

**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,

vs.

CASE NO.: 2010-CA-002537

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

Defendants.

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**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, pursuant to this Court's Scheduling Order dated August 6, 2010,<sup>1</sup> respectfully submit this response to Defendants' Cross-Motion for Summary Judgment. As set forth below, Defendants have failed to demonstrate that they are entitled to judgment as a matter of law. Accordingly, Defendants' Cross-Motion for Summary Judgment should be denied and Plaintiffs' Motion for Summary Judgment should be granted.

Defendants take the remarkable position that neither the existing provisions relating to class size in Article IX, Section 1 of the Florida Constitution (added by the "2002 Class Size Amendment") nor proposed Amendment 8 primarily pertain to the funding of public schools. This position is conclusively refuted as a matter of law by the plain text of the amendments and

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<sup>1</sup> After entry of the scheduling order, the parties stipulated to allow Plaintiffs until September 1, 2010, to file this response.

their history. Defendants persist in attempting to hide from Floridians the significant negative effect Amendment 8 would have upon Floridians' existing constitutional right to require the Florida Legislature to fund public schools to meet specific targets at the classroom level. Defendants seek to perpetuate the fantastical view reflected in the legislatively-drafted ballot summary that Amendment 8 has nothing to do with money and everything to do with concern for school districts' "flexibility." The state intentionally paints this mythical picture because if the true purpose and effect of Amendment 8—reduction of state funding of public schools—were clearly and unambiguously conveyed to voters, the amendment would certainly be defeated. This gamesmanship is not permitted by the Florida Constitution. Amendment 8 must not be submitted to the voters.

Because the deadline has passed for removal of Amendment 8 from the printed ballots, the appropriate remedy is for the Court to direct that votes cast for or against Amendment 8 will not be counted for approval or rejection of the amendment, and to direct that voters be given notice to this effect at each polling place.

### **I. Legal Standard**

Courts afford a measure of deference to the legislature in reviewing legislatively-proposed amendments. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) ("our first duty is to uphold [the legislature's] action if there is any reasonable theory under which it can be done") (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). "This deference, however, is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Id.* Thus, the deference to legislative enactments does not exempt legislatively-proposed amendments from application of the same standard applicable to all proposed amendments, *i.e.*, whether the ballot

title and summary set out the chief purpose of the amendment so as to give the electorate fair notice of the actual change in the constitution wrought by the amendment. *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982). Where it is shown clearly and convincingly that ballot language is misleading to the public concerning material changes to an existing constitutional provision, the court will strike the language from the ballot. *Id.* at 156.

**II. Article IX, Section 1 of the Florida Constitution confers upon Floridians a constitutional right to have the Florida Legislature fund public education at a level sufficient to meet the class size targets specified in that section.**

Defendants assert that the chief purpose of the 2002 Class Size Amendment (now embodied in Article IX, Section 1 of the Florida Constitution) was *not* to “increase, decrease, or mandate specific levels of state education funding [but rather] to establish . . . specific limits on the number of students per teacher in Florida’s public school classrooms.” (Defendants’ Motion at 8.) This assertion ignores major portions of this provision:

. . . . 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 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 . . . .

Art. IX, § 1, Fla. Const. (emphasis added). While the provision does indeed establish specific goals for the number of students per teacher in public school classrooms, of even greater importance is that the provision expressly imposes full fiscal responsibility for meeting these goals upon the state. Defendants dismiss the significance of these provisions as a “simple allocation of responsibility to the Legislature to provide funds as necessary to reduce class sizes

by 2010” (Defendants’ Motion at 9), but this dismissive characterization of the funding component of the provision cannot be reconciled with the provision’s plain text.

Defendants’ contention that this provision does not provide a “particular level” of funding is also belied by the provision itself. The provision unequivocally imposes an obligation on the Florida Legislature, and not local school districts, to fund public schools at a level sufficient to meet the specified classroom levels. Simultaneously, the provision grants Floridians a constitutional right to have public schools sufficiently funded *by the state* to meet the specified levels. The fact that the constitution imposes the funding requirement in the form of target classroom sizes, instead of specific dollar amounts, does not diminish the significance of the state’s obligation or the right of the citizens to seek to enforce it.

In addition to the plain text of Article IX, Section 1, the history of its adoption further supports the primacy of the funding component. The majority of the ballot summary for the 2002 Class Size Amendment focused on funding:

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 classes for various grade levels; requires compliance by the beginning of the 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.

*Advisory Opinion to the Attorney Gen. re Florida’s Amendment to Reduce Class Size*, 816 So. 2d 580 (2002) (emphasis added). And the Florida Supreme Court expressly found that the “primary purpose” of the amendment was “*the legislative funding of reduced classroom size.*” *Id.* at 585 (emphasis added).

Defendants’ assertion that the Court found the goal of the amendment “as being about maximum class sizes without express funding dictates” (Defendants’ Motion at 10) misreads the

Court's decision. In addressing the opponents' argument that the Class Size Amendment violated the single subject requirement because it would substantially alter or perform multiple functions of state government, the Court distinguished the challenged amendment from those which specified a certain amount or percentage of the budget to be spent. *Id.* at 584; *see also Advisory Opinion to the Attorney Gen. re Requirement for Adequate Public Education Funding*, 703 So. 2d 446 (Fla. 1997) (finding initiative petition which would require at least 40% of total appropriations to be spent on public education violated single subject requirement, because it would substantially alter the legislature's discretion to make appropriations among the vital functions of state government). The Court further rejected the opponents' argument that the 2002 class size amendment would intrude upon the functions of the local school board, finding the amendment did not require the legislature to meet its funding obligation by building new schools. *Advisory Opinion to the Attorney Gen. re Florida's Amendment to Reduce Class Size*, 816 So. 2d at 584-85. Instead, the amendment allowed the legislature flexibility in meeting the classroom levels "and places the obligation to ensure compliance on the Legislature, not the local school boards." *Id.* at 585.

These indisputable and unremarkable findings—that the 2002 Class Size Amendment does not specify a certain amount or percentage of the budget to be spent and does not require the legislature to meet its funding obligation by building new schools—in no way diminish or lessen the significance of the funding requirement contained in the 2002 amendment. This amendment, now embodied in Article IX, Section 1 of the Florida Constitution, unmistakably provides Floridians a constitutional right to have the legislature provide sufficient funding to public schools to meet the maximum class size goals specified in that provision.

Contrary to Defendants' contention, the right conferred in Article IX, Section 1(a) did not expire at the beginning of the 2010 school year. Indeed, this section requires that the classroom

size goals be met by the beginning of the 2010 school year. But nothing in this section suggests the legislature has no funding obligation after this date. The constitution provides “the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that . . . .” Thus the beginning of the 2010 school year is the *start date* of the time period in which legislature must ensure the class size objectives of section (1)(a) are met; it is not an end date. Article IX, Section 1 of the Florida Constitution also expressly provides that the costs associated with reducing class sizes to meet the requirements must be borne by the state, not local school districts. This express imposition upon the state of the obligation to pay for the costs of *reducing* class sizes to meet the requirements does not detract from the similarly express imposition upon the legislature of the obligation to make sure that there are sufficient classrooms to meet the class size targets set forth in Section 1(a)(1)-(3), beginning with the start of the 2010 school year. To the extent Defendants contend this legislative obligation evaporated with the start of the present school year, Defendants are urging an implied repeal of a constitutional provision which is highly disfavored. *E.g., Advisory Opinion to Attorney Gen. re Standards For Establishing Legislative Dist. Boundaries*, 2 So.3d 175, 190 (Fla. 2009).

Even if Defendants were correct that the legislative obligation to fund the constitutional class size levels expires once these levels are met, by the state’s own calculations the levels have not yet been achieved. The state estimates that between 28-37% of individual classrooms in traditional schools would not be in compliance with the constitutional class size maximums by the start of the 2010-2011 school year. *See The Florida Senate, Bill Analysis & Fiscal Impact Statement for SJR 2 at 4, attached to Defendants’ Motion for Summary Judgment as Tab A.* Therefore, it cannot be disputed that the Florida Legislature has a present obligation to fund

public schools at a sufficient level to meet the class size specification in Article IX, Section 1 of the Florida Constitution.

**III. By substantially diluting the class size requirements in Article IX, Section 1 of the Florida Constitution, passage of Amendment 8 would substantially dilute Floridians' constitutional right to have the Florida Legislature fund public education at the class size levels currently required by the Florida Constitution.**

In evaluating an amendment's chief purpose, a court must look 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 v. Harris*, 773 So. 2d 7, 18 (Fla. 2000). The chief purpose and effect of Amendment 8, on its face, is to reduce the level at which the Florida Legislature is obligated to fund public schools. Whereas the legislature currently must make adequate provision to ensure that the maximum number of students assigned to each teacher does not exceed 18 students in grades prekindergarten-3, 22 students in grades 4-8, and 25 students in grades 9-12, under the amendment the funding obligation would permit a higher maximum number of students assigned to each teacher in each of these grade groupings, *i.e.*, 21, 27, and 30 students, respectively. Additionally, under Amendment 8 the legislature would be required to make adequate provision to ensure that the *average* number of students per class in each *school*, as opposed to the *maximum* number of students *per teacher*, does not exceed 18, 22, and 25 students for the respective grade groupings. No evidence is required to show that these relaxed standards will require less state money to accomplish than the existing constitutional standards; the proposed amendment's negative effect upon the Florida citizens' right to legislative funding

of the levels currently specified in Florida Constitution is “inherent in the amendment itself.” *Armstrong*, 773 So. 2d at 18.<sup>2</sup>

Defendants nevertheless assert that the chief purpose of Amendment 8 has nothing to do with funding, but rather is solely to provide local school districts with “flexibility” to meet the constitutional class size requirements. This assertion ignores the elephant in the room, or more precisely, in the constitution. If the existing provisions of Article IX, Section 1 were framed solely as a free-standing constitutional right to have class sizes not exceed certain levels, or even to require school districts to provide for certain class sizes, then Defendants’ characterization of Amendment 8 as relating solely to “flexibility” would be plausible. But the class size limitations in Article IX, Section 1 are not free-standing requirements; they are inextricably linked with the state legislature’s obligation to fund them. These provisions cannot be decoupled; a dilution of the class size requirements in Article IX, Section 1 necessarily means a dilution of Floridians’ constitutional right to the funding provisions of Article IX, Section 1.

**IV. The ballot title and summary for Amendment 8 hide the ball regarding the amendment’s chief purpose and effect of substantially diluting Floridians’ constitutional right to have the Florida Legislature fund public education at the class size levels currently required by the Florida Constitution.**

The merit or wisdom of Amendment 8 is not before the court. The Florida Legislature is free to propose, and Florida citizens are free to adopt, any change to the organic law of this state. There is but one simple requirement: voters “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.” *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976). More specifically, where ballot language “does not inform the voter of the true purpose and effect of the

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<sup>2</sup> Plaintiffs disagree that there is a genuine issue as to any material fact that would foreclose disposition of this case by summary judgment. However, to the extent Defendants contend there are material facts in dispute, Plaintiffs submit that any such dispute would foreclose the entry of summary judgment for either party.

amendment on existing constitutional provisions,” it must not be presented to the voters. *Fla. Dep’t of State v. Fla. State Conf. of NAACP Branches*, No. SC10-1375, slip op. at 13 (Fla. Aug. 31, 2010).

The ballot language for Amendment 8 fails this test. Although the ballot language faithfully portrays the changes in the calculation of the permitted class sizes, it carefully and glaringly omits mention of the fact that the constitution currently requires the state, and not local school districts, to fund public schools at a level sufficient to meet the levels currently specified in Article IX, Section 1 of the Florida Constitution. Because this effect on a current provision of the constitution is a chief purpose and effect of the amendment, failure to address it in the ballot summary hides the ball from voters. *Fla. State Conf. of NAACP Branches*, No. SC10-1375, slip op. at 11 (“Nowhere does the ballot language inform the voter that there is currently a mandatory contiguity requirement in article III, and nowhere does the language inform the voter that the contiguity requirement could be diluted by Amendment 7.”). Additionally, Amendment 8’s ballot summary affirmatively misleads voters by stating it requires the legislature to provide sufficient funds to “maintain” the average number of students required by this amendment. In fact, by raising the maximum number of students permitted in each class, and by changing the calculation of class size limitations from a per teacher level to a school average, the amendment *reduces* the level of the legislature’s funding obligation to public schools. *E.g., Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (statement that amendment would “establish” citizens rights in civil actions was misleading where amendment actually capped level of recoverable noneconomic damages).

These deficiencies will have real effects on voters’ understanding of Amendment 8. Because the ballot title and summary do not inform voters that the constitution currently requires the legislature to fund public schools at a level necessary to satisfy the present class size

requirements, some voters are likely to believe that their local school districts are forced to fund the requirements and believe a favorable vote on the amendment will lessen the local burden and even avoid an increase in local property taxes. Only if voters are presented with a ballot summary that clearly and unambiguously discloses the state's present constitutional obligation to fund specific class size levels, and the proposed amendment's effect upon this obligation, will the voters be able to make an informed decision of whether to vote to approve or reject the amendment. Because the ballot summary omits this information, any vote by the electorate on Amendment 8 would be a nullity.


### **CONCLUSION**

Wherefore, Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment because Defendants have failed to demonstrate they are entitled to judgment as a matter of law. Further, Plaintiffs respectfully request that this Court grant summary judgment in favor of Plaintiffs, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

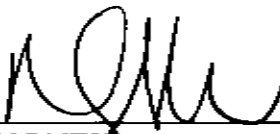
**I HEREBY CERTIFY** that a copy has been provided to the following by United States

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