

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

THE FLORIDA EDUCATION
ASSOCIATION, ANDY FORD,
and LYNETTE ESTRADA,

Plaintiffs,

v.

CASE NO.: 2010-CA-2537
Judge Charles A. Francis

DEPARTMENT OF STATE, an agency
of the State of Florida; and DAWN K.
ROBERTS, in her official capacity as
the Secretary of State,

Defendants.

**DEFENDANTS' CROSS-MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 1.510, Florida Rules of Civil Procedure, Defendants, Florida Department of State and Dawn K. Roberts, Secretary of State, move for summary final judgment, and submit this memorandum of law in support of their cross-motion and in opposition to Plaintiffs' motion for summary judgment.

Plaintiffs' challenge the ballot title and summary attached to the Legislature's proposal to revise the class size provision in article IX, section 1, of the Florida Constitution ("Amendment 8"). This challenge fails as a matter of law because the ballot language gives voters fair and sufficient notice of the choice they must make to cast an intelligent ballot. The title and summary are unambiguous, clearly state the amendment's chief purpose, and do not "hide the ball" or "fly under false colors." As such, Defendants are entitled to summary judgment.

Conversely, summary judgment *cannot* be entered for the Plaintiffs because their case and motion hinge on the disputed fact allegation critical to their case that: "Amendment 8, if

enacted, will result in a substantial reduction of state funding to local school districts.” [Pls. Mem. at 2; *see also* Compl. ¶¶ 16-17] Plaintiffs have adduced no support for this speculative claim and Defendants dispute its accuracy.

BACKGROUND

1. Brief history of Florida’s class size requirement and the Legislature’s limited funding obligation.

In 2002, Floridians approved an amendment to the Florida Constitution that aimed to restrict the number of students assigned per teacher in the state’s public schools (“Class Size Amendment”). This amendment allocated responsibility for funding class size reductions to the Legislature for the period beginning with the 2003-04 fiscal year until the 2010-11 school year when the class size goal was to be satisfied:

the legislature shall make adequate provision to ensure that, *by the beginning of the 2010 school year*, there are a sufficient number of classrooms

Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local school districts. *Beginning with the 2003-2004 fiscal year*, the legislature shall provide sufficient funds to reduce the average number of students in each classroom by at least two students per year *until* the maximum number of students per classroom does not exceed the requirements of this subsection.

Art. IX, § 1, Fla. Const. (emphasis added).

After passage, the Florida Legislature set about to implement the amendment and since that time has appropriated more than \$19 billion to satisfy the constitutional funding requirement and reach the class size goals by the 2010 school year. *See* Fla. S. Comm. on Ways and Means, SJR 2, Staff Analysis and Fiscal Impact Statement at 3 (Mar. 3, 2010) (“Senate Bill Analysis”) (Tab A). Out of the approximately \$19 billion appropriated for class size reduction, local school districts have spent approximately \$2.5 billion for purposes other than class size reduction

pursuant to § 1003.03, Fla. Stat., which affords substantial flexibility to spend the class size reduction money. Now, as the 2010 school year begins, school districts that operate, control, and supervise local schools (*see* art. IX, § 4, Fla. Const.) must be fully compliant with final class-size standards at the classroom level. *Id.*; *see also* **Tab B** (news reports regarding district efforts).

2. Amendment 8 proposes to give flexibility to local school districts.

The Legislature proposed Amendment 8 to help local school districts that anticipated difficulty meeting article IX, section 1's rigid 2010 class size standard. *Id.* Amendment 8 aims to give school districts additional flexibility to satisfy class size standards while avoiding disruptions:

Amending the class size requirement to the school level average class size for 2010-2011 and thereafter provides districts with the flexibility to meet the class size requirements and reduces the likelihood that districts would have to implement the options required in s. 1003.03(3), F.S., to reduce class size in accordance with the current, more rigid requirements.

Senate Bill Analysis (**Tab A**) at 6. The Senate Bill Analysis described the types of burdensome and disruptive operational changes that some districts anticipated making if the rigid 2010 class size requirements were left alone, including:

- Reducing or eliminating the number of non-core courses offered for students, such as music, art, and physical education;
- Limiting the availability of certain courses for students;
- Reducing a student's flexibility to schedule certain required or elective courses;
- Eliminating courses that have small enrollments;
- Changing student attendance zones and requiring students to be moved from their current home school, in some cases to a school outside the community;
- Revising and restructuring classes, students, and teachers in mid-semester if additional students enroll;
- Reassigning teachers to different courses and different grades;
- Transferring teachers to schools that have excess classroom space;
- Moving district employees with certification back into the classroom;
- Increasing the number of classrooms utilizing team teaching and co-teaching;
- Making significant reductions in non-classroom staffing and programs;
- Increasing the number of students enrolled in virtual instruction;
- Using facilities not currently used for student instruction;

- Increasing the number of students in exceptional student education classrooms;
- Recruiting and employing additional teachers; and
- Using double sessions or year-round schools.

Id. at 7-8.

Amendment 8 would simply provide local school districts additional flexibility to avoid these problems. Substantively, for the 2010-11 school year and beyond, Amendment 8 would: 1) provide for a grade-grouping based method of calculating class sizes (in place of the current classroom-based method); 2) provide a higher hard-cap in each grade grouping; 3) exempt virtual classes from the class size requirement; and 4) require the Legislature to provide funds sufficient “to maintain” the average number of students.

The ballot title and summary summarize Amendment 8’s chief aims as follows:

REVISION OF THE CLASS SIZE REQUIREMENTS FOR PUBLIC SCHOOLS – The Florida Constitution currently limits the maximum number of students assigned to each teacher in public school classrooms in the following grade groupings: for prekindergarten through grade 3, 18 students; for grades 4 through 8, 22 students; and for grades 9 through 12, 25 students. Under this amendment, the current limits on the maximum number of students assigned to each teacher in public school classrooms would become limits on the average number of students assigned per class to each teacher, by specified grade grouping, in each public school. This amendment also adopts new limits on the maximum number of students assigned to each teacher in an individual classroom as follows: for prekindergarten through grade 3, 21 students; for grades 4 through 8, 27 students; and for grades 9 through 12, 30 students. This amendment specifies that class size limits do not apply to virtual classes, requires the Legislature to provide sufficient funds to maintain the average number of students required by this amendment, and schedules these revisions to take effect upon approval by the electors of this state and to operate retroactively to the beginning of the 2010-2011 school year.

If Amendment 8 is adopted, it would alter the text of Florida’s present class size provision (in relevant part) as follows:

ARTICLE IX - EDUCATION

SECTION 1. Public education.--

* * *

To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the ~~2010-2011~~ 2010 school year and for each school year thereafter, there are a sufficient number of classrooms so that:

(1) Within each public school, the average ~~maximum~~ number of students who are assigned per class to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students and the maximum number of students assigned to each teacher in an individual classroom does not exceed 21 students;

(2) Within each public school, the average ~~maximum~~ number of students who are assigned per class to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students and the maximum number of students assigned to each teacher in an individual classroom does not exceed 27 students; and

(3) Within each public school, the average ~~maximum~~ number of students who are assigned per class to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students and the maximum number of students assigned to each teacher in an individual classroom does not exceed 30 students.

The class size requirements of this subsection do not apply to extracurricular or virtual classes. Payment of the costs associated with meeting ~~reducing class size to meet~~ these requirements is the responsibility of the state and not of local school ~~schools~~ districts. ~~Beginning with the 2003-2004 fiscal year,~~ The legislature shall provide sufficient funds to maintain ~~reduce~~ the average number of students required by ~~in~~ each classroom ~~by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection.~~

3. Plaintiffs' Complaint

Plaintiffs ask this Court to strike Amendment 8 from the ballot. They claim that the summary fails to disclose Amendment 8's chief purpose and effect, which in their view is to reduce state funding to local school districts. [Pls. Mem. at 2; *see also* Compl. ¶¶ 16-17] They seek a declaration and injunction from this Court that serves to enjoin the Secretary from placing Amendment 8 on the 2010 general election ballot. [Compl. at 8]

STANDARD OF REVIEW

Plaintiffs bear a substantial burden to remove a proposed constitutional amendment from the voters' consideration because the amendment process is "the most sanctified area in which a court can exercise power." Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958). As the Court stated, "[s]overeignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the organic law." Id. Courts must act with "extreme care, caution, and restraint" before removing a constitutional amendment from the vote of the people. Advisory Op. to the Att'y Gen. re: Fla. Marriage Protection Amendment, 926 So. 2d 1229, 1233 (Fla. 2006) (quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)).

Because of the "extreme" degree of "care, caution, and restraint" with which amendments must be evaluated, judicial review is extremely deferential. If "any reasonable theory" exists for approving an amendment for ballot placement, it should be upheld. Armstrong v. Harris, 773 So. 2d 7, 14 (Fla. 2000) (quoting Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956)). Florida courts will not interfere with the amendment process "unless the laws governing the process have been 'clearly and conclusively' violated." Advisory Op. to the Att'y Gen. re: Right to Treatment & Rehab. For Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

This high threshold for removing an amendment proposal from the ballot is stringent particularly because Amendment 8 was proposed by the Legislature. As the Florida Supreme Court stated over fifty years ago:

[S]overeignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed

amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and *it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval. Changes in government such as proposed here are provoked in the interest of economy and efficiency, they necessarily contemplate the abolition of some offices, boards and agencies and the combination of others, but this is well within the power of the electorate.*

Gray, 89 So. 2d at 790 (emphasis added). Because extreme deference is required in the court's evaluation, all doubts concerning the validity of Amendment 8 must be resolved in favor of allowing Floridians to vote on the proposal.

LEGAL ARGUMENT

Summary judgment must be awarded for Defendants, and Plaintiffs' motion must fail, because Amendment 8's ballot title and summary fairly state its chief purpose and effect of relaxing class size standards in Florida. Amendment 8 is not concerned with reducing state funding for local school districts; in fact, Amendment 8 does not require or cause any reduction in funding.

Further, Plaintiffs' motion for summary judgment is inappropriate because it relies on the speculative claim that Amendment 8 will reduce state funding of education. Defendants' dispute this claim and Plaintiffs have not offered sufficient evidence to prove this claim for purposes of summary judgment.

I. Amendment 8's Ballot Title and Summary Fairly Notify Voters of Its Chief Purpose to Revise Class Size Standards.

Amendment 8, like the existing Class Size Amendment, is concerned with enforcing specific class size limitations in public school classrooms. It contains no mandate that the Legislature allocate more funding, less funding, or any specific sum. Contrary to Plaintiffs'

assertions, Amendment 8 satisfies all legal standards for pre-election review of a proposed constitutional amendment because its ballot title and summary tell voters exactly the stakes of their vote, which concerns state class size standards, not funding. Thus, the voters should have the opportunity to decide whether to add this provision to their Constitution.

The purpose of a ballot title and summary is “to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot.” Advisory Op. to the Att’y Gen. re: Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998) (quoting Advisory Op. to the Att’y Gen. – Fee on the Everglades Sugar Prod., 681 So. 2d 1124, 1127 (Fla. 1996)). The ballot title and summary must “state in clear and unambiguous language the chief purpose of the measure.” Health Care Providers, 705 So. 2d at 566. The ballot summary, however, is not required “to explain every detail or ramification of the proposed amendment.” Advisory Opinion to the Att’y Gen. re Patients’ Right to Know, 880 So. 2d 617, 621 (Fla. 2004). But, the title and summary cannot “fly under false colors” or “hide the ball” as to the proposed amendment’s true effect. Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000).

Plaintiffs hinge their case on convincing this Court that article IX, section 1’s class size provision is not about class size, but “is a funding provision.” [Pls. Mem. at 5] They argue that this requires the ballot title and summary to explain that Amendment 8 will reduce state education funding. This argument is incorrect for two reasons. First, the chief purpose of both the current Class Size Amendment and Amendment 8 is not to increase, decrease, or mandate specific levels of state education funding; rather, their chief purpose is to establish (and now to revise) specific limits on the number of students per teacher in Florida’s public school classrooms. Second, Plaintiffs have not provided any admissible evidence at this stage of the

proceedings to prove their assertion that “Amendment 8, if enacted, will result in a substantial reduction of state funding to local school districts.” [Pls. Mem. at 2] Such an assertion is pure speculation.

A. Amendment 8’s ballot title and summary address its chief purpose to revise threshold class size standards and do not mislead.

The ballot title and summary tell voters exactly the purpose, effect, and what is at stake with Amendment 8 and do not mislead or hide the ball. As described in the background section above, Amendment 8 would: revise the Class Size Amendment in article IX, section 1, of the Florida Constitution; relax current class size standards; excuse virtual classes from the standard; and direct the Legislature to provide sufficient funds “to maintain” the new average class size goal. The summary tells voters exactly these things. It lists both original and proposed student per teacher figures that voters must consider and how the class size calculation would be modified (from a strict hard cap on the number of students-per-teacher by classroom to an average by “grade-grouping, in each public school”).

The summary’s focus on students and class size calculation is transparent and faithfully communicates the proposal within the scope and aim of the original Class Size Amendment. The sponsor of the original class size provision listed the “purpose” of the Class Size Amendment, *not* as a means to increase funding to local districts, but to “Reduce Class Size in Public Schools.” See Committee Tracking System Page for Amendment Sponsor, “Coalition to Reduce Class Size,” Fla. Dep’t of State, <http://election.dos.state.fl.us/committees/ComDetail.asp?account=34393>. The Class Size Amendment’s language, ballot title and summary reflect the same classroom-centric focus. Beyond its simple allocation of responsibility to the Legislature to provide funds as necessary to reduce class sizes by 2010, the Amendment did not mandate any increase in funding or specify any particular level of funding. In fact,

contrary to Plaintiffs' view that the Class Size Amendment is "a funding provision" [Pls. Mem. at 5] that requires "the same level of funding" indefinitely [Pls. Mem. at 8], the Florida Supreme Court expressly identified the goal of the Class Size Amendment as being about maximum class sizes without express funding dictates:

The proposed amendment in this case does not specify a certain percentage of the budget or a specific amount to be spent on reducing class size. ... Although, as a result of the amendment, the Legislature *may choose to fund* the building of new schools to achieve the *maximum classroom size set as a goal of the proposed amendment*, this is not the only method of ensuring that the number of students meets the numbers set forth in the amendment. Rather than restricting the Legislature, the proposed amendment gives the Legislature latitude in designing ways to reach the class size goal articulated in the ballot initiative.

Advisory Op. to the Att'y Gen'l re Florida's Amendment to Reduce Class Size, 816 So. 2d 580, 584-85 (Fla. 2002) (emphasis added). Because the Legislature retained wide latitude to fund the Class Size Amendment with larger or smaller appropriations as it saw fit, Plaintiffs cannot credibly argue that Class Size Amendment's chief purpose is to increase or require the "same level" of school funding.¹

B. Plaintiffs' case assumes incorrectly that the current Class Size Amendment requires the Legislature to fund class size indefinitely.

Moreover, the current Class Size Amendment cannot be viewed as a funding requirement because it does not commit the Legislature to funding class size *indefinitely* into the future. Plaintiffs incorrectly assert that the current Class Size Amendment obligates the state "to continue to provide the same level of funding which is now required." [Pls. Mem. at 8] Article

¹ In fact, legislative appropriations toward class size have widely varied since 2003. The high-water mark for state class size funding occurred in the 2006-07 and 2007-08 school years in which the Legislature appropriated more than \$3.2 billion, or three times the amount of funding than in other years. Senate Bill Analysis (Tab A) at 3. For 2009-10, the Legislature appropriated 15% less than peak funding. So, legislative funding has always varied and been increased or reduced at the Legislature's discretion.

IX, section 1, however, only requires that the Legislature provide funds sufficient “to reduce” class sizes “*beginning with the 2003-2004 school year ... until the maximum number of students per classroom does not exceed the [class size] requirements.*” The 2002 ballot summary likewise described a limited funding obligation involving capital funding for classrooms and for reducing class sizes per the prescribed funding schedule. *See Fla. Dep’t of State, <http://election.dos.state.fl.us/initiatives/initdetail.asp?account=34393&seqnum=1>*. The ballot title accompanying the Class Size Amendment also did not reference funding but described the Amendment in terms of a goal to reduce class sizes: “Florida’s Amendment to Reduce Class Size.” *Id.* Just as the two students per year classroom reduction requirement is not an indefinite one, neither is state funding for that reduction indefinite. As such, the Class Size Amendment, by its own terms, is not chiefly “a funding provision,” or an indefinite funding obligation.

Just like the current Class Size Amendment, Amendment 8’s chief purpose, as fully, fairly, and accurately stated in the ballot title and summary, concerns student-teacher class size thresholds and calculating class size. Amendment 8’s title and summary capture this purpose and will allow voters to cast an informed vote as to whether they prefer current class size standards, or new less-rigid standards that school districts may more easily meet.

Finally, if Amendment 8 had the effect of reducing state education funding, which is pure speculation, this issue need not be described in the ballot title and summary. Ballot titles and summaries are not required to describe even large fiscal consequences so long as the chief purpose of the amendment is accurately and fairly stated. For example, in 2004, Floridians voted to repeal the “High Speed Rail Amendment,” which had huge financial consequences for the state. Yet, the Florida Supreme Court saw no problem with the Amendment’s title and summary not addressing funding:

REPEAL OF HIGH SPEED RAIL AMENDMENT: This amendment repeals an amendment in the Florida Constitution that requires the Legislature, the Cabinet and the Governor to proceed with the development and operation of a high speed ground transportation system by the state and/or by a private entity.

Advisory Op. to the Att’y Gen. re: Repeal of High Speed Rail Amend., 880 So. 2d 624 (Fla. 2004); *see also* Smith v. Coalition to Reduce Class Size, 827 So. 2d 959, 964 (Fla. 2002) (rejecting an argument that a fiscal impact statement is necessary for ballot integrity); Art. XI, § 5(c), Fla. Const. (requiring a fiscal impact statement *only* for amendments proposed *by initiative*).

Amendment 8’s ballot title and summary accurately frame and communicate its chief purpose and do not mislead voters. The potential financial effects of Amendment 8 are for the political campaign on the merits. Thus, this Court should grant Defendants’ summary judgment motion and deny Plaintiffs’ motion. Amendment 8 should remain on the November ballot.

II. Plaintiffs’ Summary Judgment Motion Must Be Denied Because It Depends on a Disputed Issue of Material Fact.

In addition to the foregoing reasons, summary judgment *cannot* be entered for the Plaintiffs because their case and motion critically depend on a disputed factual claim. They assert incorrectly that: “Amendment 8, if enacted, will result in a substantial reduction of state funding to local school districts.” [Pls. Mem. at 2; *see also* Compl. ¶¶ 16, 17] Plaintiffs supply no evidentiary support for this claim, and Defendants dispute its accuracy.

As discussed above, the Class Size Amendment currently in article IX, section 1, does not mandate that the Legislature appropriate specific amounts or levels of funding to local school districts. The Legislature has always possessed wide discretion and authority to appropriate funds for the local districts to fund class size-related goals at high, low, or static levels at its own discretion. *See, e.g.*, Senate Bill Analysis (Tab A) at 3. Amendment 8 does not change that fact, or require or cause the Legislature to reduce spending. Even if Amendment 8 passes, the

Legislature must appropriate sufficient funds to maintain the required classroom size levels and would be free to increase, decrease, or leave funding the same for local school districts as it deems necessary to comply.

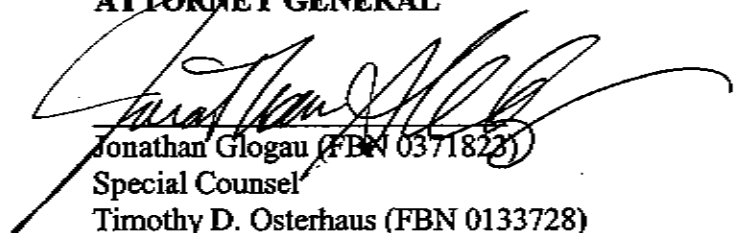
Finally, Plaintiffs rely on the Department of Education's 2010-11 Legislative Budget Request to imply incorrectly that the Legislature must fund an additional \$354 million dollars for class size reduction under the current constitutional language, which would be rendered unnecessary if Amendment 8 passes. Regardless of the amount requested in any LBR, the Legislature has the discretion to appropriate whatever amount it deems appropriate and sufficient to any purpose. The Department of Education's 2010 LBR requested \$3.199 billion for class size reduction. In response to this LBR, the Legislature appropriated \$2.927 billion for class size reduction - approximately \$272 million less than requested. Moreover, since 2003, local school districts have spent \$2.5 billion that the Legislature appropriated for class size reduction on other uses, far outpacing the purported deficit of which Plaintiffs complain. In sum, the LBR based number is not indicative of the Legislature's current obligation to fund class size, nor can Plaintiffs predict what level of funding the Legislature will adopt in the future. As their speculation does not belong in the ballot title and summary, Plaintiffs' motion must be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied, Defendant's Motion for Summary Judgment should be granted and final summary judgment should be granted in Defendants' favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23 day of August, 2010, I caused a true and correct copy of the foregoing has been furnished via U.S. Mail and email to: Ronald G. Meyer, Jennifer S. Blohm, Lynn C. Hearn, Esqs., Meyer, Brooks, Demma, & Blohm, P.A., 131 North Gadsden Street (32301), P.O. Box 1547, Tallahassee, FL 32302, *Counsel for Plaintiffs.*



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