

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

RABBI MERRILL SHAPIRO, et al.,

Plaintiffs,

v.

CASE NO. 2011-CA-1892  
(Honorable Terry P. Lewis)

KURT S. BROWNING, in his official  
capacity as Florida Secretary of State,

Defendant,

and

THE STATE OF FLORIDA,

Defendant-Intervenor.

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**DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendant, Kurt S. Browning, Secretary of State, and Defendant-Intervenor, the State of Florida, (Defendants), submit this memorandum in opposition to Plaintiffs' motion for summary judgment, which fails to establish any entitlement to relief. Instead, Defendants are entitled to summary judgment on both counts alleged in Plaintiffs' Complaint.

**I. Amendment 7's Ballot Statement Gives Fair Notice to the Voters of its Chief Purpose and is Not Misleading.**

Amendment 7 meets the standard, upon which the parties agree,<sup>1</sup> that its ballot statement must give fair notice to the voters by clearly and unambiguously describing the amendment's chief purpose and not be misleading. Plaintiffs argue, however, that the ballot statement is defective for three reasons, each addressed in the next sections. Their arguments fall well short

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<sup>1</sup> The parties agree on the legal standard. *Compare* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment ("PMSJ") at 6-7 with Defendants' Motion for Summary Judgment ("DMSJ") at 8-9.

of satisfying their substantial burden to show that “the laws governing the process have been ‘clearly and conclusively’ violated.” Adv. Op. to the Att’y Gen. re: Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 498-99 (Fla. 2002).

**A. The phrase “consistent with the United States Constitution” in the ballot summary is not misleading; it accurately summarizes the First Amendment exception provided in the text of Amendment 7.**

Plaintiffs first argue that the ballot summary’s use of the phrase “consistent with the United States Constitution” falsely implies that the amendment will “conform the Florida Constitution to what is required by the United States Constitution.” [PMSJ 7-8] There is no such implication. The phrase “consistent with the United States Constitution” in the ballot summary refers to the clause of the amendment providing that government benefits cannot be denied on the basis of religion “except to the extent required by the First Amendment of the United States Constitution.” A comparison of the language in the summary with the text of Amendment 7 shows that the summary succinctly covers the main points of the actual proposed amendment. *See* Adv. Op. to the Att’y Gen. re: Fla. Marriage Protection Amendment, 926 So. 2d 1229, 1237 (Fla. 2006) (comparing the summary to what it summarizes – the amendment).

The ballot summary does not imply, as Plaintiffs allege, that the Florida Constitution will be amended to “conform” to only those parts required by the United States Constitution or to make the state constitution “coextensive” with the federal. [PMSJ 8, 11] Rather, the plain meaning of the phrase “consistent with the United States Constitution” in the ballot summary is that the proposed change will be “compatible” with and free from “contradiction” with the United States Constitution.<sup>2</sup> The ballot summary accurately summarizes the relevant clause of

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<sup>2</sup> *See* Merriam Webster’s Collegiate Dictionary 247 (10th ed. 1998) (“Consistent...2 a:...free from variation or contradiction...b: compatible – usu. used with *with*”).

Amendment 7, which ensures consistency with the United States Constitution by providing that government benefits may be denied on the basis of religion “to the extent required by the First Amendment.”

Plaintiffs also argue that the phrase “consistent with the United States Constitution” in the ballot summary is deceptive because Amendment 7 will “actually go well beyond the United States Constitution by compelling the State to extend benefits to religious institutions even when doing so would not be required under the federal Constitution.” [PMSJ 8] While the State may “not be required under the federal Constitution,” to extend funding or benefits to religious individuals and entities as Plaintiffs allege, it is certainly “permitted” to do so by the federal Constitution as Plaintiffs concede. [PMSJ 8-9] The proposed non-discrimination clause, providing that benefits generally may not be denied on the basis of religion, is therefore entirely “consistent with the United States Constitution.”

Plaintiffs correctly point out that the Florida Constitution’s no-aid provision has been interpreted to permissibly “*prohibit*[] public funding of religious entities” because the First Amendment does not *require* such funding. [PMSJ 13 (emphasis in original); *id.* at 9-10 (collecting caselaw analyzing the “play in the joints” of the First Amendment)] On the other hand, the First Amendment *permits* such funding, making the non-discrimination clause, and even the repeal of the no-aid provision, entirely “consistent with” the United States Constitution. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-9 (1993) (reiterating that the Court has “never said that ‘religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs’” and noting the “absurd results” of a contrary rule). Even under Plaintiffs’ reasoning that the “Amendment would *require* the State to extend government benefits to religious entities”—which it would not—such funding would only be to

the extent “permitted by the federal Constitution.” [PMSJ 10 (emphasis in original)] The proposal is thus “consistent with the United States Constitution” because it is permitted by the United States Constitution. Proposing to do what is permitted but not required by the First Amendment in no way “eliminate[s] all ‘play in the joints’” of the First Amendment as Plaintiffs allege—it *is* the play in the joints. [PMSJ 10]

Finally, Amendment 7’s ballot summary does not change the language from “that which is used in the amendment itself” to render it defective as Plaintiffs allege. [PMSJ 11] In support of their argument, Plaintiffs cite several cases involving ballot summaries that were found to be defective because of substituted language. *See id.* In the cited cases, the defective summaries used “substantially different” terms that differed “in material ways” from the text of the proposed amendments. *See Adv. Op. to the Att’y Gen. re: Amendment to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 896 (Fla. 2000) (finding that the term “people” in the summary diverged from the legal term “persons” used in the text); *Adv. Op. to the Att’y Gen. re: Rights of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (noting “material and misleading” discrepancy between the terms “citizens” and “natural person”); *Adv. Op. to the Att’y Gen. re: Casino Authorization, Taxation, & Regulation*, 656 So. 2d 466, 468-69 (Fla. 1995) (noting that the statutory definitions of “hotel” and “transient lodging establishment” are “substantially different”); *Adv. Op. to the Att’y Gen. re: 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 975-76 (Fla. 2009) (stating that the terms “have reached” and “exceed” differ “in material ways”).

Unlike the cases cited by Plaintiffs, Amendment 7’s ballot summary does not employ terminology that is divergent from the text of the proposal and is therefore not defective. To the

contrary, the summary accurately *summarizes*<sup>3</sup> the First Amendment exception to the proposed ban on religious discrimination and comes very close to reiterating the briefly worded amendment. *See Adv. Op. to the Att’y Gen. re: The Medical Liability Claimant’s Compensation Amendment*, 880 So. 2d 675, 679 (Fla. 2004) (upholding summary that came “very close to reiterating the briefly worded amendment”); *see also Marriage Protection Amendment*, 926 So. 2d at 1237 (upholding summary that employed “language that is essentially identical to that found in the text of the actual amendment”).

**B. Amendment 7’s ballot summary clearly and accurately describes the Amendment’s chief purpose: the repeal of the no-aid provision and the addition of a general constitutional prohibition on denials of government benefits on the basis of religion.**

Plaintiffs also argue that the ballot summary is deceptive because it “fails to explain the main effect of the Amendment,” which Plaintiffs misconstrue as “compel[ling] the State to extend benefits to religious institutions even when doing so would not be required under the federal Constitution.” [PMSJ 8; *see also id.* 12-13 (stating that the proposal would “*mandate* such public funding under certain circumstances” that are not identified)] But nothing in the summary or text of Amendment 7 states or implies that the State will be affirmatively required to fund religious institutions in all circumstances as Plaintiffs contend. Rather, the chief purpose of the amendment is the removal of a discriminatory bar to aid (the no-aid provision) and the addition of an express non-discrimination clause that provides a First Amendment exception to ensure it is applied in a manner “consistent with the United States Constitution.” This chief

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<sup>3</sup> Because the amendment’s text states that denials of “funding, benefits, or other support” may not be based on religion—“[e]xcept to the extent required by the First Amendment”—the summary accurately states that such denials may not be based on religion, which is “consistent with the United States Constitution.”

purpose is clearly and unambiguously explained in the ballot summary, as Defendants explained at length in their motion for summary judgment. *See* [DMSJ 9-13]

Plaintiffs also argue that the ballot summary fails to inform voters that Amendment 7 would “take away discretion” (“in extending or denying public funds or benefits to religious entities”) “that the State otherwise would have.” [PMSJ 8, 12] But Plaintiffs fully concede that the Florida Constitution currently provides the State *no* discretion to provide government benefits on nondiscriminatory terms: “Article I, § 3 now *prohibits* public funding of religious entities”. *Id.* at 13 (emphasis in original). Amendment 7 does not “take away discretion,” but represents an exercise of discretion allowed by the “play in the joints” of the First Amendment.

The ballot summary for Amendment 7 accurately describes the Amendment’s chief purpose and is not misleading. The choice of whether to adopt the proposal should therefore be left to the voters.

**C. The ballot title “Religious Freedom” is not misleading; Amendment 7 addresses the topic of religious freedom and proposes to amend the “Religious freedom” section of the Florida Constitution.**

Plaintiffs’ final argument addresses Amendment 7’s ballot title: “Religious Freedom.” [PMSJ 13-14] Plaintiffs claim that the title is misleading because Amendment 7 would “do[] away with the concept of ‘religious freedom’ that is currently embodied in the Florida Constitution”—the no-aid provision—and mandate public funding in its place. *Id.* at 13. As explained elsewhere, nothing in Amendment 7’s text or summary imposes an affirmative obligation to fund religious entities, other than on non-discriminatory terms and to the extent permitted by the First Amendment. *See* [DMSJ 9-12] And Amendment 7’s repeal of the no-aid provision is clearly explained in the ballot summary, which explicitly states that the proposal will “delete the prohibition against using revenues from the public treasury directly or indirectly in

aid of any church, sect, or religious denomination or in aid of any sectarian institution.” The ballot title cannot be read in isolation, it must be “read in context and conjunction with the rest of the language contained in the ballot title *and summary*.” Marriage Protection Amendment, 926 So. 2d at 1240 (emphasis added).

Nor is the ballot title simply “political rhetoric” as Plaintiffs allege. [PMSJ 14] The title here is nothing like the title at issue in the case cited by Plaintiffs, Adv. Op. to the Att’y Gen. re: Save Our Everglades, 636 So. 2d 1336 (Fla. 1994). Whereas the title at issue in Save Our Everglades substituted the “emotional” term “save” for the docile term “restore” that was used in the text, Amendment 7’s title is identical to the title of the section of the Florida Constitution that would be amended: “Religious freedom.” See Health Hazards of Second-Hand Smoke, 814 So. 2d at 421 (explaining the tactic at issue in Save Our Everglades). The title “Religious Freedom” in no way approaches a comparable level of “legerdemain” as at issue in Save Our Everglades. Health Hazards of Second-Hand Smoke, 814 So. 2d at 420 (upholding title and summary that used the term “hazards” because it did “not rise to a comparable level of political and emotional language and subjective evaluation as the language we rejected in Save Our Everglades”).

In addition to being the title of article I, section 3 of the Florida Constitution, “Religious Freedom” is also the topic of the proposed amendment. Plaintiffs acknowledge that the question of whether religious entities may receive government benefits is a matter of religious freedom. See [PMSJ 13-14 (referring to the no-aid provision as “the concept of ‘religious freedom’ that is currently embodied in the Florida Constitution”)]. But Amendment 7’s proposal to repeal the no-aid provision, and replace it with a general constitutional prohibition on denials of government benefits on the basis of religion, is no less a matter of religious freedom. Freedom from discrimination on the basis of religion *is* religious freedom. Plaintiffs simply disagree with the

concept of religious freedom contained in the substance of the proposed amendment. Their arguments would more appropriately be directed to the voters, who should be allowed to decide for themselves whether to adopt the changes proposed in Amendment 7. “[A]pppearance on the ballot simply does not constitute adjudication or acceptance of statements contained therein as a factual determination.” Adv. Op. to the Att’y Gen. re: Protect People From the Health Hazards of Second-Hand Smoke, 814 So. 2d 415, 421 (Fla. 2002).

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The ballot statement for Amendment 7 clearly and unambiguously describes the chief purpose of the amendment and is not misleading. The ballot summary’s use of the phrase “consistent with the United States Constitution” to modify the proposed ban on religious discrimination accurately summarizes the First Amendment exception to that ban, i.e., that religion may be the basis of a denial where the First Amendment would require it. The proposed ban on religious discrimination is “consistent with” the United States Constitution because, as Plaintiffs have acknowledged, such a restriction is permitted by the federal Constitution. Finally, the ballot title is aptly named “Religious Freedom,” as Amendment 7 proposes to amend the “Religious freedom” section of the constitution to provide freedom from religious discrimination.

**II. The Legislature May Lawfully Delegate the Responsibility to Correct a Deficient Ballot Statement to the Attorney General While Lodging Final Review Authority with the Courts.**

The only separation of powers claim Plaintiffs have raised is the prohibition that “no branch may delegate to another branch its *constitutionally assigned* power.” [PMSJ 15 (emphasis added)] The phrase “constitutionally assigned” is emphasized because Plaintiffs entirely overlook that the Florida Constitution contains no assignment of ballot statement drafting

responsibilities to any specific branch. While the constitution authorizes the Legislature to propose constitutional amendments by joint resolution, article XI, section 1, nothing in the constitution mentions—let alone assigns—the responsibility for the preparation of a ballot statement.

This absence of a specific constitutional assignment of this power leaves it to the Legislature to decide how the drafting of ballot statements is to be done. For example, prior to 1973, the Department of State—an executive branch agency—was responsible for “furnish[ing]” the ballot statement to the counties for appearance on the ballot.

Whenever a constitutional amendment or other public measure shall be submitted to the vote of the people ... [t]he phraseology of the substance of the amendment or other public measure, shall be furnished to the several counties by the department of state so as to insure uniformity.

§ 101.161, Fla. Stat. (1971). In 1973, the Legislature—by statute—revised this provision and gave itself the task of specifying the “exact wording” to appear on the ballot. Ch. 73-7, § 1, Laws of Fla. The reason the Legislature currently prepares the initial ballot summaries and includes them in joint resolutions is not that the constitution requires it be done this way; instead, it is the way the Legislature has prescribed by statute.

That is why section 101.161(3)’s new provision, which allows the Attorney General to correct ballot statements that are judicially-determined to be deficient, is a constitutionally permissible exercise of the Legislature’s authority that does not intrude upon a “constitutionally assigned power” in violation of separation of powers principles. Nor is it a “fundamental and primary policy decision” reserved only to the Legislature, nor an “abdication of the legislature’s constitutional duty” as Plaintiffs claim. [PMSJ 15]

Even if preparing and correcting ballot statements were considered a legislative power,<sup>4</sup> it can be delegated as has been done traditionally in section 101.161. The ballot correction process at issue in section 101.161(3) is not a “bald instruction” without any guidelines or standards whatsoever, as Plaintiffs assert [PMSJ 16] To the contrary, the statutory and institutional limits of the ballot integrity process impose highly restrictive parameters rendering the corrective task to be channeled in an exceptionally narrow way. These statutory and institutional limits remove the possibility that an attorney general could somehow thwart ballot integrity or offend well-established, non-delegation principles. *See, e.g., Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978) (“When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature ... then, in fact, the agency becomes the lawgiver rather than the administrator”).

Plaintiffs ignore the many constraints on the Attorney General’s discretion. First, section 101.161(3)(a), sets forth explicit ballot statement guidelines for legislatively proposed amendments:

Each ballot statement shall consist of a ballot title, by which the measure is commonly referred to or spoken of, not exceeding 15 words in length, and either a ballot summary that describes the chief purpose of the amendment or revision in clear and unambiguous language, or the full text of the amendment or revision.

§ 101.161(3)(a), Fla. Stat. Likewise, subsection (3)(b)(3) incorporates relevant ballot statement standards in Florida by reiterating the goal of “a clear and unambiguous statement of the substance and effect of the amendment or revision, providing fair notice to the electorate.”

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<sup>4</sup> If it were so, the ballot statements of all amendments (proposed by initiative, by convention, by the taxation and budget reform commission, or by the constitution revision commission) would fall upon the Legislature’s shoulders to prepare, throwing into doubt the long-standing assignment of responsibilities in section 101.161(2).

§ 101.161(3)(b)(3). Any correction of a court-identified deficiency by the Attorney General would have to meet these requirements.

Second, the language of the proposed amendment itself would dictate the parameters of a ballot statement correction by the Attorney General. A ballot statement does not function in a vacuum, but is a wholly ancillary and subordinate byproduct of the language contained in the proposed constitutional amendment itself. In this context, there is no chance that the attorney general could assume the role of “lawgiver rather than the administrator” (Askew, 372 So. 2d at 919), because ballot statements have no independent “legislative” force and cannot address matters outside of the text of the proposed amendment.

Third, the vast body of ballot summary law significantly constrains the correction process. Any corrections the Attorney General makes would have to be consistent with ballot statement caselaw, *see* [DMSJ 8-9], thereby curtailing the potential for an inaccurate ballot statement.

Fourth, the rewrite statute allows the Attorney General to only “correct[] the deficiencies identified by a court.” § 101.161(3)(b)(2), Fla. Stat. The statute does not permit an attorney general to exercise freewheeling authority either to edit the proposed amendment itself, or to wholesale revise a ballot statement to her liking. The statute severely curtails the attorney general’s authority to merely correcting deficiencies identified by a court.

Finally, the challenged law makes judicial review available should the revised ballot summary be contested. Id. The availability of judicial review further constrains an already highly restricted task, essentially eliminating the potential that a revised ballot statement could stray from the text of the proposed amendment or somehow venture into the exclusive legislative realm of making a “fundamental or primary policy” decision.

Notably, the cases upon which Plaintiffs rely are far afield from the Attorney General rewrite process at issue. Each involves unbridled discretion given to regional planning councils or state agencies overseeing candidate withdrawal processes, license revocations, and so on, that shares little in common with the highly constrained task of correcting a deficiency in a ballot statement. *See* [PMSJ 16-17] Whether a legislative delegation of responsibility is appropriate depends on “the practical context of the problems sought to be remedied or the policies sought to be effected.” Fla. League of Cities, Inc. v. Admin. Comm’n, 586 So. 2d 397, 410 (Fla. 1st DCA 1991); *see also* Clark v. State, 395 So. 2d 525, 527-28 (Fla. 1981). Here, the highly constrained context of the ballot correction process in section 101.161(3)(b)(2) easily distinguishes these cases and makes them inapplicable.

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In short, Plaintiffs mistakenly claim that ballot statement correction process lacks “ascertainable minimal standards and guidelines” to guide the Attorney General’s discretion. The Attorney General’s role is a constrained one without room for her to exercise unbridled discretion; indeed, her role is far more constrained compared to what exists in many other states or compared to the version of section 101.161 that delegated authority to the Department of State prior to 1973. Because section 101.161(3)’s ballot statement correction process operates within highly constrained parameters, no separation of powers or delegation problem exists.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs’ motion for summary judgment should be denied in its entirety and Defendants are entitled to summary final judgment.

Respectfully submitted,

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I hereby certify that, on this 14<sup>th</sup> day of October, 2011, I caused a true and correct copy of the foregoing has been furnished electronically and/or U.S. Mail to:

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