SC18-1513

In the Supreme Court of Florida

KEN DETZNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF FLORIDA, HEAD OF THE FLORIDA DEPARTMENT OF STATE, AND FLORIDA'S CHIEF ELECTION OFFICER,

Appellant/Respondent,

v.

HARRY LEE ANSTEAD AND ROBERT BARNAS,

Appellees/Petitioners.

APPELLANT'S REPLY BRIEF

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
Case No. 1D18-3804

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

ARGUMENT

I. A PETITION FOR WRIT OF QUO WARRANTO IS NOT THE PROPER VEHICLE TO FORCE THE SECRETARY TO REMOVE CRC PROPOSALS FROM THE BALLOT.

Quo warranto is the proper vehicle "for inquiring into whether a particular individual has improperly exercised a power or right derived from the State." *Whiley v. Scott*, 79 So. 3d 702, 707 (Fla. 2011). Petitioners agree that the Secretary "has the power and duty to place proposals to amend the constitution on the 2018 general election ballot," ROA at 11, and it is undisputed that Secretary has no role in creating the revisions that appear on the ballot and no authority to refuse to add a ballot proposal sent to him by the CRC. By placing such provisions on the ballot, he has complied with his statutory responsibility, thus *properly* "exercis[ing] a power or right derived from the State." *Whiley*, 79 So. 3d at 707. For that reason alone, the Court should deny the petition now before it.

The common thread in this Court's quo warranto jurisprudence is an allegation that some State actor took some action that neither the Florida Constitution nor any Florida Statute gave him the power to take at all. In *Whiley*—the sole case on which Petitioners rely—the Court found that a quo warranto petitioner "assert[ed] [a] proper basis for quo warranto relief" by alleging "that the Governor lacked authority" to issue an executive order suspending State agency rulemaking. *Id.* at 707. The same is true of *Florida House of Representatives v. Crist*,

see 999 So. 2d 601, 607 (Fla. 2008) (concluding that the Court had quo warranto jurisdiction where petitioners sought relief against the governor for *exceeding his authority* to unilaterally execute a gambling compact expanding casino gambling on tribal lands), and *Martinez v. Martinez*, *see* 545 So. 2d 1338, 1339 (Fla. 1989) (quo warranto was the proper method to test the *governor's power* to call a second special session).

Petitioners have not contested the Secretary's power to place CRC provisions on the ballot (indeed, they have repeatedly and explicitly conceded that the Secretary does in fact have this power). Rather, they challenge the *substance* of the provisions themselves; in their view, the proposals violate the First Amendment and Section 101.161(1), Florida Statutes. Because an action for declaratory and injunctive relief is the proper vehicle for challenging the substance of these proposals, Petitioners' decision to forgo that route means that they cannot, consistent with this Court's jurisprudence, secure the relief they seek—removal of the provisions from the ballot.

Article V, § 2(a) of the Florida Constitution does not give Petitioners license to convert their improper quo warranto petition into an appropriate vehicle at this late stage. *See* Ans. Br. 6. True, Article V, § 2(a) provides that this Court must "adopt rules for the practice and procedure in all courts" that include a "requirement that no cause shall be dismissed because an improper remedy has been sought." Art. V, § 2(a), Fla. Const. But this Court has made plain that "improper or misconceived

remedies . . . will not justify dismissal" if "a proper remedy or review procedure is available" and "the relief sought was timely brought." *State v. Johnson*, 306 So. 2d 102, 103 (Fla. 1974). As discussed below, a proper review procedure is no longer available because the ballot language has already been sent for printing, and the Petitioners' challenge was not timely brought.

II. EQUITY DICTATES THAT THE COURT DISMISS PETITIONERS' UNTIMELY FILING.

Petitioners offer no explanation for the three-month delay in applying for an extraordinary writ. *See* In. Br. 14-17. Instead, they cite *Armstrong v. Harris*, a case in which a group of citizens sued on October 9, 1998, to remove a proposed constitutional amendment from a November 3 ballot, 773 So. 2d 7, 9-10 (Fla. 2000), for the proposition that no justification for that delay is required. But in *Armstrong*, the challengers filed a complaint in circuit court in which they properly sought injunctive and declaratory relief. *Id.* at 9. In addition, the challengers there (1) waited only "several weeks" after they received constructive notice of the proposed amendment, (2) were not "a formal political apparatus or an established special interest group with clear pre-publication knowledge of the amendment," and (3) did "not appear dilatory," based on "the record." *Id.* at 10. In contrast, Petitioners here (1) waited more than *three months* to file their petition after having *actual* notice of the CRC's decision to bundle several revisions; (2) had clear knowledge of the proposed revisions long before they filed suit; and (3) do indeed appear dilatory,

especially given their unexplained delay and undisputed awareness of other CRC challenges filed months before this one. Accordingly, Petitioners are wrong to suggest that, "[i]f the action was not untimely in *Armstrong v. Harris*, *a fortiori* [their] action was not untimely." Ans. Br. 9.

The confusion that Petitioners' relief would now cause also supports a discretionary dismissal. *See Diaz v. Cobb,* 541 F. Supp. 2d 1319, 1327 (S.D. Fla. 2008) (describing last sixty days before an election as "the most tumultuous times in a[n] [election] Supervisor's office"). The proposals they challenge will appear on the November ballots no matter what comes of this litigation—all ballot printing has been ordered and some ballots have already been sent to overseas and absentee voters, in compliance with federal and state law requiring such transmission no later than 45 days before the election. Thus, an order from this Court to "remove" a proposal would effectively invalidate otherwise legally cast votes. *See, e.g., Smith v. Am. Airlines,* 606 So. 2d 618 (Fla. 1992).

Invalidating a measure submitted to the voters disrupts the integrity of the election process and invites far more voter confusion than bundling ever could. If the Court now orders removal of the proposals, voters will inevitably lose confidence in whether their ballot is correct, and "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," *Purcell v. Gonzalez,* 549 U.S. 1, 41 (2006); *see also Eu v. San Francisco Cty. Democratic*

Central Comm., 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). Thus, even if Petitioners' claims were successful on the merits, the voter confusion that would ensue from granting their requested relief is a cure far worse than the ill they seek to remedy.

III. BUNDLING DOES NOT VIOLATE SECTION 101.161, FLORIDA STATUTES.

Petitioners concede that the CRC does not labor under a single-subject limitation. Ans. Br. 13. Nevertheless, they insist that this Court should interpret § 101.161, Florida Statutes, to effectively create such a limitation. Ans. Br. 13-27. For several reasons, this Court should decline the invitation.

Most notably, Petitioners' request would amount to a *statutory* override of the CRC's *constitutional* prerogative to propose multi-subject revisions to the Florida Constitution—including a revision of the *entire* constitution in a *single* proposal. *See* Art. XI, § 2(c), Fla. Const. Petitioners argue that a revision to the entire constitution would satisfy the "dependent" and "related" limitation they ask this Court to create out of whole cloth, but they do not show how a proposal that would amend every single unrelated article in the Florida Constitution (e.g., "Declaration of Rights" (Article I), "Suffrage and Elections" (Article VI), "Finance and Taxation" (Article VII), "Local Government" (Article VIII), and "Education" (Article IX)) could satisfy their novel single-subject limitation. Nor do they explain why the CRC's greater power to amend the entire constitution in one proposal does not include the

lesser power to amend fewer parts of the constitution in one proposal. *See* In. Br. 24.

Petitioners also announce that the CRC imposed a single-subject rule on itself, which it then violated. As an initial matter, the rule they cite does not appear in the CRC's rules. *Compare* Ans. Br. 13 (citing a Rule "3.7") *with* Rules of the Constitution Revision Commission 2017-2018, *available at* http://flcrc.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/Rules.pdf (listing no Rule 3.7). More importantly, this argument does not help their cause. Just as other branches "may not invade" this Court's domain, this Court will not invade a coordinate branch's "prerogative to make, interpret and enforce its own procedural rules." *See Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984). In any event, Petitioners did not raise a claim based on an alleged violation of the CRC's internal rules in their original petition or in the proceeding below, and they should not be allowed to raise a new claim at this late stage of the litigation.

Petitioners cite no authority to support their suggestion that the CRC's authority to propose constitutional "revisions" is more circumscribed than the Legislature's and the electorate's authority to propose constitutional "amendments." Ans. Br. 14. In any event, the constitutional text disposes of this argument, as it authorizes the ultimate in bundled proposals—a "revision of this constitution" as a whole. Art. XI, § 2(c), Fla. Const.

Decisions speaking to "the right of voters to elect candidates of their choice,"

and the "requirement that the voter be permitted to cast an intelligent vote," Ans. Br. 16, likewise fail to support Petitioners' proffered single-subject limitation. Bundling does not bar voters from making an "intelligent" yes-or-no "choice" on a single package of proposals, and Petitioners offer no explanation to the contrary. That "§ 101.161 Fla. Stat. is written with singular nouns and verbs," Ans. Br. 19, does not foreclose multi-subject proposals, either. This Court has never interpreted the statute to impose a freestanding single-subject requirement and it has just this month upheld ballot language for multi-subject proposals against challenges premised on alleged violations of § 101.161, Florida Statutes. *See, e.g., Cty. of Volusia v. Detzner*, --- So. 3d ---, 2018 WL 4272435 (Fla. Sept. 7, 2018). Indeed, a bundled amendment is still a single "proposal" or "measure," the ballot summary for such an amendment is still a single "explanatory statement," and that summary satisfies the requirement that the "chief purpose of the measure" be disclosed. Ans. Br. 19-23.

In the end, Petitioners propose—without citation to any authority—that this Court interpret § 101.161, Florida Statutes to impose an extra-textual, novel, two-pronged test for evaluating bundled CRC proposals: (1) whether a bundled proposal is an "undue infringement" on voters' ability to "intelligently vote"; and (2) if it is, whether it passes some form of heightened scrutiny. Ans. Br. 27. This proffered test is entirely divorced from the statutory language that Petitioners purport to expound. It also contains no judicially manageable standards: Petitioners fail to explain how

courts will purport to differentiate between a permissible and an "undue" infringement, much less how they will determine when bundled proposals lack the connection to allow an "intelligent" vote. They assert that any proposal containing "discrete" parts that voters might favor or disfavor would fail their proffered test. *Id.* But that would have the effect of limiting the CRC to single-subject revisions, which illustrates the central defect in their argument—it represents an effort to impose, in effect if not by name, a single-subject limitation on CRC proposals contrary to the constitutional text and this Court's precedent construing it. *See* In. Br. 19-20.

IV. BUNDLING DOES NOT VIOLATE THE FIRST AMENDMENT.

Petitioners acknowledge that the trial court did not accept their First Amendment claim. *See* Ans. Br. 28. And they offer no explanation why that claim is properly before this Court, in view of their failure to take a cross-appeal. *See* In. Br. 27. For this reason, the Court should decline to address it.

Even if the Court addresses Petitioners' waived First Amendment claim, that claim fails on the merits. This Court has already rejected the claim that multi-subject proposals "violate the 'one person-one vote' guarantee of the Fourteenth Amendment," *see Smathers v. Smith*, 338 So. 2d 825, 826 (Fla. 1976); *see id.* at 827-28 (distinguishing CRC proposals from legislative proposals in their ability to address multiple subjects). Because it is well-established that "the First Amendment provides no greater protection for voting rights than is otherwise found in the

Fourteenth Amendment," *Hand v. Scott*, 888 F.3d 1206, 1211 (11th Cir. 2018), this Court should likewise reject Petitioners' First Amendment claim.

Petitioners admit they can locate no case in the history of the Republic that has adopted their First Amendment theory. Ans. Br. 33. What is more, their novel First Amendment claim has no basis in the text of the First Amendment, and it also runs headlong into longstanding, contrary historical practice. *See* In. Br. 28. For example, the current revision of the Florida Constitution was ratified as a set of three bundled proposals—*not* as a single proposal or a series of individual proposals. *Id.* at 29. If Petitioners' theory were sound, then the ratification of the current Florida Constitution violated the First Amendment.

Petitioners attempt to avoid this problematic implication of their theory by asserting that the First Amendment distinguishes between whole and partial revisions to the state constitution, as "voters may intelligently address a single ballot question, such as: 'Do you favor the form of government that now exists? Or do you favor the proposed change?'" Ans. Br. 28. But this is no answer; the 1968 revision was proposed to and ratified by the electorate in *three* bundled proposals, not one. In. Br. 29. Regardless, any proposed constitutional amendment can be framed at such a level of generality, as a constitutional change can always be said to alter the existing "form of government." Moreover, Petitioners offer no explanation why a vote on a multi-subject proposal need be any less "intelligent" than a vote on a

single-subject one.

Petitioners' theory likewise poses a serious threat to any number of prior successful amendments to the Florida Constitution, including the 1998 CRC's multi-subject Revision 7, which altered judicial selection methods, judicial terms, and the funding structure for the state courts system. *Id.* at 25. Petitioners respond that the First Amendment draws a distinction between bundled "independent and unrelated proposals" and bundled "related" proposals. Ans. Br. 30-31. It is not at all clear that the 1998 CRC's Revision 7 would survive this nebulous test. But in any event, a voter may well have favored increasing county court judges' terms from four to six years but opposed altering the funding structure for the state courts system. If, as Petitioners contend, the First Amendment guarantees voters a right not to be put to a choice between "a *favored* proposition" and "an *opposed* proposition," Ans. Br. 30, it would seem to make little difference whether the proposed changes are related; voters can have differing views on related but distinct proposals.

As Respondent also has explained, Petitioners' theory is inconsistent with other aspects of our constitutional history, including the way that the United States Constitution was ratified and subsequently amended. In. Br. 20-23. Petitioners counter that "the United States Constitution was adopted by conventions called in the states and not by a vote of the people," and it provides mechanisms for amendment other than popular vote. Ans. Br. 29. True enough. But Petitioners fail

to explain why the First Amendment should be construed to guarantee a right to vote on non-bundled state constitutional amendments but no right to vote on federal constitutional amendments.

In addition, Petitioners contend that "every amendment [to the U.S. Constitution] adopted after the adoption of the [B]ill of [R]ights . . . is tightly confined to a single subject," while conceding that the Fourteenth Amendment is a "possible exception." Ans. Br. 29 & n. 7. Indeed, like the First Amendment, *see* In. Br. 30, the Fourteenth Amendment addresses multiple subjects. Among other things, it requires equal protection of the law, defines United States citizenship, requires that citizens be represented proportionately in Congress, sanctions criminal disenfranchisement by the states, and validates "the public debt of the United States," including debt incurred during the civil war. U.S. Const. amend. XIV. If Petitioners' theory were sound, the process by which the Fourteenth Amendment was ratified violated the First Amendment.

Petitioners affirmatively raise other examples that tend to refute the novel theory they advance. As they note, voters cast a single vote for Governor and Lieutenant Governor of Florida. *See* Ans. Br. 32-33. Likewise, they cast a single vote for President and Vice President of the United States. If the First Amendment guarantees a right not to vote for a bundle of favored and disfavored measures, *see* Ans. Br. 30, why would it not invalidate multi-candidate bundles?

Petitioners assert that "the First Amendment protections of the right to vote have greatly advanced since the birth of this nation," Ans. Br. 29, courts routinely confront "novel sets of facts," *id.* at 30, and "a progression of First Amendment decisions" purportedly "points unerringly to the rightness of the proposition [Petitioners] present to this Court," *id.* at 35. The decisions on which they rely, however, have nothing to do with this case. Petitioners cite decisions of this Court that applied the single-subject limitation (which does not apply to CRC proposals) to citizen initiatives without even mentioning the First Amendment. *See id.* at 33-35 (citing *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *In re Advisory Op. to Att'y Gen.—Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994)). They also rely on decisions of the U.S. Supreme Court addressing legislative apportionment, *Reynolds v. Sims*, 377 U.S. 533 (1964), poll taxes, *Harman v. Forssenius*, 380 U.S. 528 (1965), election-day vote-solicitation restrictions, *Burson v. Freeman*, 504 U.S. 191 (1992), districting, *Wesberry v. Sanders*, 376 U.S. 1 (1964), restrictions on political parties, *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989), and voter eligibility requirements, *Hill v. Stone*, 421 U.S. 289 (1975). *See* Ans. Br. 35-39.

While these cases may, at a high level of generality, speak to "[t]he importance and quality of" the right to vote, Ans. Br. 37, they hardly suggest, much less establish, that the right has the expansive, novel contours the Petitioners ask this

Court to draw in the name of the First Amendment. Given the lack of support in law or logic for Petitioners' First Amendment theory—along with its numerous and problematic implications—this Court should reject it. And at the very least, any doubts must be resolved against Petitioners. *See* In. Br. 31-33.

V. REVISION 6'S BALLOT LANGUAGE SATISFIES SECTION 101.161(1), FLORIDA STATUTES.

As shown in the Secretary's Initial Brief, Revision 6's ballot title and summary clearly, plainly, accurately, and entirely describe Revision 6's chief purpose and the legal effect it will have on the Florida Constitution if the voters approve of it this November. The ballot title and summary of Revision 6 should "provide fair notice of the content of" that measure. *Advisory Op. to the Att'y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). To appear on the ballot, Revision 6's ballot title and summary must "state in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982). To determine whether Revision 6's ballot title and summary accomplish what they must, the Court asks (1) "whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,'" and (2) "'whether the language of the title and summary, as written, misleads the public.'" *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010).

Article I, Section 2 of the Florida Constitution guarantees that "all natural persons" possess certain "inalienable rights," including the right "to acquire, possess

and protect property." These rights are not currently "inalienable" for "aliens ineligible for citizenship." This is because Article 1, Section 2, qualifies these rights by stating that "that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." *Id.* Revision 6, if passed by the Florida electorate, will remove this discriminatory language from Article I, Section 2's guarantee of certain "basic rights."

Revision 6's ballot summary informs the electorate of this effect. When voters look at the ballot, they will be informed that a vote in favor of Revision 6 is a vote in favor of "[r]emov[ing] discriminatory language related to real property rights." ROA at 68-69. No more is needed to pass legal muster for inclusion on the ballot.

In the Circuit Court's view, "the ballot language for Revision 6 is deceptive and misleading" because "it does not disclose to voters that the proposed amendment to Article I, § 2 removes the power of the legislature to regulate or prohibit 'ownership, inheritance, disposition and possession of real property by *aliens ineligible for citizenship*." ROA at 136. That conclusion, however, glosses over three related, yet distinct, principles this Court has created to guide the ballot-clarity inquiry. First, Florida voters are presumed to have "a certain amount of common understanding and knowledge," *Fla. Educ. Ass'n*, 48 So. 3d at 701; second, terms must be "read . . . in context," *Advisory Op. to the Att'y Gen. re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996); and third, ballot language "need not explain every detail

or ramification of the proposed amendment," *Advisory Op. to the Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 974 (Fla. 2009).

Here, common understanding and context demonstrate that Revision 6's ballot title and summary provide the requisite information regarding its legal effect. When voters look at their November ballot, they will see that Revision 6 (1) will amend Article I, § 2; (2) that, of the basic rights in Article I, § 2, Revision 6 will alter the constitutional text as it relates to "PROPERTY RIGHTS," ROA at 70; and (3) as an alteration to the property-rights provision, it will "[r]emove discriminatory language related to real property rights," *id.* at 68-69. Common sense dictates that the "removal of discriminatory language related to real property rights" from the declaration of basic rights will formally remove a defunct restriction on real property rights for a group that previously experienced "discrimination" in this context and will guarantee that "[a]ll natural persons" will indeed enjoy the "inalienable rights" protected by Florida's constitution. That Revision 6's ballot summary declines to explicate that "all" natural persons will now include "aliens ineligible for citizenship" is a "detail or ramification" of Revision 6 that its ballot language "need not explain." *Advisory Op. to the Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d at 974.

CONCLUSION

This Court should reverse the trial court's order granting the petition for a writ of quo warranto.

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 24th day of September, 2018, to the following counsel:

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