

**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,

CASE NO.: 2010-CA-002537

vs.

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

Defendants.

**PLAINTIFFS' MOTION FOR SUMMARY FINAL JUDGMENT
AND INCORPORATED SUPPORTING MEMORANDUM**

Plaintiffs, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, submit this Motion for Summary Judgment and Incorporated Memorandum of Law. Plaintiffs seek a final judgment declaring that the ballot title and summary for Amendment 8 violate Section 101.161(1), Florida Statutes, and removing the amendment from the ballot for the general election to be held November 2, 2010.¹

In support of this motion, the Court is respectfully shown that there are no disputed issues of material fact and that the Plaintiffs are entitled to judgment as a matter of law.

¹ The Parties have agreed to waive timelines associated with summary judgment in order to facilitate bringing this matter to prompt final conclusion. The Defendants will respond to this motion in accordance with a schedule to be established by the Court to facilitate a prompt final hearing on the merits.

Amendment 8, if enacted, will result in a substantial reduction of state funding to local school districts, money intended to be used for the purpose of reducing the number of students in school classrooms. The amendment will substantially reduce the funding requirement placed on the State of Florida, expressed in Article IX, Section 1(a) of the Florida Constitution that “the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms” to ensure that children in grades pre-kindergarten through 3rd grade are taught in classes which do not exceed 18 students; children in grades 4 through 8 are taught in classes which do not exceed 22 students; and children in grades 9 through 12 are taught in classes which do not exceed 25 students. The amendment also repeals the funding needed to reduce overcrowded classrooms by two students per year as presently required.

Using wording which can only be described as confusing, Amendment 8 speaks to providing “sufficient funds to maintain the average number of students” required by the amendment, without disclosing to the voter that, in fact, passage of the amendment does not maintain current funding but instead substantially reduces the funds presently required to be provided to local school districts by the State to achieve the goal of smaller classes.

The requirement for any amendment to appear on the ballot is that its title and ballot summary must be accurate and written in **clear and unambiguous language** and must state **the chief purpose of the measure**. Section 101.161(1), Florida Statutes. The title and ballot summary, viewed alone, must “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.” *Voluntary Universal Pre-Kindergarten Education*, 824 So. 2d 161, 166 (Fla. 2002). A voter “must be able to comprehend the sweep of each proposal from a fair notification in the

proposition itself that is neither less nor more extensive than it appears to be.” *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982). Thus, the Supreme Court has held that the application of these principles requires a reviewing court to focus on two questions:

- (1) Whether the ballot title and summary, in clear and unambiguous language, 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.

Florida Marriage Protection Amendment, 926 So. 2d 1229, 1236 (Fla. 2006); *Independent Nonpartisan Comm'n*, 926 So. 2d 1218 (Fla. 2006). These principles are rooted in constitutional law and apply “across-the-board” to all constitutional amendments,” including those proposed by the Florida Legislature pursuant to Article XI, Section 1 of the Florida Constitution. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000); *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008).

The Supreme Court has regularly urged the Legislature to resist the temptation to use deceptive “wordsmithing” in an effort to achieve passage of an amendment:

The voters of Florida should not be subject to sleight-of-hand word games when they enter the voting booth. Rather, the title of a proposed amendment to the Florida Constitution should fairly apprise voters with regard to a proposed amendment... These options would produce a ballot title and summary that would not be misleading. However, the use of a highly specific title, which completely fails to mention a very major and significant aspect of the amendment, causes a proposal to violate the statutory requirements of section 101.161. *See Slough*, No. SC08-1569 at 11-13, 992 So. 2d at 148-49.

Florida law requires the use of straightforward and direct language in a ballot title and summary, not creative “wordsmithing” in an attempt to ensure passage.

Ford v. Browning, (Lewis J., concurring), 992 So. 2d 132, 142 (Fla. 2008).

The Supreme Court has not hesitated to remove measures from the ballot when the title and ballot summary include terminology that is misleading or which omits material facts which are required to ensure that the ballot summary is not misleading, *Limited Political Terms*, 592

So. 2d 225 (Fla. 1991); *Casino Authorization*, 656 So. 2d 466, 469 (Fla. 1995) (holding that “This language is misleading not because of what it says, but what it fails to say”), or contains an ambiguity requiring the voter to guess at an amendment’s true meaning or effect. *Smith v. American Airlines*, 606 So. 2d 618 (Fla. 1992); *Right of Citizens to Choose Healthcare Providers*, 705 So. 2d 563 (Fla. 1998).

Measured against these standards, Amendment 8 contains flaws which are materially misleading, thereby requiring the removal of the amendment from the ballot.

(1) The Present Language in Article IX, Section 1(a) Concerns Funding

Article IX, Section 1(a) of the Florida Constitution requires the State of Florida, as part of its “paramount duty” to provide a high quality system of public schools, to make “adequate provision” to fund smaller classrooms. Article IX, Section 1, Florida Constitution. A review of the recent amendments made to Article IX is useful.

In 1996, a coalition made up of Florida School Boards brought an action challenging the adequacy of school funding under the provisions of Article IX as it then existed. In *Coalition for Adequacy v. Chiles*, 680 So. 2d 400 (Fla. 1996), the Supreme Court determined that the Constitution did not then contain appropriate standards defining what was required for the “adequacy” funding requirement to be measured and met. In 1998, in response to the *Coalition* decision, the Constitutional Revision Commission proposed, and the people of Florida adopted, amendments to Article IX which established standards for determining the adequacy of funding public education. *Bush v. Holmes*, 919 So. 2d 392, 406 (Fla. 2006).

In 2002, the people of Florida again amended Article IX imposing further objective funding requirements on the State. The so-called “Class Size Amendment” which resulted in the current language which appears in Article IX, Section 1(a), directed the State to provide funding

to pay for smaller classes for Florida's public school children. When the Supreme Court reviewed the 2002 amendment for compliance with the single subject and ballot clarity requirements, it agreed with the proponents of the amendment that "only the Legislature, in the manner in which it provides funding for school classrooms, will be required to act as a result of this amendment." *Amendment to Reduce Class Size*, 816 So. 2d 580, 584 (Fla. 2002). In effect, the Class Size Amendment prescribed additional funding requirements—additional standards for determining the adequacy of funding public schools. The Class Size Amendment imposed a funding obligation on the Legislature to make adequate provision to pay for smaller classes in order to meet the numeric class size goals expressed in Article IX, Section 1(a), 1-3; it is a funding provision.

(2) Amendment 8 Fails to Disclose it Will Reduce State Funding of Education

The ballot title states that Amendment 8 is a "Revision of the Class Size Requirements for Public Schools." The title presents no indication that funding would be reduced as a result of the revision. Neither does the ballot summary in "clear and unambiguous" language, apprise a voter that approval of the amendment will result in a significant ongoing reduction of the State's obligation to pay for reduced class sizes. To the contrary, the ballot summary, in language which can only be described as unclear, first states the current goals expressed in the constitution relating to the maximum number of students who can be assigned to a particular classroom and then discusses that such current limits "would become limits on the average number of students assigned per class to each teacher, by specified grade grouping, in each public school." While the summary does acknowledge that such averaging may result in up to 3 extra students being placed in Prekindergarten through grade 3 classrooms, and 5 extra students being placed in grade 4 through 12 classrooms, it wholly fails to inform the voter that such "averaging" will also

substantially diminish the amount of funding which the State is now required to provide to local school districts to achieve smaller classes. For the 2010-2011 school year, the State Board of Education determined that categorical funding to pay for smaller classrooms, as required under the present language of Article IX, of approximately \$354 million additional dollars is needed.² Were Amendment 8 to be enacted, the State would be relieved of providing such funds.

While the news media and third party organizations³ have recognized the substantial reduction in the State's funding obligation that passage of Amendment 8 will engender, the ballot title and summary are silent with regard to the drastic reduction in funding. So, too, the Legislature, in its February 15, 2010 staff analysis of SJR 2 (which became Amendment 8) stated that Amendment 8's passage "[r]epeals the requirement for funding the annual average two-student-per-year reductions to class size to achieve the constitutional class size limits." (see "Bill Analysis and Fiscal Impact Statement," Senate Education Pre-K-12 Committee, February 15, 2010).⁴ However, the ballot title and summary are silent with respect to this repeal and the substantial diminution of State funding which enactment of Amendment 8 will bring.

Indeed, the only reference to funding in the ballot summary is affirmatively misleading. It refers to providing "sufficient funds to *maintain* the average number of students required by this amendment." (Emphasis added). The summary wholly fails to apprise the voter that the language relating to providing sufficient funds to maintain the average, in reality is a substantial reduction in the funds presently required from the State to carry out its "paramount duty" to

² See, page 2, "Class Size Reduction," State Board of Education Meeting Minutes, Sept. 15, 2009, "Proposed 2010-2011 Legislative Operating and Fixed Capital Outlay Budget Request" http://www.fldoe.org/board/meetings/2009_09_15/budget.pdf

³ In a Research Report, prepared by Florida TaxWatch, the conclusion is that "Amendment 8 will undoubtedly save a lot of money" which TaxWatch estimates "could range from \$350 million - \$1 billion annually," page 9, <http://www.floridataxwatch.org/resources/pdf/07232010Amendment8CSR.pdf>

⁴ See, page 6 "Bill Analysis and Fiscal Impact Statement" <http://www.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s0002.ed.pdf>

provide a high quality system of public schools. It must be kept in mind that the money allocated for class size reduction is not limited to the construction of school classrooms. Rather, a substantial portion of the class size reduction funds have been allocated to ensuring that sufficient numbers of faculty and supplies are present, as well, in public schools in order to meet the constitutional requirement of adequate funding for a high quality system of free public schools.

By contrast, the ballot summary to the original Class Size Amendment which was presented to the people for approval in 2002, clearly stated that it was all about funding. Thus, the ballot summary in 2002 provided that the ballot proposal:

Proposes an amendment to the State Constitution to require that the Legislature provide funding for sufficient classrooms so that there be a maximum number of students in public school classrooms for various grade levels; requires compliance by the beginning of 2010 school year; requires the Legislature, and not local school districts, to pay for the costs associated with reduced class size; prescribes a schedule for phased-in funding to achieve the required maximum class size. (Emphasis added).

(available at <http://election.dos.state.fl.us/initiatives/fulltext/pdf/34393-1.pdf>)

To be certain, the disclosure of the substantial funding obligation which was created in the 2002 proposal placed the likelihood of public support in question. The then Governor of Florida, campaigning against the amendment, forecast that the cost would “blot out the sun.” However, notwithstanding the clear statement that the amendment would result in increased costs for support of smaller classes in public schools, the people approved of and adopted the Class Size Amendment.

We submit that if the ballot summary for Amendment 8 in “clear and unambiguous” language were to describe the substantial loss of State funding which would accompany its passage, only then would voters be able to make an informed decision on whether they approve of reducing the State’s obligation to adequately fund public schools. That is, a voter may agree


with the concept of using a school wide average of the number of students who can be assigned to classrooms, rather than a class-by-class head count, while at the same time disagree with reducing the overall obligation of the State to continue to provide the same level of funding which is now required. However, neither the ballot title nor summary provide any inkling that passage of Amendment 8 will result in a loss to local school districts of State funding. By omitting this fact, the amendment clearly "hides the ball" and "flies under false colors" by pretending that it is about something other than the reduction of funding.

Accordingly, the Plaintiffs submit that the ballot title and summary to Amendment 8 do not meet the requirement of Section 101.161(1), Florida Statutes, that requires the title and ballot summary to be accurate and written in clear and unambiguous language which states the chief purpose and the effects passage of the Amendment will have. A survey of Supreme Court case law reviewing proposed constitutional amendments over the past thirty years reveals that the Court has never sustained a proposition where the ballot title and summary omit a material fact or contain misleading statements of the type and magnitude of the flaws contained in Amendment 8, as discussed above. The Court is respectfully urged to order that the proposition be removed from the ballot.

Respectfully submitted,

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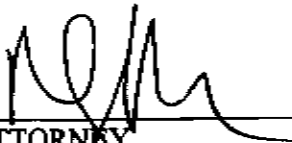
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy has been provided to the following by United States Postal Service and by electronic mail on this 3rd day of August, 2010 to: C.B. Upton, II, Esquire, General Counsel, Florida Department of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399 (CBUpton@dos.state.fl.us) and Jon Glogau, Esquire, Assistant Attorney General, 400 South Monroe Street, Room PL-01, Tallahassee, Florida 32399-6536 (jon.glogau@myfloridalegal.com).



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