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

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.,

Plaintiffs,

vs. Case No. 2018-CA-001523

KEN DETZNER, in his official capacity as Florida Secretary of State,

Defendant.
_____/

PLAINTIFFS' RESPONSE TO
DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 1.510 of the Florida Rules of Civil Procedure and this Court's July 23, 2018 Scheduling Order, Plaintiffs submit this Response to "Defendant's Consolidated Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment" and Reply in Support of Plaintiffs' Motion for Summary Judgment.

ARGUMENT

Defendant acknowledges that the purpose and effect of the portion of Revision 8[1] that addresses the authority of local school boards is to eliminate their exclusive authority to operate, supervise and control all public schools within the school district and to eliminate their exclusive

[1] Contrary to Defendant's contention (Defendant's Cross-Motion 1 n.1), Plaintiffs are correct in referring to the challenged revision as "Revision 8." As explained in Plaintiffs' Motion for Summary Judgment, although the Constitution Revision Commission designated this measure as Revision 3, it will appear on the ballot as Revision 8 because it follows other measures previously approved by the legislature and citizen petitions. (Plaintiffs' MSJ 5). The rules of the Division of Elections plainly provide that a revision commission proposal shall be "be titled and designated" as a "Constitutional Revision," not a constitutional amendment. *See* Rule 1S-2.0011(1)(b), Fla. Admin. Code.

authority to authorize new public schools in the first instance. (Defendant's Cross-Motion 14-15, 17-18). Yet Defendant argues that the failure of the ballot title and description for Revision 8 to clearly disclose this intention in terms an ordinary voter could understand is not fatal. In fact, because these intentions are not clearly and unambiguously communicated to voters, Revision 8 must be removed from the ballot.

1. CRC Discussion and Debates are Highly Relevant

As a threshold matter, Defendant's contention that this Court should not consider the discussion and debate of the Constitution Revision Commission (CRC) in considering the chief purpose and intended effect of the revision is contrary to the well-established principle that constitutional amendments are to be construed consistent with the intent of the framers and voters. *See, e.g., Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n*, 838 So. 2d 492, 501 (Fla. 2003). The Florida Supreme Court has often examined the discussions and debates conducted by the CRC in ascertaining the framers' intended meaning of a constitutional amendment. *See, e.g., id.* at 503 (citing CRC discussion immediately before revision was approved for placement on the ballot); *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So. 2d 567, 569-70 (Fla. 1983) (reaching conclusion regarding meaning of constitutional provision "primarily based on the intent of the drafters . . . [a]fter reviewing all of the transcripts available from meetings of the Constitutional Revision Commission"); *see also Brinkmann v. Francois*, 184 So. 3d 504, 511-12 (Fla. 2016) (citing commentary on CRC as grounds for rejecting appellant's proposed interpretation of constitutional provision).

Here, as demonstrated in Plaintiffs' Motion for Summary Judgment as well as in this Response/Reply, both the ballot summary and the text of the revision are sufficiently cryptic so as to obscure their meaning. The CRC minutes disclose the chief purpose of the amendment – to

allow charter schools to be authorized by outside groups – which is not clear in its text, and hence the CRC minutes are vitally important to whether the ballot description for Revision 8 is accurate. *Caribbean Conserv. Corp.*, 838 So. 2d at 501 (where intention of constitutional provision cannot be determined from its plain language, the Court is required to look further than simply at the plain language to determine the intent of the provision).

2. Ballot Language is Not Immune from Challenge if it Tracks Amendment Language

Defendant also repeatedly argues that consideration of the CRC minutes is unnecessary because the ballot language purportedly accurately tracks the language of the proposed amendment. (Defendant's Cross-Motion 20, arguing that because "[t]he current language of article IX, section 4(b) has not been construed to be misleading … [i]t follows that the ballot summary, in tracking that language, likewise is not misleading"). But Defendant's assumption that a summary is immune from challenge if it merely tracks the language of the revision is contrary to established Florida law. As the Supreme Court has explained, where amendment text does not give voters notice of an important effect, a ballot summary that similarly fails to do so is deficient. *Florida Dep't of State v. Florida State Conf. of NAACP Branches*, 43 So. 3d 662, 668-69 (Fla. 2010) (nullification of existing constitutional requirement which was not clear from amendment text "should have been clearly and unambiguously stated in the ballot language").

3. Defendant Does Not Rebut Plaintiffs' Showing that the Ballot Language Contains Significant Omissions

a. <u>"Charter Schools"</u>

Defendant's contention that the omission of the term "charter schools" from the ballot summary is unimportant because the constitution itself does not mention charter schools reveals a lack of understanding of the purpose of the ballot summary. The ballot summary must state the "chief purpose" of the amendment, which is determined by consideration of the amendment's

"true meaning, and ramifications." *Florida State Conf. of NAACP Branches*, 43 So. 2d at 667. Defendant readily acknowledges that, of the alternatives to traditional schools, charter schools are the "[m]ost significant as of this particular time in our history."[2] (Def. Cross-Motion 16-17). Defendant even cites to the Department of Education website—notwithstanding his earlier contention that no facts beyond the text of the summary and revision are relevant to this proceeding—to support the assertion that charter schools "are very popular" and "among the fastest growing school choice options in Florida." (*Id.* at 18). These assertions by Defendant confirm, rather than refute, that the chief purpose and effects of the revision relate to a single category of public schools, *i.e.*, charter schools, and that the failure to mention charter schools by name is an attempt to "hide the ball" regarding this chief purpose.

b. Authorization of Charter Schools

Defendant unambiguously acknowledges that a key purpose of the relevant portion of Revision 8 is to eliminate the exclusive power of the school boards to "authorize" charter schools, which power was recognized in *Duval County School Board v. State, Board of Education*, 998 So. 2d 641 (Fla. 1st DCA 2008). (Def. Cross-Motion 17-18). Yet Defendant can point to nowhere in the ballot summary that this purpose and effect is communicated. Even if it could be said that the authority to "authorize" new public schools is subsumed within the authority to "establish" new public schools (a proposition which, as discussed below, is far from clear), the ballot summary does not give fair notice that the result of Revision 8 will be to

[2] Defendant does attempt to suggest that omission of the word "charter" is appropriate because there are purportedly other categories of school besides public schools and charter schools. (Defendant's Cross-Motion 16-17). But Defendant's argument to that effect and citations to various provisions of Florida law do not respond to Plaintiffs' observation that each of these types of school either predates the 1968 constitution, is, like a traditional public school, supervised by a district school board, or is in fact a charter school. (Plaintiffs' MSJ 13 and n.3).

eliminate the school boards' exclusive authority to authorize new public schools, including charter schools, and to allow such schools to be authorized by some new, undefined entity. As explained more fully in Plaintiffs' Motion for Summary Judgment, this omission renders the ballot summary for Revision 8 fatally defective. (Plaintiffs' MSJ 11-16).

4. The Phrase "established by the district school board" is Ambiguous

Defendant's Cross-Motion also fails to resolve the confusion created by the ambiguous phrase "established by the district school board" in both the revision text and ballot summary. Although Defendant correctly acknowledges that the Florida Constitution does not specify how or by whom public schools are established (Def. Cross-Motion 17), the Cross-Motion itself offers mixed messages as to whether or not school boards currently "establish" all public schools under the constitution.

On the one hand Defendant suggests that some existing public schools (presumably charter schools) may not have been established by school boards, by suggesting that Revision 8 will "eliminate [a school board's] existing constitutional authority to control public schools that have **not** been established by it" and that if Revision 8 passes, "then school boards across the state will no longer have control over public schools they do not establish." (*Id.* at 15) (emphasis in original). On the other hand, Defendant unequivocally contends that the current constitution authorizes local school boards to establish all public schools, including charter schools. (*Id.* at 18-19) (stating that Article IX, Section 4 "gives rise to local school boards' authority to establish and run charter schools"); (*see also id.* at 21) ("If the school boards were without power to establish and control charter schools under the current wording of article IX, section 4(b) . . . there would be no charter schools in Florida at all.")

Under either view, Revision 8 would constitute a significant change which voters must understand in order to make an informed vote. If local school boards are deemed *not* to have "established" charter schools, then Revision 8 would remove the school boards' authority to operate, control and supervise all charter schools in the state. If, on the other hand, local school boards are deemed to have exclusive authority to establish all public schools, including charter schools, then Revision 8 obliquely eliminates that exclusive authority and opens the door for some other unspecified entity to establish new public schools, including charter schools. Neither of these two possible effects is clearly communicated to voters, and worse yet, there is no place voters can go for an answer as to which effect will occur—because no answer exists under current law.

In sum, the use of the vague, undefined phrase "established by the school board" renders it impossible for voters to know the revision's true effect and ramifications, and calls for the revision to be stricken from the ballot. (See Plaintiffs' MSJ 15) (citing *Advisory Op. to the Atty. Gen. re Amendment to Bar Govt. from Treating People Differently*, 778 So. 2d 888, 898-99 (Fla. 2000) and *Advisory Op. to the Atty. Gen. re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use*, 699 So. 2d 1304, 1308-09 (Fla. 1997)).

5. The Reference to Regulation by the State is Affirmatively Misleading

Defendant acknowledges that the text of Revision 8 does not expressly grant the state the authority to regulate schools not "established by the district school board." (Def. Cross-Motion 20, 23). Defendant appears simply to assume that "the state" will regulate schools not "established by the school board[s]" because, under Article IX, Section 1(a) of the Florida Constitution, "the state" has "a paramount duty . . . to make adequate provision for the education of all children residing within its borders" and "[a]dequate provision shall be made by law for a

uniform, efficient, safe, secure and high quality system of free public schools" in Florida. (Def. Cross-Motion 16).

But this is not a well-founded assumption, as the revision itself is silent on what entity will be given the authority to operate, control and supervise schools not established by the school board. And the discussion and debate of the CRC make clear that it quite intentionally *did not* specify that it would be "the state" that would undertake the duties of the school board, in order to allow a diverse range of possible overseers. Specifically, the sponsor, Commissioner Donalds stated:

- "I would expect that [] the Legislature would define what the governance structure would be." (Appendix 7 at 56).
- [T[he top five authorizers in the country are . . . [a] non-profit, a state University, a state board of education, a local school district and a charter board." (*Id.* at 60).
- "I could have said we are going to create a state authorizing board. . . [I]n looking at what a quality authorizer is across the country, I have found that it is not always a state board." (*Id.* at 61-62).
- "I want to leave that to the Legislature to decide what is going to work for Florida based on their thorough vetting of the issue to see what is going to be the top quality solution." (*Id.* at 62)
- "I don't want to define what their oversight looks like." (*Id.* at 65).

Whereas the CRC intentionally did not specify who or what would operate, control and supervise schools not established by the school board, the ballot summary seeks to fill this gap by saying that the proposal permits "the state" to do so. Thus voters are led to believe that the state will conduct oversight of schools no longer overseen by school boards when it is wholly unknown and, given the history of the proposal, unlikely that will be the case. This is precisely why Commissioner Donalds opposed an amendment to change the title to read, "Alternative State Supervision of Certain Public Schools," because "[i]t is assuming what the Legislature will do if this proposal passes as opposed to what the proposal actually does if it passes." (Appendix 8 at 147-48, 154). On this point, Commissioner Donalds was entirely correct. The reference to

state oversight in the ballot summary adopted by the CRC suffers from the same problem. Because it affirmatively misleads voters by telling them the state will oversee schools no longer overseen by school boards, the revision must be stricken.

6. Logrolling

Finally, this Court must reject Defendant's implicit contention that no amount of logrolling by the Constitution Revision Commission could ever render a revision defective. (Def. Cross-Motion 24). Plaintiffs do not contend that the Florida Constitution imposes a single subject requirement on proposals by the CRC. However, Plaintiffs do contend that where, as here, the logrolling rises to the level of rendering the ballot summary deceptive, this violates the Florida Constitution's accuracy requirement which *is* applicable to CRC revisions.

The Florida Supreme Court has explained that the reason citizens' initiatives are subject to a single subject requirement, and the other methods of amending the Florida Constitution are not, is because the initiative method does not provide a "filtering legislative process for the drafting of any specific proposed constitutional amendment or revision." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). In contrast, the "legislative, revision commission, and constitutional convention processes . . . all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal." *Id.* According to the Court, "[n]o single-subject requirement is imposed because this process embodies adequate safeguards *to protect against logrolling and deception*." *Charter Review Comm'n v. Scott*, 647 So. 2d 835, 837 (Fla. 1994) (emphasis added).

Thus, the lack of a single-subject requirement for revisions proposed by methods other than citizens' initiative does not operate as a free pass for unlimited logrolling or deception. Rather, it reflects a level of optimism and trust that the processes followed by these other

methods will "protect against logrolling and deception." Where these processes fail, and logrolling and deception occur such that the Court's optimism and trust is misplaced, courts must nevertheless find the products of these processes to be unconstitutional in violation of the applicable section of Article XI of the Florida Constitution.

Here, although the CRC held numerous public hearings, it held none on the combination of proposals contained in Proposal 6003, addressing school board term limits (Proposal 43), the elimination of school board control over public schools not established by school boards (Proposal 71), and the promotion of civic literacy (Proposal 10). (Supplemental Appendix 10, 11) (showing, respectively, the last CRC public hearing was held March 13, 2018, and Proposal 6003 was first considered by the CRC Style and Drafting Committee on April 5, 2018). Thus the entire basis for exempting CRC from a single-subject requirement is inapplicable here.

Moreover, it is readily apparent that the CRC intentionally logrolled Proposal 71 with Proposals 43 and 10 in order to increase the likelihood of passing Proposal 71. Commissioner Donalds, the sponsor of Proposals 43 and 71, specifically noted the high favorability polling of Proposal 43 regarding school board term limits. (Appendix 7 at 6-7). Predictably, this proposal is the only one clearly identified in the revision's title, and it also leads the ballot summary. And the sponsor of Proposal 10 openly acknowledged his expectation that his proposal would help other proposals to which it was connected pass. (Appendix 6 at 464). The CRC clearly sought to leverage these proposals in the most advantageous manner possible, deliberately burying a vague but controversial proposal within other popular and uncontroversial proposals in hopes that they will distract from the controversial one. This conduct does not merit the Court's optimism and trust, and only exacerbates the lack of "truth in packaging" of the ballot summary.

CONCLUSION

For the reasons set forth herein as well as those in Plaintiffs' Motion for Summary Judgment, Plaintiffs respectfully submit that they have demonstrated they are entitled to judgment as a matter of law that Revision 8 fails to comply with Article XI, Section 5 of the Florida Constitution, and therefore must be removed from the ballot for the 2018 General Election.

/s/Lynn C. Hearn
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CERTIFICATE OF SERVICE

Pursuant to Rules 2.516(b)(1) and (f) of the Florida Rules of Judicial Administration, I certify that the foregoing document has been furnished to Blaine Winship (blaine.winship@myfloridalegal.com), The Capital, Office of Attorney General, 400 South Monroe Street, Suite PL-01, Tallahassee, FL 32399-6536, by email via the Florida Courts e-filing Portal this 13th day of August, 2018.

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