SC18-1368

In the Supreme Court of Florida

KEN DETZNER, IN HIS OFFICIAL CAPACITY AS FLORIDA SECRETARY OF STATE,
Petitioner,

v.

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., PATRICIA BRIGHAM, INDIVIDUALLY, AND AS PRESIDENT OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., AND SHAWN BARTELT, INDIVIDUALLY, AND AS SECOND VICE PRESIDENT OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.,
Respondents.

PETITIONER'S REPLY BRIEF

ON DISCRETIONARY REVIEW AND CERTIFICATION
FROM THE FIRST DISTRICT COURT OF APPEAL
Case No. 1D18-3529

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INTRODUCTION

As discussed more fully in Petitioner's Initial Brief, Article IX, Section 4(b) of the Florida Constitution currently requires each district's school board to "operate, control and supervise all free public schools within the school district." Art. IX, § 4(b). If approved by the Electorate, Revision 3 will add a clause to Article IX, Section 4(b) that would narrow school boards' constitutionally prescribed authority to "operate, control and supervise" only those free public schools "established by" them. R. at 61.

The ballot language discloses precisely this legal effect, and no more, as required by this Court's precedents. *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984); *see In re Advisory Op. to the Att'y Gen. re: Voter Control of Gambling*, 215 So. 3d 1209, 1216 (Fla. 2017) (approving ballot summary because it "fairly represent[s] the amendment's actual text and effect"). Specifically, the ballot language discloses the constitutional status quo ("Currently, district school boards have a constitutional duty to operate, control, and supervise all public schools"), what the Revision, if passed, will leave intact ("[t]he amendment maintains a school board's duties to public schools *it establishes*), and how it would change the Florida Constitution if passed (the Revision "permits the state to operate, control, and supervise public schools *not established* by the school board"). R. at 62 (emphases added). Because the sole question before the Court is whether the Ballot language

informs the Electorate of the revision's legal effect in non-misleading language, and because Revision 10's ballot language plainly satisfies this requirement, the Circuit Court's contrary ruling must be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE BALLOT LANGUAGE CONTAINS MATERIAL OMISSIONS.

A. Local School Boards Currently Have No Constitutional Authority To Establish Or Authorize Public Schools, And The Revision Would Not Change The Status Quo.

Respondents are correct that the ballot language does not disclose any effect on who shall "establish" or "authorize" the State's public schools. *See* Ans. Br. at 17. But that is because Revision 3, like the current language of the Florida Constitution, is silent on that issue, so there is nothing to disclose in the ballot language. Although Respondents concede that "Article IX, Section 4(b), does not expressly specify—either currently or as contemplated by Revision [3]—who 'establishes' public schools," Ans. Br. at 19, Respondents claim that the provision gives school boards constitutionally prescribed power to "authorize" public schools, and that this power will be diminished by amendment to the provision and therefore must be disclosed in the ballot language. Ans. Br. at 17-18. To the contrary, Article IX, Section 4(b) merely requires each district's school board to "operate, control and supervise all free public schools within the school district." Art. IX, § 4(b), Fla. Const. Nothing in that language gives school boards the power to *authorize* public

schools.

In support of their proposed deviation from the plain language of the Florida Constitution, Respondents rely exclusively on the First DCA's decision in *Duval County School Board v. State Board of Education*, 998 So. 2d 641 (Fla. 1st DCA 2008). There, the court "considered whether a statute creating 'an independent, state-level entity with the power to authorize charter schools throughout the State of Florida' conflicted with school boards' constitutional authority under Article IX, Section 4." Ans. Br. at 18 (quoting *Duval Cty. Sch. Bd.*, 998 So. 2d at 642-43). The court held that the statute was unconstitutional because it gave the entity "all the powers of *operation, control and supervision* of free public education specifically reserved in article IX, section 4(b) of the Florida Constitution, to locally elected school boards." *Duval Cty. Sch. Bd.*, 998 So. 2d at 642-43 (emphasis added). In other words, the statute was unconstitutional because it gave the entity powers that the Constitution textually commits to school boards, not because it gave the entity "the power to authorize charter schools." Thus, *Duval County* does not support Respondents' argument.

In any event, even if "the powers of operation, control and supervision," *Duval Cty. Sch. Bd.*, 998 So. 2d at 642-43, include the power to "authorize," the ballot language is nevertheless entirely accurate because it, like both the current language of the Florida Constitution and Revision 3, uses the same language and

therefore conveys the same meaning. *See* Art. IX, § 4(b), Fla. Const. ("operate, control and supervise"); R. at 61 ("operate, control, and supervise"; R. at 62 ("operate, control, and supervise").

B. The Ballot Language Was Not Required To Define The Phrase "Established By The School Board."

Below, the Circuit Court faulted the ballot language for disclosing the precise language of the Revision itself because, in the court's view, "both the text and summary are entirely unclear as to which schools will be affected by the revision." R. at 308. Specifically, the court ruled that both the Revision and ballot language should say what schools are "not established by the school board." *Id.* Respondents likewise argue that the ballot language must define that phrase because "if the revision passes, public schools not 'established by the school board' can no longer be operated, controlled, and supervised by the school board." Ans. Br. at 12. "Where an ambiguity in the amendment text is not remedied in the ballot summary," Respondents claim, "the amendment must be stricken." Ans. Br. at 16.

By insisting that the ballot language include a definition not present in the Revision, Respondents "are actually asserting that the ballot summary should include language that is not in the proposed amendment itself. This is not required." *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 808 (Fla. 2014). Indeed, adding such language likely would render the summary inaccurate, misleading, or in violation of this Court's precedents

requiring that the summary disclose the Revision's "legal effect" and nothing more. *See Evans*, 457 So. 2d at 1355.

Respondents' argument is foreclosed, moreover, because this Court has rejected arguments that pertain to the "legal effect of the *amendment's* text rather than the clarity of the ballot title and summary." *In re Advisory Op. to the Att'y Gen. re: Voter Control of Gambling*, 215 So. 3d 1209, 1216 (2017) (emphasis added). The Court has repeatedly held that "it is not necessary for the title and summary to explain every detail or ramification of the proposed amendment," and that "the precise meaning of" an ambiguous term used in the amendment "is better left to subsequent litigation, should the amendment pass." *In re Advisory Op. to the Atty. Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004) (not necessary to define "medical liability"); *see also Voter Control of Gambling*, 215 So. 3d at 1216 (not necessary to say whether "gambling" includes "gambling that was previously authorized by general law rather than by citizens' initiative"); *Advisory Op. to the Atty. Gen. Re: Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1238 (Fla. 2006) (not necessary to define "substantial equivalent" to marriage).

Contrary to Respondents' suggestion, this is not an appropriate case to "dispel [any] ambiguity regarding which public schools are 'established by the school board'" within the meaning of Revision 3. R. at 12. The only question before the

Court concerns the "clarity of the ballot title and summary." *Voter Control of Gambling*, 215 So. 3d at 1216. Any argument concerning the "legal effect of the amendment's text," *id.*, "is better left to subsequent litigation, should the amendment pass," *Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d at 679; *see Fla. Marriage Protection Amendment*, 926 So. 2d 1238.

Respondents cite two cases in which this Court faulted ballot language for failing to define an ambiguous term that was parallel to the language of the amendment at issue. *See* Ans. Br. at 14-16 (citing *Advisory Op. to the Atty. Gen. re Amendment to Bar Govt. from Treating People Differently*, 778 So. 2d 888 (Fla. 2000); *Advisory Op. to the Atty. Gen. re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use*, 699 So. 2d 1304 (Fla. 1997)). But in *Advisory Op. to the Atty. Gen. Re: Fla. Marriage Protection Amendment*, this Court limited the holdings in those cases to "[t]he factors presented." 926 So. 2d at 1238. There, plaintiffs challenged ballot language in an amendment that would define marriage in part because it provided that "no legal union that is treated as marriage or the substantial equivalent thereof," without defining the term "substantial equivalent thereof." The Court rejected the challenge, however, explaining that the term "[wa]s used both in the proposed amendment and the summary," would be "understood by the common voter, and . . . does not require special training in the legal profession to comprehend its meaning." *Id.* at 1238.

Here, too, the phrase "established by the school board" has a plain meaning that is easily "understood by the common voter" and "does not require special training in the legal profession." *Id.* "Establish" means to "create, found, institute, organize" or "to bring something into existence and set it in operation." Webster's Third New Int'l Dictionary 608 (2002); *see In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 800 (Fla. 2014) (explaining that this Court relies on dictionary definitions to determine the common-sense meaning of terms presented to voters). The ballot language need not define the phrase further, as it "state[s] in clear and unambiguous language the chief purpose of the measure," *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), *i.e.*, Revision 3's "legal effect," *Evans*, 457 So. 2d at 1355.

C. This Court's Precedents Permit, If Not Require, Ballot Language That Omits Specific Reference To Revision 3's Potential Effect On Charter Schools.

Respondents contend that, if charter schools in particular are not "established by the school board," then the ballot language must say so because "charter schools are by far the largest single category of public schools that may be most immediately affected by the passage of Revision [3]." Ans. Br. at 22. This argument is flawed for several reasons.

First, Respondents agree that Revision 3 limits school boards' constitutionally prescribed authority with respect to "all public schools," including both traditional

public schools and a wide variety of nontraditional public schools. R. at 62; *see* Ans. Br. at 22. By disclosing exactly that, the ballot language accurately explains to voters that Revision 3 will have a legal effect on *all public schools* in Florida that are not established by the school board. Singling out the Revision's impact on charter schools would be the sort of "subjective evaluation of special impact" and "political motivation" that this Court has said cannot appear in the ballot language and "must be propounded outside the voting booth." *Evans*, 457 So. 2d at 1355.

Second, for the reasons discussed in Petitioner's Initial Brief, Pet. Br. at 15-16, Respondents' reliance on discussions among CRC members to ascertain the Revision's "chief purpose" is misplaced. *See* Ans. Br. at 21; *see*, *e.g.*, *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000) (explaining that this Court looks "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"); *Use of Marijuana for Certain Med. Conditions*, 132 So. 3d at 799.

Moreover, even if such reliance were appropriate, the debate transcripts simply do not portray a CRC focused on charter schools to the exclusion of other schools. Throughout the debates, commissioners emphasized the Revision's broader impact on *all* public schools. *See*, *e.g.*, R. at 138 ("[I]t does say public schools. And so there are perhaps types of schools that we haven't even envisioned yet. When I first brought the proposal it said the word 'charter' because even I am not thinking

necessarily 20 years ahead."). Commissioners also expressed concern about "mischaracterization of the Proposal . . . as being totally about charter schools, which it is not. There is nothing in that – in the language that relates to charter schools." R. at 221. Indeed, commissioners explained, the three aspects of the Revision are all related because they "have to do with K through 12 education," not merely charter schools. R. at 222; *see* R. at 222-231.

That much of the debate concerned charter schools, despite the Commissioners' recognition that the Revision applies more broadly (as reflected in the Revision's text), underscores that this Court's precedents prohibit ballot language describing any "special impact" on charter schools because it would reflect only an alleged "political motivation," rather than merely its "legal effect." *Evans*, 457 So. 2d at 1355.

Third, despite Respondents' claim that, unlike other public schools, charter schools would be "immediately affected by the passage of Revision [3]," Ans. Br. at 22, the Revision would have *no* immediate impact on charter schools. As disclosed in the ballot language, the Revision "maintains a school board's duties" to operate, control, and supervise "the public schools it establishes," but merely "*permits* . . . the state to operate, control, and supervise" other public schools, exactly what the Revision would do. R. at 62 (emphasis added).

Nothing in the Revision suggests that it would repeal any existing statute,

including the existing, comprehensive statutory scheme under which local school boards currently control and supervise charter schools, irrespective of who "establishe[s] them." *See* § 1002.33(5), Fla. Stat. That regime will remain in force unless and until changed by the Legislature, and the status quo will continue so long as it does. If the ballot language speculated about what a subsequent Legislature might do, it would be affirmatively misleading. The ballot language instead properly discloses only the Revision's "legal effect." *Evans*, 457 So. 2d at 1355.

Even if the Revision *would* affect existing statutes, this Court has rejected the argument that ballot language must "disclose the effect that the proposed amendment would have on existing statutory law." *In re Advisory Op. to Att'y Gen. ex rel. Local Trustees*, 819 So. 2d 725, 731 (Fla. 2002) (citing *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415 (Fla. 2002)). For example, in *Local Trustees*, the ballot language at issue accurately disclosed that an amendment would create "[a] statewide governing board of seventeen members [that] shall be responsible for the coordinated and accountable operation of the whole university system." *Id.* at 727. The ballot language did not, however, disclose that the governing board created by the amendment would replace an existing statutory scheme, specifically, the oversight provided by the Florida Board of Education pursuant to Chapter 229, Florida Statutes. *Id.* at 731. The Court approved the ballot language because the Court presumed that "the average voter is

. . . aware that the state university system is currently governed by the Florida Board of Education, whose powers and duties are enumerated in chapter 229 of the Florida Statutes," and "it would be virtually impossible to indicate within the word limit of the ballot summary all the ramifications the proposed amendment would have on the" statutory scheme. *Id.* at 731.

The ballot summary accurately discloses school boards' existing authority over public schools and that Revision 3 "maintains a school board's duties to public schools it establishes" but "permits the state to operate, control, and supervise public schools not established by the school board." R. at 62. Just as this Court presumed that "the average voter is . . . aware that the state university system is currently governed by the Florida Board of Education, whose powers and duties are enumerated in chapter 229 of the Florida Statutes," *Local Trustees*, 819 So. 2d 731, the average voter must be presumed to know, at a minimum, that Florida law provides for public charter schools and, therefore, that the Revision authorizes the Legislature to make statutory changes related to charter schools. *See also Voter Control of Gambling*, 215 So. 3d at 1217 (explaining that the voters must bear "*some* onus . . . to educate themselves about the substance of the proposed amendment." (emphasis added; citation and internal quotation marks omitted)).

II. THE TRIAL COURT ERRED BY CONCLUDING THAT THE BALLOT LANGUAGE IS AFFIRMATIVELY MISLEADING.

1. The Circuit Court found that the ballot language was affirmatively

misleading because it says Revision 3 "'permits *the state* to operate, control, and supervise public schools not established by the school board" but Revision 3 "is conspicuously silent about who or what would undertake these responsibilities for schools not established by the school board." R. at 309 (emphasis in original). As explained in Petitioner's Initial Brief, Revision 3 would indeed leave the Florida Constitution silent as to who shall "operate, control and supervise" public schools not established by school boards. The ballot language, however, is accurate and non-misleading because, just as many other constitutional provisions leave gaps that may be filled via the legislative process—*i.e.*, the process through which "the State" acts, Revision 3 would leave to that process the question of who shall supervise such schools.

Respondents argue that the ballot language is misleading because voters may "reasonably think 'the state' referred to one of its executive authorities involved in education, such as the State Board of Education or the State Department of Education." Ans. Br. at 25. The plain language of the summary, however, says that the authority to operate, control, and supervise schools not created by school boards defaults to "the State," not one of its agencies. That a voter may misread the summary is no basis to strike it from the ballot. *Cf. Voter Control of Gambling*, 215 So. 3d at 1217 (explaining that the voters must bear "*some* onus" (emphasis added)).

Respondents also contend that "the ballot summary is entirely inconsistent

with the expressed intention of the proposal's sponsor *not* to assign this authority to any particular entity so as to maximize future flexibility." Ans. Br. at 25. This Court has made clear, however, that in evaluating ballot language, this Court looks "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; *see also Use of Marijuana for Certain Med. Conditions*, 132 So. 3d at 799. It therefore does not matter whether the ballot language is consistent with the sponsor's intent; it matters only whether the ballot language is consistent with the *Revision*, which it is.

In any event, Respondents misstate the sponsor's views. She said during CRC debates that it "would be up to the Legislature to decide." R. at 130; *see also* R. at 243 ("[W]hat we know could happen if this is freed up is that the Legislature could be very innovative."); R. at 133-34 ("[W]hen we do something that leaves it completely up to the Legislature we want to debate what the legislation is going to look like.").

2. Respondents also contend that the summary is misleading because it "contains an additional ambiguity not identified by the trial court—it uses a different tense than the revision text." Ans. Br. at 14. Specifically, Respondents object that the Revision refers to "public schools establish*ed* by the district school board," R. at 61 (emphasis added), which Respondents describe as the "past tense," while the

ballot language refers to "a school board's duties to public schools it establish*es*," R. at 62 (emphases added), which Respondents describe as the "future tense." *See* Ans. Br. at 14. According to Respondents, the latter is misleading because it suggests "that school boards' authority to operate, control and supervise public schools will be limited to those it establishes after the amendment is adopted." Ans. Br. at 14.

As a threshold matter, Respondents never made this argument before the Circuit Court, and, accordingly, this Court should not consider it. *See Landmark First Nat. Bank of Ft. Lauderdale v. Gepetto's Tale O' The Whale of Ft. Lauderdale, Inc.*, 498 So. 2d 920, 921-22 (Fla. 1986). In any event, Respondents are incorrect. In the Revision, the phrase "established by the district school board" is not "past tense," it is a past participial phrase, or "verbal adjective," that describes the subset of schools that school boards will operate and supervise, and it refers to any such schools "pending or future." *See Lang v. United States*, 133 F. 201, 203-04 (7th Cir. 1904). Nor is the phrase "it establishes" in the ballot summary "future tense." Rather, it too is a verbal adjective used to describe the set of schools that school boards will operate or supervise if the Revision is passed, *i.e.*, "public schools it establishes." The language does not suggest a temporal limitation. This reading is reinforced by the summary's use of the verbal adjective "not established by the school board" to describe the category of schools that school boards will not operate or supervise if the Revision is passed, *i.e.*, "public schools not established by the school board." R.

at 62.

III. NO SINGLE-SUBJECT RULE APPLIES TO CRC REVISIONS, AND RESPONDENTS IDENTIFY NO REASON WHY BUNDLING IS MISLEADING IN THIS CASE.

Respondents agree that Florida law "does not impose a single subject requirement on proposals by the Constitutional Revision Commission." Ans. Br. at 26. They argue instead that the "the portion of the ballot summary that addresses the changes to the scope of local school boards' authority pertaining to public schools in their district is fatally ambiguous and affirmatively misleading, and its "defects are hidden from voters by its placement with two other simple and concise measures which are easily understood." Ans. Br. at 28. In other words, this argument depends entirely on Respondents' other arguments that the ballot language is defective. As discussed above and in Petitioner's Initial Brief, that is incorrect. Accordingly, Respondents' argument fails.

CONCLUSION

For the foregoing reasons, this Court should quash the order under review and approve the ballot title and summary for Revision 3 for placement on the ballot.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I 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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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-Filing Portal on this 31st day of August, 2018, to the following:

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