

SUPREME COURT OF FLORIDA

Case No.: SC18-1366, 1367
Lower Case: 1D18-3644; 372018CA001525

DEPARTMENT OF STATE, ETC., et al.,

Appellants,

v.

LEE HOLLANDER; PATRICIA BINGHAM; and LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.,

Appellees.

REPLY BRIEF OF DEFENDANT/APPELLANT
MARSY'S LAW FOR FLORIDA, LLC

ON APPEAL FROM THE SECOND JUDICIAL CIRCUIT
LEON COUNTY, FLORIDA

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ARGUMENT

Marsy's Law for Florida, LLC, Defendant/Appellant, sets forth below its responses to the arguments of Appellees and Amici Curiae that were not already discussed in Marsy's Law's Initial Brief.

I. The Claim that Defendants' Rights are Curtailed

In Marsy's Law's Initial Brief, it demonstrated that none of the victims' rights created by the proposed amendment would have a material effect upon current constitutional rights of defendants. Appellees assert that the amendment does adversely affect such rights in several ways and that the ballot summary fails to mention such effects. The first of these assertions involves Article I, section 16(b) of the Florida Constitution, which states:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, *to the extent that these rights do not interfere with the constitutional rights of the accused.*

(emphasis added). Appellees argue that the italicized language established an independent "fundamental state constitutional right" of defendants in Florida and that its deletion constituted a material curtailment of that right. The section was removed because it was replaced by the proposed amendment, which included the three rights in section 16(b) and nine additional rights. The italicized language created no independent constitutional right. It is simply a proviso to the preceding

language, stating that the three victims’ rights provided for in section 16(b) — the right to be informed, to be present, and to be heard — should not operate to interfere with the constitutional rights of an accused. Failure to include the proviso language in the proposed amendment is not a material change that needs to be noted in the ballot summary because its retention would have been meaningless. As discussed in Marsy’s Law’s Initial Brief and further discussed below, nothing in the amendment would interfere with any existing constitutional right of defendants.

Appellees cite language in the transcript of the Constitution Revision Commission (“CRC”) proceedings during a discussion of the repeal of section 16(b). The discussion provides no guidance on this appeal. In the first place, as this Court has made clear, the review at this stage is limited to determining whether the language of the summary accurately reflects the language of the proposed amendment. *Voter Control of Gambling*, 215 So. 3d 1209 (Fla. 2017). Comments of commissioners during deliberations may have some value in a subsequent proceeding regarding construction of the provision, but they are irrelevant for purposes of the current review. In addition, the comments that Appellees quote are entirely consistent with Appellants’ position. Commissioner Cerio, whose statements are cited, is quoted as stating that “there is no harm to the defendant by what is being proposed in Marsy’s Law.” Appellees’ Answer Brief, p.20.

Appellees cite only three specific defendants' rights they claim are diminished by the proposed amendment. First, Appellees argue that the provisions for pretrial release and detention contained in Article I, section 14 of the Florida Constitution would be directly affected by the guarantee in the amendment to victims of "the right within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused." Amendment to Article I, § 16(b)3. The provision has no material effect on Article I, section 14, which entitles a defendant, with some exceptions, to "pretrial release *on reasonable conditions.*" (emphasis added). Under the current constitution, judges can and do take into consideration the safety and welfare of the victim and the victim's family in setting pretrial conditions. Nothing in the proposed amendment changes the rights of a defendant to pretrial release.

Second, Appellees argue that the amendment curtails a defendant's right to obtain information pursuant to the public records provisions of Chapter 119, Florida Statutes, and Article I, section 24 of the Florida Constitution. Appellees refer to the provision in the amendment that guarantees victims:

The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.

The amendment has no effect upon a defendant's constitutional right to obtain public records because no such right currently exists with respect to identifying information

regarding a victim. Article I, section 24 authorizes the Legislature to create new exemptions from access to public records. In accordance with that provision, the Legislature created the following exemption from the public records law:

Any document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime and identifies that person as the victim of a crime, which document is received by any agency that regularly receives information from or concerning the victims of crime, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Thus, the proposed amendment does not curtail any rights of a defendant currently guaranteed by Article I, section 24 of the Constitution.

Third, Appellees and Amici argue that the ballot summary fails to note that the amendment adversely effects defendants' speedy trial rights. In its Initial Brief, Marsy's Law noted that nothing in the proposed amendment curtails a defendant's existing constitutional rights to demand and receive a speedy trial. Appellees and Amici do not now argue that a defendant's right to receive a *speedy* trial is curtailed. Instead, they argue that the amendment would interfere with a defendant's due process right to obtain a *delayed trial* when necessary to allow the defendant to properly prepare a defense. There is nothing in the amendment from which such a conclusion can fairly be drawn. The proposed amendment grants to a victim:

The right to proceedings free from *unreasonable* delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings.

Amendment § (b)(10) (emphasis added). The amendment does not entitle a victim to proceedings with no delay, only proceedings free from “unreasonable delay.” No rational construction of the provision would hold that a delay necessary to enable a defendant sufficient time to prepare a defense in the exercise of due process would be unreasonable.

In addition to the three specific rights discussed above, Appellees charge that the preliminary paragraph in new section 16(b) could be interpreted to bar defendants from exercising fundamental rights. The new language states:

(b) To preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims’ rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents, every victim is entitled to the following rights, beginning at the time of his or her victimization.

Article I, § 16(b), Fla. Const. Appellees argue that by requiring that the rights of victims be given equal consideration with those of defendants, the provision would permit a court to deny a defendant the right to confront adverse witnesses. The above language does not itself create a specific right. It is preliminary language that is followed by a specific list of rights, none of which could reasonably be interpreted to deny a defendant the right to confront witnesses.

II. Appellees' Proposed New Word Count Constitutional Standard

Appellees suggest a new standard for assessing the validity of a ballot summary: count the number of words in the summary compared to the proposed amendment. Appellees assert that it is unimaginable that a 25-word summary could possibly provide fair notice of the content of a 1,300-word amendment. Appellees provide no explanation for such limited imagination. More importantly, they offer no authority or constitutional theory for such analysis and fail to explain how it would be judicially manageable. In *Use of Marijuana for Certain Medical Conditions*, 132 So. 3d 786 (Fla. 2014), the Court upheld a proposed amendment that contained 1,205 words with a 75-word ballot summary. Is there some magic constitutional formula by which the Court could hold the ratio in that case valid and the ratio in the current case invalid?

If the amendment were lengthy because it contained many separate subjects, and the summary were short because it failed to mention most of those subjects, the problem would not be the lopsided word count, but the lopsided subject references. Here most of the words making up the amendment are devoted to providing details of victims' rights, the provision for which is a chief subject of the amendment. That chief purpose can be — and was — effectively stated in the ballot summary. There is no constitutional limit to the length of a proposed amendment, but there are limits to the length of a ballot summary, both statutory and practical. Under Appellee's

theory, there would be an effective limit to the length of an amendment. The Florida Constitution, which allows the CRC to amend entire articles, or even the entire constitution in a single revision, does not countenance such a limitation.

III. The Question of Whether the Amendment Applies to Corporations

The ballot summary states that Amendment 6 “creates constitutional rights for victims of crime.” Appellees claim that the summary is defective because it fails to state that Amendment 6 applies to corporations as well as humans. However, nothing in Amendment 6 says that it applies to corporations, which are never mentioned. Whether corporations are included is an issue for interpretation of the amendment at a later time if it is adopted.

Appellees cite two cases, *Treating People Differently Based on Race and Public Education*, 778 So. 2d 888 (Fla. 2000); and *People’s Property Rights*, 699 So. 2d 1304 (Fla. 1997), both of which struck measures from the ballot due to ambiguities in the ballot summaries. In *Treating People Differently*, the Court stated:

The summary states: “Exempts bona fide qualifications based on sex...” . . . The term is not defined leaving voters to guess at its meaning. Moreover, like the term “common law nuisance” in *People’s Property Rights Amendments*, “bona fide qualification based on sex” is a legal phrase, and voters are not informed of its legal significance.

Treating People Differently, 778 So. 2d at 899. In *People’s Property Rights*, the ballot title referred to “people’s property rights” and the summary referred to the “owner” of property. The court stated:

The title provides, “People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects.” The initiative's summary refers to the owner of real property but does not define “owner.” Consequently, the use of the term “people” in the title “People's Property Rights Amendments” is confusing because it is unclear if “owner” is restricted to people.

People's Property Rights, 699 So. 2d at 1309.

Unlike *Treating People Differently*, the Amendment 6 summary does not include legal terms of art that a voter cannot be expected to understand. Unlike *People's Property Rights*, the Amendment 6 summary does not contain terms that are different than those used in the title, resulting in an ambiguity. Here, the ballot summary says exactly what the amendment says. The amendment refers only to “victims” and so does the summary. If there is an ambiguity regarding whether corporations are included in the term it is in the amendment text and not the summary, and ambiguities in a proposed amendment cannot be resolved in the ballot summary. If a ballot summary attempted to do so, challengers would properly argue that the summary was misleading by stating a purpose or effect not found in the language of the amendment.

A more appropriate guide for the case at bar than those cited by Appellees is this Court's recent decision in *Voter Control of Gambling, supra*. The Court held that any ambiguity in the text of the amendment is a matter for judicial construction in a post-election challenge if the measure passes. It is beyond the scope of pre-

election review. In *Voter Control*, the plaintiffs in a pre-election challenge argued that the measure should not be placed on the ballot because there was an ambiguity in the text of the amendment as to whether it applied retroactively. The Supreme Court held that the issue had to await a post-election challenge:

[A]s the sponsor points out, the opponents' arguments concern the ambiguous legal effect of the amendment's text rather than the clarity of the ballot title and summary. * * * [W]e review the clarity of only the ballot title and summary to determine whether the Initiative may be placed on the ballot. Thus, we do not address whether the amendment would apply retroactively if the Initiative is placed on the ballot * * *.

Voter Control, 215 So. 3d at 1216.

IV. The Authorization to Enforce Victims' Rights

The amendment includes the following in the rights provided to victims:

(c) The victim, the retained attorney of the victim, a lawful representative of the victim, or the office of the state attorney upon request of the victim, may assert and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other authority with jurisdiction shall act promptly on such a request, 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.

The ballot summary addresses the provision by stating:

requires courts to facilitate victims' rights; authorizes victims to enforce their rights throughout criminal and juvenile justice processes.

Appellees argue that this portion of the ballot summary is misleading in three ways. First, they state that a voter who reads the phrase “authorizes victims to enforce their rights” “may not understand the nuances and intricacies of the different remedies available in the criminal and juvenile justice proceedings versus civil proceedings.” Summaries are not required to explain all of the nuances and intricacies that might be implicated by a proposed amendment. See *Prohibiting Public Funding of Political Candidates’ Campaigns*, 693 So. 2d 972 (Fla. 1997) (“[T]he title and summary may not explain every detail or ramification of the proposed amendment.”) The amendment authorizes victims to enforce the rights provided in the amendment “in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right.” The summary correctly informs the voter of all that is necessary: that the amendment authorizes victims to enforce their rights.

Next, Appellees argue that the summary misleads voters into believing that victims can have a private right of action, noting that the amendment prohibits actions for damages against state agencies. Appellees appear to be equating private right of action with an action for damages. Nothing in the summary implies that a victim has a right to seek damages against the state. It says only that the amendment creates victims’ rights and entitles victims to enforce those rights in any court with jurisdiction.

Third, Appellees argue that the ballot summary is misleading when it states that the amendment “requires courts to facilitate victims’ rights,” while the amendment “contains absolutely no requirement that courts facilitate victims’ rights.” Appellees’ Brief, p. 36. The only support offered for the statement is that the amendment doesn’t use the word “facilitate.” Webster’s online dictionary defines “facilitate” as “to make easier: help bring about.” That is exactly what the amendment does by stating that when victims seek to enforce their rights,

The court or other authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of law for the violation of any right.

Amendment, 16(b)(11)(c).

V. The Effort to Impose a Single-Subject Restriction

Article XI of the Florida Constitution provides four methods for amendment. Of the four, only the initiative process set forth in Article I, section 3 contains a single-subject restriction. This Court has explained that the distinction was not an oversight, but was based upon the fact that the initiative process lacked the “legislative filtering process” that exists in the other three methods. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). Since its decision in *Fine*, it has been settled law that the single-subject restriction applies solely to the initiative amendment process.

In *Fine*, this Court explained that the purpose of the single-subject restriction on initiative amendments was to avoid “logrolling.” The Court recognized that logrolling is also present in multi-subject amendments proposed by the Legislature, constitutional convention, and the CRC, but refused to impose the single-subject restriction on those proposals because of the clear distinction in the language of Article XI and because the negative aspects of logrolling are balanced by the filtering process present in proposals by the Legislature, constitutional convention, and CRC.

Amici recognizes that a logrolling/single-subject argument based on the Florida Constitution will not fly, so they offer a novel theory to circumvent *Fine*. They assert that logrolling violates voters’ First Amendment rights by requiring them to accept a result undesirable to them in order to obtain a desirable result. Amici cite no authority for this proposition. The best they can do is to cite U.S. Supreme Court cases stating general propositions regarding the right to vote in the apportionment context.

No reported Florida or federal case has ever held that the First Amendment protects voters from having to make a choice. A voter in a contested election may have to choose between a candidate who supports abortion rights which the voter favors, but also supports gun rights, which the voter disfavors, and an opposing candidate who holds the mirror opposite positions. The First Amendment does not entitle that voter to a different set of candidates. There is no rational distinction

between such a choice of candidates and choice of constitutional amendments. Logrolling is not a constitutional issue. It's a political issue, and the federal constitution leaves it to the states to determine how and when to avoid logrolling. Florida has chosen to avoid it in the case of constitutional amendments proposed by initiative petition, but not otherwise.

CONCLUSION

The Court is respectfully urged to reverse the decision of the lower court.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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