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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1367

KENNETH J. DETZNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF FLORIDA AND THE DEPARTMENT OF STATE, AN AGENCY OF THE STATE OF FLORIDA,

Petitioners,

-vs-

AMY KNOWLES,

Respondent.

ON DISCRETIONARY REVIEW AND CERTIFICATION

RESPONDENT'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-3643

KENNETH J. DETZNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF FLORIDA AND THE DEPARTMENT OF STATE, AN AGENCY OF THE STATE OF FLORIDA,

Petitioners,

-vs-

AMY KNOWLES,

Respondent.

ON DISCRETIONARY REVIEW AND CERTIFICATION

INTRODUCTION

This Respondent's brief is filed in response to a state challenge to a circuit court order removing a proposed constitutional amendment from the November 6, 2018 general election ballot.

STATEMENT OF THE CASE AND FACTS

On April 16, 2018, Florida's Constitutional Revision Commission certified to the Secretary of State eight proposed amendments to the Florida Constitution for inclusion on the November 6, 2018 general election ballot. One of those proposed amendments is Amendment 6 (termed the "Rights of Crime Victims"). Amendment 6 provides as follows:

Rights of Crime Victims; Judges

> **Ballot Summary**
>
> Creates constitutional rights for victims of crimes; requires courts to facilitate victims' rights; authorizes victims to enforce their rights throughout criminal and juvenile justice processes. Requires judges and hearing officers to independently interpret statutes and rules rather than deferring to government agency's interpretation. Raises mandatory retirement age of state justices and judges from seventy to seventy-five years; deletes authorization to complete judicial term if one-half of term has been served by retirement age.

The summary preceding the full text reads:

> A proposed revision relating to crime victims and judges; amending Section 16 of Article I of the State Constitution to revise and establish additional rights of victims of crime; amending Section 8 of Article V and creating a new section in Article XII of the State Constitution to increase the age after which a justice or judge may no longer serve in a judicial office; and creating Section 21 of Article V of the State Constitution to require a state court or an officer

> hearing an administrative action to interpret a state statute or rule de novo in litigation between an administrative agency and a private party.

On July 6, 2018, the Respondent Amy Knowles filed a Petition for Declaratory Judgment or, In the Alternative, Writ of Mandamus in Monroe County to challenge Amendment 6. The petition for declaratory relief named as Defendants The Florida Department of State and Ken J. Detzner, in his official capacity as Secretary of State. The Monroe County circuit court transferred venue to the circuit court in Leon County.

Given the time constraints before the matter is placed on the ballot and to expedite review, Ms. Knowles then filed a separate Petition for Declaratory Judgment or, In the Alternative, Writ of Mandamus in Leon County. Motions for Summary Judgment, and responses and replies thereto, were filed in the Leon County case and, on August 27, 2018, the circuit court in Leon County issued a detailed order enjoining the Defendants from placing proposed Amendment 6 on the general election ballot.

The Defendants sought review in the First District Court of Appeal who ultimately exercised its pass-through jurisdiction and on August 28, 2018, this Court accepted the case for review and consolidated it with *Kenneth J. Detzner,*

etc. v. Hollander, SC18-1366.[1] The Court ordered expedited briefing and the consolidated cases are scheduled for oral argument on September 5, 2018.

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[1] To comply with the expedited briefing schedule, the Respondent Hollander is filing a separate brief on the merits.

QUESTION PRESENTED

WHETHER PROPOSED CONSTITUTIONAL AMENDMENT 6 COMPLIES WITH THE STATUTORY "ACCURACY REQUIREMENT" PRESCRIBED BY FLORIDA STATUTE 101.16 (1) AND THE CONSTITUTIONAL "ACCURACY REQUIREMENT" DISCUSSED IN THIS COURT'S DECISION IN *ARMSTRONG V. HARRIS*, 773 SO. 2D 7 (2000)?

SUMMARY OF THE ARGUMENT

The Petitioner has challenged a circuit court order finding proposed Constitutional Revision Commission Amendment 6 to be invalid. Specifically, the amendment fails to satisfy the statutory accuracy requirements of Florida Statute 101.161 (insufficient ballot title and ballot summary). Because the proposed amendment fails to adequately inform voters about its nature and scope, and because it fails to advise voter about its chief purpose(s), the decision below was correct.

Although the Respondent Knowles urged the circuit court to find the proposed amendment in violation of Florida's constitutional accuracy requirement (in this case, its bundling of distinct subjects), the court based its decision on the insufficient ballot title and summary. Nevertheless, this issue is of vital importance to this case and to many of the pending challenges to Constitutional Revision Commission proposals and warrants this Court's review.

ARGUMENT

> PROPOSED CONSTITUTIONAL AMENDMENT 6 DOES NOT SATISFY THE STATUTORY "ACCURACY REQUIREMENT" PRESCRIBED BY FLORIDA STATUTE 101.16 (1) AND BECAUSE IT COMMINGLES SEPARATE AND DISTINCT SUBJECTS, IT FAILS TO SATISFY THE CONSTITUTIONAL "ACCURACY REQUIREMENT" DISCUSSED BY THIS COURT IN *ARMSTRONG V. HARRIS*, 773 SO. 2D 7 (2000).

All matters that are placed on election ballots must satisfy two forms of "accuracy requirement." First, the measures must give voters sufficient notice of what they entail and what their chief purpose is and, second, they must be phrased in a manner that allows for a free and uncompromising exercise of the right to vote. In short, electors must be allowed to cast a knowing and meaningful vote. Proposed Amendment 6 fails both prongs of this test.

Statutory Accuracy Requirement

Florida Statute 101.161 (a) provides:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision

> commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5). The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. This subsection does not apply to constitutional amendments or revisions proposed by joint resolution.

The ballot title and summary for Amendment 6 read:

Rights of Crime Victims; Judges

> **Ballot Summary**
>
> Creates constitutional rights for victims of crimes; requires courts to facilitate victims' rights; authorizes victims to enforce their rights throughout criminal and juvenile justice processes. Requires judges and hearing officers to independently interpret statutes and rules rather than deferring to government agency's interpretation. Raises mandatory retirement age of state justices and judges from seventy to seventy-five years; deletes authorization to complete judicial term if one-half of term has been served by retirement age.

The question then is whether the above ballot title and summary satisfy the "notice" requirements provided in section 101.16 (a). This Court reviews the challenge under the *de novo* standard. *Fla. Dep't of State v. Slough*, 992

So. 2d 142, 147 (Fla. 2008).

In *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), this Court explained that section 101.161 (a) established a statutory accuracy requirement for proposals to meet before they can be placed on an election ballot: the ballot title and summary must state -- "in clear and unambiguous language" -- the chief purpose of the measure. 773 So. 2d at 12-13 (quoting *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982)). *Armstrong* called this notice requirement the "truth in packaging law for the ballot." 773 So. 2d at 13.

> Implicit in this provision [Art. XI, Sect. 5, Fla. Const.] is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity.

Armstrong, 773 So. 2d at 12 (emphasis original).

As the Petitioners acknowledge, Amendment 6 has three distinct components, each with its own chief purpose: increasing the constitutional rights of victims and their families, raising the mandatory retirement age of state judges and justices from seventy to seventy-five years, and requiring judges and hearing officers to independently interpret governmental agency rules without giving deference to the agency's interpretations of its own rules. Pet. Brief on the Merits at 14

At best, the ballot title refers to only two of the three components

contained in Amendment 6 (and that's putting aside the question of whether citing to "Judges" adequately advises voters that the proposal concerns judicial retirement). It does not cite at all to the deference component.

As for the ballot summary, *Armstrong* and, before that, *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), make clear that – despite the 75-word limit – the ballot summary must sufficiently advise voters what the proposal covers and what its chief purpose is. Even though some voters will take the initiative to research proposals before the election, many voters will see only the ballot title and summary before casting his or her vote.

In this case, as the Petitioners concede, Amendment 6 has at least three chief purposes. Yet, the ballot summary speaks to only the increase in the rights of victims and their families. The summary never mentions the other two chief purposes. Whether or not the increase in victim's rights is, as the Petitioner calls it, the "main chief purpose," this doesn't relieve the Constitutional Revision Commission (proponent of the Amendment) from the obligation to discuss the other chief purposes that are encompassed by the Amendment.

Despite the Petitioners' claim that Amendment 6 merely amends Article I, Section 16, page 1 of the Petitioners' Brief on the Merits, it essentially supersedes it. At the very least, voters must be advised in the ballot summary

that the proposed amendment materially changes the provisions of an existing constitutional amendment. *See Askew.*[2]

Contrary to the representations made, Amendment 6 is not simply a victim-notification provision. Several of the guarantees enumerated therein give victims (and their families) the right to participate in the criminal prosecutions (such as the right to request speedy trial and to confer on plea agreements, pretrial diversion programs, release, sentencing and post-conviction processes). Indeed, if the appellate courts fail to dispose of an appeal in the time allotted (two years for appeals in non-capital cases, five years in capital cases), Amendment 6 provides that the chief judge of the district court

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[2] In *Askew*, this Court considered whether voters must be advised that a proposal before them in the general election has the effect of materially modifying an existing law. In 1976, voters approved of a law imposing an absolute two-year ban on lobbying by legislators and elected officials but in 1982, a joint resolution proposed that the two-year ban applied only where the person failed to make a financial disclosure. Thus, the joint resolution modified the terms in the 1976 law. The proposal was challenged on the ground that its ballot summary failed to satisfy the accuracy requirements of Florida Statute 101.16.

This Court held that the problem with the proposed amendment was that its ballot summary failed to advise voters that it was modifying an existing ban on such lobbying. "Had SJR 1035 not been an amendment to an existing provision, if it had been a totally new provision, its ballot summary and title would probably have been permissible." But it wasn't a totally new provision. Like the instant Amendment 6, it was a modification of an existing law and voters must be apprised of that fact. *See also Wadhams v. Bd. of County Commissioners of Sarasota County*, 567 So. 2d 414 (Fla. 1990).

must report to the Speaker of the House of Representatives and the President of the Senate explaining why review was not completed on time.

Finally, Amendment 6 provides for a victim's cause of action for the non-enforcement of proposed victim's rights. Although the victim cannot get damages for the non-enforcement, the Amendment provides that "[t]he court or other authority with jurisdiction shall act promptly on such a request [for enforcement], affording a remedy by due course of law for the violation of any right. The reasons for any decision regarding the disposition of a victim's right shall be clearly stated on the record." This implies, if not explicitly states, that there is a cause of action for the failure to enforce victim's rights – but Amendment 6 gives no indication of the form such a cause of action will take.

Finally, while the Petitioners argue in detail about the Supremacy Clause, suggesting that voters should know that an accused's rights to a fair trial guaranteed by the United States Constitution can not be superseded by the state constitutional provisions on the same subject, it is interesting to note that Amendment 6 deletes the language in Article I, Section 16 of the Florida Constitution providing that victim's rights are enforceable "to the extent that these rights do not interfere with the constitutional rights of the accused." *See* Petitioner's Brief on the Merits at 5.

This Court has repeatedly made clear that the elector's right to cast a meaningful vote depends on being properly advised as to the nature and scope of the proposed amendment. *See, e.g., Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976) (voters "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"). While the proponents of Amendment 6 may have had the best of intentions, the proposal is drafted in a manner that lends itself to voter confusion. Therefore, under this Court's consistent precedents, Amendment 6 should not be included on the general election ballot.

Constitutional Accuracy Requirement and Logrolling

In *Armstrong*, this Court recognized the existence of an accuracy requirement that is not based on statutory law; one whose genesis stems from the Court's obligations under the constitution.

> As these cases illustrate, the 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. The applicability of this requirement also is simple: It applies across-the-board to all constitutional amendments, including those proposed by the Legislature.

773 So. 2d at 16.

The constitutional accuracy requirement exists even in the absence of

statutory authority. In *Armstrong*, for example, the plaintiff challenged a joint legislative resolution that proposed changing the wording of Article I, Section 17 of the Florida Constitution (excessive punishments provision). Under the existing constitutional provision, courts could not impose punishments that are "cruel *or* unusual"; under the proposed amendment, courts could not impose punishments that are "cruel *and* unusual".

Armstrong argued that the proposal failed to advise voters that the proposed amendment would give the legislature too much discretion over the method of execution and the crimes that would be punishable by the death penalty. This Court held that Florida Statute 101.161 codifies the constitutional accuracy requirement, 773 So. 2d at 12, and that by applying the statutory accuracy requirements to the ballot title and summary, it found the proposed amendment misleading and insufficient.

In this case, the Respondent has challenged proposed Amendment 6 on logrolling grounds. That is, the amendment is comprised of three independent and disparate subjects that have nothing to do with each other. Indeed, it is hard to see how raising the retirement age of judges has anything to do with increasing victim's rights or eliminating judicial deference in administrative matters. If Amendment 6 had been proposed by citizen-initiative, rather than by way of Constitutional Revision Commission, it would not survive a

single-subject challenge.[3]

The Petitioners' response is simply that courts are not authorized to conduct single-subject analyses on Constitutional Revision Commission proposals.[4] Article XI, Section 3 provides that all citizen-initiated proposals must undergo single-subject review to ensure that they "embrace but one subject and matter directly connected therewith." It does not mention proposals by the Constitutional Revision Commission; therefore, the Petitioners argue, such review is unauthorized.

The Respondent agrees that such review is not authorized by Article XI,

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[3] It is interesting to note that the bundling in "Marsy's Law" proposals – like the wording of the one here (Amendment 6) – has been challenged in other states. For example, the Montana Supreme Court found the proposed constitutional amendment violative of the state's separate vote requirement. The Court held that because the amendment, which had since been approved by voters, substantially changed other provisions in the state constitution, but was not subject to separate vote, it violated the state's guarantee against logrolling. *See Montana Assoc. of Counties v. State*, 404 P.2d 733 (Mont. 2017).

[4] For example, the Petitioners cite to *Charter Review Commission of Orange County v. Scott*, 647 So. 2d 835 (Fla. 1994), for the proposition that single-subject review is never authorized for Constitutional Review Commission proposals. In *Scott*, this Court analogized the Orange County Commission process to the Florida Constitutional Revision Commission process and held that since Article XI of the Florida Constitution explicitly requires that only citizen-initiated proposals undergo single-subject review, it would not impose it here. It would appear that this Court's decision was based primarily on the explicit reference in Article XI. Nevertheless, the decision explains that the procedural safeguards in the commission process, as valuable as they are, merely reduce the chances of logrolling and deception.

Section. But that doesn't mean that it is not authorized by the constitution.

Indeed, this Court has long recognized the danger of bundling in the voting context. For example, in *Antuono v. City of Tampa*, 99 So. 324 (Fla. 1924), long before Article XI, Section 3 was enacted, this Court cited approvingly to a 1921 treatise to hold that bundling is wrong:

> In 5 McQuillin on Municipal Corporations, § 2199, the rule is stated that –
>
> "If there are two or more separate and distinct propositions to be voted on, each proposition should be stated separately and distinctly, so that a voter may declare his opinion as to each matter separately, since several propositions cannot be united in one submission to the voters so as to call for one assenting or dissenting vote upon all the propositions; and elections are invalid where held under such restrictions as to prevent the voter from casting his individual and intelligent vote upon the object or objects sought to be obtained."
>
> . . .
>
> This rule is amply sustained by reason and authority; it accords with the principles of fair dealing required of all officials in the exercise of public functions, powers or duties.

99 So. at 326.[5] *See also State v. City of St. Augustine*, 235 So. 2d 1 (Fla. 1970);

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[5] This Court found that because the proposed city ordinance bundled separate and distinct uses for bond money to be assessed, without giving the elector an opportunity to vote on the uses individually, "the voter is denied the substantial right and privilege of voting on the items severally." 99 So. at 327.

City of Coral Gables v. Gray, 19 So. 2d 318 (Fla. 1944).[6]

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[6] In *Gray*, this Court made the following observation:

> How may the electors of the State at large vote upon the proposed amendment in such a manner as to express their views intelligently? It may be that the voters may well think that consolidation is good for Dade County and not for Orange; or vice versa. The electors may be in favor of consolidation of tax assessment and tax collection functions in the counties; but not the elimination of prosecuting officers in the inferior criminal courts and the transfer of their functions to the State Attorney, who has more than one county in which to prosecute his duties. They may be in favor of entire consolidation but opposed to giving the Legislature the right by special or local legislation to abolish fee systems within the counties. A variety of other views in opposition to each other may be imagined. Yet, if required to vote upon the proposed amendment as presently framed the electors will be put to it to accept, or reject, all subject matters contained therein, in toto, without the opportunity for discrimination. This is contrary to the manifest purpose of section 1 of Article XVII of the Florida Constitution, which is designed to require the submission of each amendment upon its merits alone and thereby secure by means of the ballot the free and independent expression of the will of the people thereon. By this constitutional requirement matters not in common, or those having no reasonable connection with each other, may not be consolidated. If it were otherwise, the elector would be put in the position where, in order to aid in carrying a proposition which he considered good or wise, he would be obliged to vote for another which he would otherwise reject as bad or foolish. It would sanction the practice of combining meritorious and vicious legislation in one proposal, so that the former could not be secured without submitting to the latter.

In the years since *Antuono*, the dangers of bundling have been addressed in a variety of contexts. But it has yet to be addressed in the Constitutional Revision Commission context. Most of the discussion has centered on the Commission's process for arriving at the proposals: specifically, the public hearings and debates that take place before final proposals are made. However, while these processes "reduce the danger of logrolling and diminish the possibility of deception," *Charter Review Com'n of Orange County v. Scott*, 647 So. 2d 835, 837 (Fla. 1994), they cannot guarantee that bundling will never occur. It is possible and there is nothing in the Florida Constitution that immunizes Constitutional Revision Commission proposals from such review.

Finally, even to the extent single-subject review is not independently guaranteed by the constitutional right to vote, a version of the single-subject requirement is enshrined in the plain language of Article XI, Section 2(c). That provision states that the Constitutional Revision Commission shall "file with the custodian of state records its proposal, if any, of a revision of this constitution or any part of it." Art. XI, § 2(c), Fla. Const. The constitution therefore allows the Constitutional Revision Commission to propose

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19 So. 2d at 319.

amendments in two ways. First, it may propose an amendment to "this constitution," meaning a revision of the Florida Constitution "as a whole." Petitioner's Brief at 26. Second, it may propose an amendment to "any part of" the constitution. Under the second of those avenues, section 2(c) contemplates that a single "proposal" will be used to amend a single "part" of the constitution.

But proposed Amendment 6 does not amend "any part of" of the constitution. Instead, it amends *several* parts of the constitution—namely, Article I, Section 16; Article V, Sections 8 and 21, and Article XII. Thus, the power the Constitutional Revision Commission now claims is a power not authorized by the constitution: to use a single "proposal" to amend "[multiple] part[s]" of the constitution. Nothing in Article XI, Section 2(c) conveys the authority to propose amendments to the constitution in a third fashion. When the Constitutional Revision Commission wishes to propose amendments not to the constitution as a whole but to an individual "part of it," it must issue a new proposal for each "part" it wishes to amend.

This limitation on the use of the Constitutional Revision Commission's authority makes sense. When voters go to the polls in November, they will rightly assume that a proposed constitutional revision will address a specific aspect of the Florida Constitution. They will not anticipate that a single

proposed revision simultaneously works as a hodgepodge of changes throughout various parts of the constitution, inserting language in one section of one article and removing it in a section from a wholly different article. The average voter would find it difficult, if not impossible, to comprehend while in the confines of the ballot box the scope of multiple changes to disparate aspects of the constitution, and to evaluate those proposed amendments to determine whether to vote yes or no.

Limiting the Constitutional Revision Commission's authority under the second prong of section 2(c) to proposals for singular, discrete parts of the constitution increases simplicity and ensures that voters are able to make informed and fully-reasoned judgments. Given the grave importance of the state constitution, voters should expect nothing less.[7]

As the plain text dictates, if the Constitutional Revision Commission wishes to rewrite the entirety of the constitution in one fell swoop—as rarely, but sometimes, may prove necessary—it can do so by proposing an amendment of "this constitution." But if it wishes to amend less than the full constitution,

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[7] In fact, the Constitutional Revision Commission initially conceived of each of the distinct changes contained in Amendment 6 as individual proposals. *See* "Commissioner Proposals," Constitution Revision Commission (last visited Aug. 31, 2018), *available at* goo.gl/4wJYR5 (*e.g.*, listing individual proposals "P0005," "P0006," and "P0008" before those proposals were eventually bundled into a single proposal, "P0096," later filed with the Secretary of State as "P6001").

it must do so one piece — or "part"— at a time. Indeed, this constitutional reading is part and parcel of the "process" of Constitutional Revision Commission revision that this Court has previously held "embodies adequate safeguards to protect against logrolling and deception." *Scott*, 647 So. 2d at 837. A contrary view of section 2(c)'s plain text would substantially degrade those safeguards.

And because the plain language of Article XI, section 2(c) already contains this limitation, there was no need for the drafters of section 2 to include an explicit single-subject statement within its text. The inclusion of additional language would have been surplusage because it merely would have stacked an additional single-subject requirement upon the existing single "part" rule. *See Edwards v. Thomas*, 229 So. 3d 277, 284 (Fla. 2017) (observing that the law generally rejects the use of "mere surplusage" in constitutional and statutory language).

Because proposed Amendment 6 fails the statutory and constitutional accuracy requirements, it should not be included in the general election ballot.

CONCLUSION

For the foregoing reasons, the respondent submits that the decision of the circuit court be affirmed.

Respectfully submitted,

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times Roman.

/s/ *Harvey J. Sepler*
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