Tax Collectors Answer Br. 28-29); and incorrectly state that only voters in charter counties may approve such a special act (Id. at 10). The Secretary mistakenly attributes the constitutional special law power of the legislature under article VIII, section 1(d), to non-charter counties themselves (Detzner Answer Br. 14); and conflates the constitutional power of the legislature that is to be removed with the exercise of that power (Id. 22-23 n.7).

In Advisory Opinion to the Attorney General re Fish and Wildlife Conservation, 705 So. 2d 1351, 1355 (Fla. 1998), the Court found uninformative an initiative ballot summary whose stated chief purpose was to "unify" the statutory Marine Fisheries Commission and the constitutional Game and Fresh Water Fish Commission. The Court observed that the amendment would remove legislative

power to regulate marine life that belonged solely to the legislature and that this effect was not disclosed. Citing Askew, supra, the Court found that the ballot was misleading for its failure to disclose elimination of legislative power. So too is the ballot summary for revision 10.

B. The summary uses impermissible political rhetoric.

The Court has not stricken a proposed amendment or revision from the ballot solely because of political rhetoric. But the Court seems to have come close to doing so; and it certainly has considered political rhetoric as a factor in its determination of truth-in-packaging. See Florida Department of State v. Mangat, 43 So. 2d 642, 648 (Fla. 2010) (collecting cases). Similar to the ambiguous statement in Mangat that the Court considered to be political rhetoric, the revision 10 ballot language does not identify the source of the threat to election of the named offices: a referendum of county voters. Florida Department of State v. Mangat, 43 So. 3d 642 (Fla. 2010). Further like Mangat, the revision 10 ballot language otherwise misleads the voter.

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

Volusia does not contest that the constitution review commission has the ability under article XI, section 2 to combine subjects. Volusia maintains rather that the ballot language for revision 10 does so in a manner that violates the accuracy requirement of article XI, section 5. The result is a ballot that does not give fair notice to the voters of the choice they are asked to make. Cf. Advisory Opinion to

the Attorney General re Voter Control of Gambling in Florida, 215 So. 3d 1209, 1215 (Fla. 2017) (Polston, dissenting) (opining that ballot for initiative amendment did not give voters notice of choice to be made, citing Advisory Opinion to Attorney General re 1.35% Property Tax Cap Unless Voter Approved, 2 So. 3d at 967). The revision 10 ballot conveys a visual illusion that confuses and deceives. The Court has condemned such contrivance when as here the result is a ballot that is deceptive and misleading. Slough, 992 So. 2d at 149.

The masking of the decision to be made by the voter is not limited to a ballot arrangement that avoids ready notice of the amendments for county government. The ballot also textually obscures the choice by its negative implication that the department of veterans' affairs might not continue to exist without the amendment;[1] and by its statement that the revision will create an office of domestic security and counterterrorism that already exists.[2]

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[1] 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) (misleading negative implication that government currently practicing discrimination).

[2] See Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation, 656 So. 2d 466, 469 (Fla. 1995) (misleading suggestion that amendment necessary to prohibit casinos when most prohibited by statute); Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984) (ballot summary misled by stating that it would "establish" citizens right in civil actions that already existed in summary judgment procedural rule).

The Secretary brushes aside the misleading nature of this last ballot statement of chief purpose; and ignores its repercussion for the ballot combination. He contends that it is a virtue of the revision 10 ballot that it "closely tracks" the language of the revision (Secretary Answer Br. 20 n.4). The ballot language in Askew, supra, also closely tracked the text of the proposed amendment. Despite that, the Court found that the ballot language misled because of what it did not say. Id. 421 So. 2d at 156. The same is true here.

Ms. Gannon, the Palm Beach Tax Collector, acknowledges that the office of domestic security and counterterrorism already exists pursuant to statute. (Gannon Answer Br. 22). However, she argues that, "Florida law is clear that a summary that clearly states it will establish a right under the Florida Constitution is not misleading where no current constitutional provision establishes that right" (Id.). For this mistaken proposition, she cites Advisory Opinion to the Attorney General re Rights of Electricity Customers Regarding Solar Energy Choice, 188 So. 3d 822 (Fla. 2016). Ms. Gannon misapprehends the Court's decision.

In Solar Energy Choice, the Court distinguished its prior decision in Evans v. Firestone, supra, which had held that a ballot summary misled by stating that it would establish what already existed by rule. The Solar Energy Choice Court held that a ballot summary was not misleading because it explicitly claimed to *"establish[] a right under Florida's Constitution"* and the constitution did not

provide the specific right that the amendment created for electricity consumers. Id., 188 So. 3d at 833. Neither did any Florida statute establish such a right, the Court also reasoned. Id. In contrast to Solar Energy Choice, the revision 10 ballot language lacks any qualifying language that avoids a misleading statement, and a statute has already created the same office that the ballot language says that the revision will. The Court's decision in Evans v. Firestone, supra, is the law that governs revision 10.

The misleading statement that the revision will create an office of domestic security and counterterrorism is a fatal flaw of the revision 10 ballot language. A voter otherwise fairly informed of the effects of the revision for counties and not inclined to vote for it still might be induced to do so by the false promise that the amendment will result in the creation of this state office. A ballot that obfuscates the decision to be made by the voter as does this one is of no legal effect.

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

The Court frequently has said that ballot summary and title must be read together to determine whether the ballot information properly informs the voter. See, eg., Slough, 992 So. 2d at 148. Volusia argues that the ballot title for revision 10 does not aid in this purpose; instead it adds to the illusion. The Secretary responds that all four proposals are related to the ballot title, "State and Local Government Operation" (Secretary Answer Br. 21); and that voters will see from the title (or what

might be termed as the heading above the title) that revision 10 will affect article VIII, sections 1 and 6 (Id. 22 n.6). This answer misses the point. The ballot title uses the more general title of article VIII, "Local Government," instead of a more descriptive phrase, say "county government," for changes that pertain exclusively to counties; and does not identify the letters of subsections to be amended. The title does not fairly impart the effect of the revision for provisions that it expressly amends, much less for those on which its impact is only implied. The ballot title is one more aspect of ballot language that obscures rather that informs.

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.

The ballot language misleads the voter because in part it too ambiguously describes the scope of the revision. Appellees contend that the ballot language plainly states that the revision "[e]nsures election" of named offices in "all counties" by "[r]emov[ing] charter counties' ability to abolish, change term, transfer duties, or eliminate election of these offices"; and that any ambiguity is in the revision, not the ballot.

Yet "all counties" cannot mean that without removal by the revision of legislative power under article VIII, section 1(d) applicable both to charter and non-charter counties, an effect omitted from the ballot. All counties cannot mean that

without inclusion of non-charter counties, an exclusion in the ballot summary from "charter counties' ability," to which only the legislative power is applicable. All counties cannot mean that unless in the ballot summary the verb phrase "[r]emoves charter counties' ability," should be understood, contrary to its present tense, to apply to counties that already have exercised their ability and counties for which the legislature has exercised its power. All counties cannot mean that in the ballot summary unless the revision will be construed by the Court to effect an implied partial repeal or diminishment of article VIII, section 1(c) of the 1968 constitution and section 11(3) of the 1885 constitution. All these patent or latent ambiguities are in the ballot summary itself.

But if the Court construes the revision not to apply to those counties that previously have exercised the ability that the revision prospectively will prohibit, yet concludes that these counties are not excepted from the ballot language, then it will not have delivered to the voter what it said that the revision would do. As in NAACP, supra, revision 10 requires construction in this proceeding to determine whether the ballot language is an accurate description of a main effect.

No matter whether the revision nullifies portions of existing charters, the ballot language remains misleading for its failure to disclose the prospective elimination of the rights of all county voters under article VIII, section 1(d); and the subordination of article VIII, section 6(e) to eliminate rights of county voters

preserved under article VIII, section 11(1)(f) of the 1885 constitution to abolish the named offices.

No matter all the above, the revision 10 ballot language is misleading for its omission of the effect of the revision on legislative power under article VIII; and for its false claim that the revision creates a state office of domestic security and counterterrorism. It is notable that Appellees and their supporting Amici devote relatively little attention to these ballot deficiencies. If all the other several flaws of the revision 10 ballot language were excused, these two still would render it clearly and conclusively defective.

The ballot summary for a constitutional revision combining multiple specific amendments must sufficiently describe all fairly and accurately, so that the voter may intelligently cast a ballot on the entire revision. This ballot does not.

CONCLUSION

The revision 10 ballot fails to meet the constitutional requirement for accuracy. Because the ballot title and summary have failed their purpose, the Court should reverse the circuit court order granting final summary judgment to Appellees and order the Secretary to strike it from the ballot.

Respectfully submitted,

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