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

RABBI MERRILL SHAPIRO, REVEREND KENT SILADI, REVEREND HARRY PARROTT, JR., REVEREND HAROLD BROCKUS, RABBI JACK ROMBERG, REVEREND BOBBY MUSENGWA, ANDY FORD, LEE SWIFT and SUSAN SUMMERS-PERSIS,

Plaintiffs,

v.

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

Defendant,

and

STATE OF FLORIDA,

Intervenor/Defendant.

Case. No. 2011 CA 1892
(Honorable Terry Lewis)

FILED
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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

During its 2011 Session, the Florida Legislature adopted a proposal to amend Article I, § 3 of the Florida Constitution – the Constitution's provision on "Religious Freedom" – which would be submitted to the electorate at the 2012 general election. The proposed amendment, adopted as CS/HJR 1471, would rewrite Article I, § 3 in two respects.[1] First, it would delete entirely the existing constitutional prohibition – which has remained unchanged for over 125 years – against the use of public funds "in aid of any church, sect, or religious denomination or in

[1] A copy of CS/HJR 1471 is attached hereto as Exhibit A, for the Court's convenience.

aid of any sectarian institution." Second, in a 180-degree departure from that long-standing prohibition on the use of public funds to aid religious institutions, the proposed amendment would *require* the State to extend public funding and benefits to religious entities under certain circumstances.

The joint resolution by which the Legislature adopted this ballot proposition included the text of a ballot title and summary that would be placed on the general election ballot. In a consistent line of authority the Florida Supreme Court has held that such ballot statements must be written to "fairly inform" voters of the chief purpose of the proposed amendment, *Advisory Opinion to the Att'y Gen. re 1.35% Prop. Tax Cap, Unless Vote Approved*, 2 So. 3d 968, 974 (Fla. 2009), and that they must not "hide the ball" from the electors. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000). But the ballot summary enacted as part of CS/HJR 1471 misleadingly suggests that the effect of the proposed amendment would be to bring the Florida Constitution into conformity with the requirements of the United States Constitution – when it would actually require the State to provide benefits or funds to religious entities under circumstances when this would *not* be required by the federal Constitution. In addition, the ballot title itself – which labels the proposed amendment a matter of "Religious Freedom," when its purpose and effect is to do away with the concept of religious freedom that has been part of the Florida Constitution for 125 years – is itself misleading.

Given these fundamental flaws in the ballot language that the Legislature has proposed to submit to the electorate, the plaintiffs – a group of Florida citizens and voters – respectfully request that this Court declare the Legislature's ballot statement defective and enjoin its placement on the 2012 general election ballot. Florida voters are entitled to receive fair notice of what they are being asked to decide, which the proposed ballot statement fails to provide.

Plaintiffs also challenge the constitutionality of the enactment, in the same 2011 Session of the Legislature, of § 101.161(3)(b)(2), Fla. Stat., which purports to delegate to the Attorney General the authority – whenever the courts determine a ballot statement adopted by the Legislature to be defective – to draft a new ballot statement for placement on the ballot. This provision is facially inconsistent with the Constitution's provisions mandating the separation of powers, and it should be declared invalid for that reason.

FACTUAL BACKGROUND

I. The Proposed Constitutional Amendment

CS/HJR 1471, adopted by both houses of the Florida Legislature during its 2011 Session, Compl. ¶ 16; Answer ¶ 16, proposes an amendment to Article I, § 3 of the Florida Constitution, which would be submitted to the electorate at the November 2012 general election.

Article I, § 3, currently provides as follows:

> RELIGIOUS FREEDOM.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. *No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.*

Art. I, § 3, Fla. Const. (emphasis added). This provision has been a part of the Florida Constitution, without change, since 1885. *See* Decl. of Rights, § 6, Fla. Const. of 1885.

The proposed amendment would make two changes to Article I, § 3. First, it would delete entirely the last sentence of the section (italicized above), which prohibits the use of public funds "directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution," and thus imposes restrictions on State support for religion beyond those found in the federal Constitution. *See Bush v. Holmes*, 886 So. 2d 340, 357-61 (Fla. Dist. Ct. App. 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Silver Rose Entm't,*

Inc. v. Clay County, 646 So. 2d 246, 251 (Fla. 1st DCA 1994). Second, the proposed amendment would add a new sentence, which would *require* the State to extend funding to religious institutions under certain circumstances. Thus, upon the favorable vote of the electorate, Article I, § 3 of the Florida Constitution would be amended as follows:

> SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any other individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief. ~~No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.~~

The Legislature's joint resolution adopting this amendment includes a ballot statement (*i.e.*, ballot title and summary) that would be placed on the ballot when the proposed amendment is submitted to the voters. Compl. ¶ 20; Answer ¶ 20. This ballot title and summary read as follows:

> CONSTITUTIONAL AMENDMENT
> ARTICLE I, SECTION 3
> RELIGIOUS FREEDOM.—Proposing an amendment to the State Constitution to provide, consistent with the United States Constitution, that no individual or entity may be denied, on the basis of religious identity or belief, governmental benefits, funding or other support and to 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 proposed constitutional amendment was transmitted to and filed with defendant Browning on July 1, 2011, and it has been designated for placement on the November 2012 general election ballot as "Amendment No. 7." Compl. ¶ 19; Answer ¶ 19.

II. The Ballot Summary Legislation

In addition to the proposed constitutional amendment adopted by the Legislature through CS/HJR 1471, the same session of the Legislature also enacted, in Section 29 of CS/CS/HB 1355, amendments to the statutory provisions governing judicial challenges to ballot statements. Compl. ¶ 22; Answer ¶ 22. Insofar as is pertinent here, this legislation purports to delegate to the Attorney General the Legislature's responsibility for drafting a ballot statement if the one enacted by the Legislature is held to be defective. Codified as § 101.161(3)(b)(2), Fla. Stat., this legislation provides in relevant part as follows:

> If the court finds that all ballot statements embodied in a joint resolution are defective and further appeals are declined, abandoned, or exhausted, unless otherwise provided in the joint resolution, the Attorney General shall, within 10 days, prepare and submit to the Department of State a revised ballot title or ballot summary that corrects the deficiencies identified by the court, and the Department of State shall furnish a designating number and the revised ballot title or ballot summary to the supervisor of elections of each county for placement on the ballot. The court shall retain jurisdiction over challenges to a revised ballot title or ballot summary prepared by the Attorney General, and any challenge to a revised ballot title or ballot summary must be filed within 10 days after a revised ballot title or ballot summary is submitted to the Department of State.

§ 101.161(3)(b)(2), Fla. Stat.

ARGUMENT

This case presents for decision two purely legal issues based on a factual record that is undisputed. It is, therefore, ripe for resolution upon plaintiffs' motion for summary judgment under Fla. R. Civ. P. 1.510. "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *see also* Fla. R. Civ. P. 1.510(c). We address in turn the two issues presented.

I. The Ballot Summary And Title Adopted By The Legislature Are Misleading And Therefore Defective

A. The Florida Constitution requires that any proposal to amend the Constitution be "accurately represented on the ballot; otherwise, voter approval would be a nullity." *Florida Educ. Ass'n v. Florida Dep't of State*, 48 So. 3d 694, 699 (Fla. 2010) (quoting *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000)). This requirement, implicit in Article XI, § 5 of the Constitution, mandates that the ballot statement language of a proposed amendment appearing on the general election ballot must express the substance of the amendment in clear and unambiguous terms. *Florida Educ. Ass'n*, 48 So. 3d at 700. This "truth in packaging" requirement has been codified by the legislature in § 101.161, Fla. Stat.; *see Armstrong*, 773 So. 2d at 13; *Florida Educ. Ass'n*, 48 So. 3d at 700. Its purpose 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." *Id.* (quoting *Advisory Opinion to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998)).

"[T]he gist of [this] ... requirement is simple: A ballot statement cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong*, 773 So. 2d at 16. Though the rule may be simple, its importance cannot be overstated. Voters cast their ballots based "*only* on the ballot title and summary." *Advisory Opinion to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004) (emphasis in original). "Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the . . . process of amending our constitution." *Id.* at 653-54. This requirement also "assure[s] that the electorate is advised of the true meaning, and ramifications, of an amendment." *Advisory Opinion to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)).

Accordingly, in order to pass muster, a ballot statement must "state in clear and unambiguous language the chief purpose of the measure." *Askew*, 421 So. 2d at 155. In determining whether it does so, a court considers 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 Dep't of State v. Florida State Conference of NAACP Branches*, 43 So. 3d 662, 667 (Fla. 2010). (citation omitted). "The unifying principle for all proposed constitutional changes is that the 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.'" *Florida Educ. Ass'n*, 48 So. 3d at 701 (quoting *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)). The proposed amendment "must stand on its own merits and not be disguised as something else." *Id.* (quoting *Askew*, 421 So. 2d at 156).

Although courts reviewing ballot statements generally accord a "measure of deference" to the Legislature, *Armstrong*, 773 So. 2d at 14, they have also recognized that such deference is not "boundless," *id.*, and the Florida Supreme Court has not hesitated to declare invalid ballot summaries that mislead by failing to inform the voters of the full effects of the amendment, *see, e.g., id.* at 18; by using different terminology in the summary than is used in the amendment, *Advisory Opinion to Att'y Gen. re Casino Authorization, Taxation, & Regulation*, 656 So. 2d 466, 468-69 (Fla. 1995); or by using a misleading title, *Advisory Op. to Att'y Gen. re Save Our Everglades,* 636 So. 2d 1336, 1341 (Fla. 1994).

B. Against this backdrop, the ballot statement for the proposed amendment (hereinafter "Amendment") is defective for at least three reasons. *First,* the use of the ambiguous phrase "consistent with the United States Constitution" leaves the false impression

that the effect of the Amendment is to conform the Florida Constitution to what is required by the United States Constitution. In fact, the Amendment would place greater restrictions on the State's ability to exercise discretion in extending or denying public funds or benefits to religious entities than does the federal Constitution. *Second,* the ballot summary fails to explain to voters the main effect of the Amendment, *i.e.*, to compel the State to extend benefits to religious institutions even when doing so would not be required under the federal Constitution. *Finally,* the ballot title "Religious Freedom" is misleading in that it suggests that the Amendment expands religious freedom, when it would actually eliminate from the Florida Constitution the concept of religious freedom that has been a part of the Constitution for over 125 years.

1. According to the ballot summary adopted by the Legislature, the proposed amendment "provide[s], *consistent with the United States Constitution,* that no individual or entity may be denied, on the basis of religious identity or belief, governmental benefits, funding or other support . . ." (emphasis added). The use of the phrase "consistent with" is misleading because it gives voters the impression that the effect of the Amendment is to bring the Florida Constitution into line with – *i.e.*, to make it "consistent with" – the federal Constitution. But that is not the case, as the Amendment would 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.

This is so because, under the First Amendment of the federal Constitution, there are circumstances under which a state actor is *permitted* to extend public funding or benefits to religious entities but is not *required* to do so. The United States Supreme Court made this clear in *Locke v. Davey*, 540 U.S. 712 (2004), in which it held that "there is room for play in the joints" between the Establishment and Free Exercise Clauses of the First Amendment, because

"there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 719.

At issue in *Locke* was whether the State of Washington could exclude students pursuing a degree in "devotional theology" from an otherwise inclusive college scholarship program. *Id.* at 715. The Court ruled that although the state *could have* extended the scholarship program to theology students without violating the Establishment Clause, it was not *required* to do so by the Free Exercise Clause (or any other part of the United States Constitution). *Id.* at 725.

Courts applying *Locke* have reached the same result with regard to other governmental benefits. Thus, in *Eulitt v. Maine, Department of Education*, 386 F.3d 344 (1st Cir. 2004), the First Circuit upheld Maine's exclusion of sectarian schools from a voucher program under which the state paid tuition for certain school children to attend other private (nonsectarian) schools. As the court explained, *Locke* "confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity." *Id.* at 354. Similarly, in *Bowman v. United States*, 564 F.3d 765 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 55 (2009), the Sixth Circuit held that a federal program could exclude employment with religious organizations from its definition of community service that was used to compute military retirement benefits. And, closer to home, Florida's First District Court of Appeals has specifically held that the "no-aid" language that the proposed amendment would remove from Article I, § 3 was not contrary to the Free Exercise Clause of the federal Constitution, in light of the First Amendment "play in the joints" described by *Locke*. *Holmes*, 886 So. 2d at 362-66. *See also Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008) ("It has long been clear . . . that the Free Exercise Clause does

not mandate the inclusion of religious institutions within every government program where their inclusion would be permissible under the Establishment Clause. There is room for legislative discretion.").

Here, the effect of the proposed amendment would be to eliminate all "play in the joints" that otherwise would allow the State discretion in making funding and benefit decisions with respect to religious entities. Under the terms of the Amendment, funding and benefits *could not* be denied to a recipient on the basis of religious belief or affiliation, even when the First Amendment would permit the State to exclude religious entities from the receipt of such benefits. In other words, were the Amendment to become law, Florida could not design scholarship programs in the same manner as did the State of Washington in *Locke*. Nor could it establish a private-school voucher program limited to nonsectarian private schools, as the State of Maine permissibly did in *Eulitt*. Thus, the Amendment goes much farther than merely removing the prohibition on extending public funds to religious entities that has been a part of the Florida Constitution since 1885. Rather, the Amendment would *require* the State to extend government benefits to religious entities to the full extent that providing such benefits is *permitted* by the federal Constitution, thereby removing the "play in the joints" that exists under the federal First Amendment.

Whether or not the Constitution should be amended to require the State to fund and provide benefits to religious entities on the same terms as secular entities is, of course, a matter of policy upon which citizens may disagree. That is not what is at issue here. What *is* at issue is that the ballot summary drafted by the Legislature misleads the electors about the proposal on which they are being asked to vote. Rather than explaining that the Amendment would go beyond the federal Constitution with regard to the provision of funding and benefits to religious

institutions and entities, the ballot statement asserts that the changes to the Florida Constitution rendered by the Amendment would be "consistent with" the Federal Constitution, thus leaving the voters with the impression that the effect of the Amendment would be to bring the Florida Constitution into conformity with the federal Constitution. That, as we have just shown, is not the case.

The misleading impression created by this language is enough to invalidate the ballot summary, as "[a] proposed amendment cannot fly under false colors[.]" *Askew*, 421 So. 2d at 156; *see also Save Our Everglades,* 636 So. 2d at 1341 (proposed ballot summary misleading because, in stating that the sugarcane industry was "to help to pay to clean up pollution," it gave voters the "impression that entities other than the sugarcane industry will be sharing in the expense of the cleanup").

It bears emphasis in this regard that the Florida Supreme Court has, on multiple occasions, invalidated ballot summaries that use language that masks the potential breadth of the proposed amendments—particularly where, as here, the language of the ballot summary is changed from that which is used in the amendment itself. *See Casino Authorization, Taxation, & Regulation,* 656 So. 2d at 468-69 (substituting the term "hotels" for the amendment's language of "transient lodging establishments"); *Advisory Opinion 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, 897 (Fla. 2000) (substituting "persons" for "people"); *1.35% Property Tax Cap*, 2 So. 3d at 975 (substituting "have reached" for "exceed" in referring to a revenue cap); *Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 at 566 (substituting "citizens" for "every natural person"). Here too, the use of the phrase "consistent with" hides from voters the actual effect of the Amendment, and the ballot summary enacted by the Legislature is accordingly defective.

2. Even apart from the use of the phrase "consistent with" in the ballot summary, the complete failure of the ballot summary to explain to voters that the Amendment would have the effect of compelling the State to provide public funding or benefits to religious entities in certain circumstances not required by the federal Constitution also renders the ballot summary defective. As the Florida Supreme Court has repeatedly held, a ballot summary is defective if it fails to communicate to voters the "main effect," *Armstrong*, 773 So. 2d at 18, of an amendment. Here, even without the "consistent with" language, an elector reviewing the ballot summary in the voting booth would have no idea that the Amendment would take away discretion that the State otherwise would have – and grant to religious entities rights that they otherwise would not have – under the federal Constitution.

This is precisely the type of "ball hiding" that has rendered ballot summaries invalid in the past. In *Armstrong*, the Florida Supreme Court found that a ballot summary was defective where it failed to state "or even hint[]" at the "main effect" of the proposed amendment, which was to nullify the Cruel and Unusual Punishment Clause of the Florida Constitution. *Id.* at 18. And in *Florida Dep't of State*, 43 So. 3d at 669, the court found that a ballot summary was defective where it failed to inform voters clearly and unambiguously that the chief purpose of a proposed amendment was to nullify the "mandatory contiguity requirement" in political redistricting. The court explained: "This is a matter that should have been clearly and unambiguously stated in the ballot language. Failing this clear explanation, the voters will be unaware of the valuable right . . . which may be lost if the amendment is adopted." *Id.; see also, e.g., Casino Authorization, Taxation, & Regulation*, 656 So. 2d at 469 (proposed ballot summary defective "not because of what it says, but what it fails to say"); *Florida Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532, 537-38 (Fla. Dist. Ct. App. 2002) (ballot summary defective where it did

not "clearly tell the voter that he or she is being asked to grant largely independent lawmaking authority to a committee of twelve legislators"); *Term Limits Pledge*, 718 So. 2d at 804 (ballot summary defective where it failed to inform the public that the amendment would confer discretionary powers on the Secretary of State that the Secretary did not then possess); *Advisory Opinion to Att'y Gen. re People's Prop. Rights Amendments*, 699 So. 2d 1304, 1308-09 (Fla. 1997) (ballot summary defective where it failed to define terms used within the summary, thus leaving voters uninformed).

So too here. By failing to explain that the Amendment would have the effect of taking away discretion that the State otherwise would have under the federal Constitution, the ballot summary does not communicate to voters the main effect of the Amendment. Quite apart from its affirmatively misleading use of the "consistent with" language, therefore, the ballot summary is defective for this separate reason as well.

3. Finally, the title of the ballot statement – "Religious Freedom" – is also misleading. Although the title of the ballot statement is the same as the title of section 3 of Article I of the Florida Constitution, it is used here to describe an Amendment that in fact does away with the concept of "religious freedom" that is currently embodied in the Florida Constitution: whereas Article I, § 3 now *prohibits* public funding of religious entities, *see Holmes*, 886 So. 2d at 347-61, the proposed amendment would *mandate* such public funding under certain circumstances. Any voter that ascribed to "religious freedom" the meaning that it has had, in the context of the Florida Constitution, for over 125 years – that is, freedom from being compelled to support religious institutions through taxation – would be badly misled by its use to describe an amendment that completely eliminates constitutional protection of this type of religious freedom.

Used as it is in the ballot title, "Religious Freedom" is not descriptive of the proposed amendment. Instead, it is "political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment." *Additional Homestead Tax Exemption*, 880 So. 2d at 653. Such "apple pie" language is suspect in ballot statements, as a "voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment." *Save the Everglades*, 636 So. 2d at 1341-42.

For this reason as well, the language of the ballot statement adopted by the Legislature to describe the proposed amendment is defective, and the Secretary of State should be enjoined from placing it on the general election ballot in 2012.

II. The Legislature's Delegation To The Attorney General Of The Authority To Rewrite Ballot Summaries Violates The Separation Of Powers

Like its federal counterpart, Article II, § 3 of the Florida Constitution provides for the separation of powers among the judicial, legislative, and executive branches of government. It embodies what has been described as a "strict separation of powers doctrine," *see State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000), expressly stating that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const.

This doctrine has been understood to encompass two "fundamental prohibitions." *Chiles v. Children A, B, C, D, E & F*, 589 So. 2d 260, 264 (Fla. 1991). The first is that no branch may encroach upon the powers of another. *Id.* The second – at issue here – is that "no branch may delegate to another branch its constitutionally assigned power." *Id.* When applied to the legislative branch, this prohibition prevents the Legislature from granting subordinate functions to the executive branch "absent ascertainable minimal standards and guidelines." *Orr v. Trask*,

464 So. 2d 131, 134 (Fla. 1985). Instead, "statutes granting power to the executive branch 'must clearly announce adequate standards to guide . . . in the execution of the powers delegated.'" *Florida Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 770 (Fla. 2005) (quoting *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 55-56 (Fla. 1976)). This is so to ensure that "fundamental and primary policy decisions [are] made by members of the legislature who are elected to perform those tasks, and [that the] administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." *Id.* at 769 (quoting *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978)). Under this nondelegation doctrine, "[a]ny attempt by the legislature to abdicate its particular constitutional duty is void." *Chiles*, 589 So. 2d at 264.

At issue here is § 101.161(3)(b)(2), Fla. Stat., which provides that where a ballot statement that has been enacted by the Legislature as part of a joint resolution has been found to be defective by a court, "the Attorney General shall, within 10 days, prepare and submit to the Department of State a revised ballot title or ballot summary that corrects the deficiencies identified by the court." Without any "standards or guidelines," *Martin*, 916 So. 2d at 771, limiting the Attorney General's discretion as to how any such "deficiencies" are to be "correct[ed]," the Legislature has improperly delegated its legislative authority to an officer of the executive branch.

There is no question that when the Legislature drafts a ballot statement to accompany a proposed constitutional amendment, it is performing a legislative act. Article XI, § 1 empowers the Legislature to propose constitutional amendments only "by joint resolution agreed to by three-fifths of the membership of each house of the legislature." Art. XI, § 1, Fla. Const. The ballot statement is a necessary component of any such legislative proposal to amend the

Constitution, *see* § 101.161(1), Fla. Stat., which ensures that the "electorate is advised of the true meaning, and ramifications, of an amendment." *Roberts v. Doyle,* 43 So. 3d 654, 659 (Fla. 2010) (internal quotation omitted). The act of drafting a ballot statement is, therefore, part and parcel of the legislative process of adopting a proposed constitutional amendment. It is subject to the same political process as is required to obtain the support of at least three-fifths of the Legislature for the proposed amendment that it describes. Consequently, the Legislature cannot delegate this portion of its legislative authority to a single official of the executive branch, as § 101.161(3)(b)(2) purports to do, without providing more guidance than the bald instruction to "correct[] the deficiencies identified by the court."

The lack of such ascertainable standards and guidelines in this case stands in contrast to cases such as *Brown v. Apalachee Regional Planning Council*, 560 So. 2d 782 (Fla. 1990). There, the Florida Supreme Court found that the Legislature did not violate the nondelegation doctrine in enacting statutes that allowed for the creation of regional planning councils, given that the Legislature "set forth, in considerable detail, specific criteria to be used by [the regional planning council] in conducting [regional impact] reviews." *Id.* at 785. No such detailed, specific criteria exist here. Instead, this case more closely resembles *Martin*, in which the court found that the Legislature violated the non-delegation doctrine by giving the Division of Elections of the Department of State the discretion to determine whether a candidate for office should be allowed to withdraw within 42 days of an election. 916 So. 2d at 771. The Court rejected the Department's contention that its discretion was sufficiently guided by the "stated goal of, and requirement for, orderly elections," given that the Florida Election Code did "not set forth any restrictions or specific criteria governing the Department's response to requests to withdraw …." *Id.* at 772.

A similar conclusion was reached in *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26 (Fla. Dist. Ct. App. 2008), where the court found that a statute that permitted the Board of Pharmacy to "establish by rule requirements for reapplication by applicants whose licenses have been permanently revoked" was unconstitutional because it gave "an administrative agency the authority to declare what the law shall be." *Id.* at 30. *See also Bush v. Schiavo*, 885 So. 2d 321, 332-33 (Fla. 2004) (statute permitting the Governor to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient was unconstitutional as the Legislature "failed to provide any standards" to guide the Governor's actions); *Orr*, 464 So. 2d at 134 (holding that Governor did not possess authority to remove a deputy commissioner from office, despite proviso in appropriations bill that "contemplated" the elimination of one deputy commissioner, because the Legislature had not established "guidelines or criteria" as to how to select the deputy position to be abolished); *see also Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978); *Lewis v. Bank of Pasco County*, 346 So. 2d 53 (Fla. 1976).

As in these cases, the absence in § 101.161(3)(b)(2) of "ascertainable minimal standards and guidelines," *Orr*, 464 So. 2d at 134, to guide the Attorney General's discretion in re-writing the ballot statement is fatal. Section 101.161(3)(b)(2) is an unconstitutional delegation of power by the Legislature and therefore void.

CONCLUSION

For the reasons set forth above, the Court should grant plaintiffs' motion for summary judgment. The Court should declare that the ballot statement enacted by the Legislature to describe proposed Amendment No. 7, CS/HJR 1471, is defective, and that § 101.161(3)(b)(2), Fla. Stat., is unconstitutional and void. Accordingly, Secretary Browning and all persons and

entities acting under his direction or in concert with him should be enjoined from placing Amendment No. 7 on the 2012 general election ballot.

DATED this 30th day of September, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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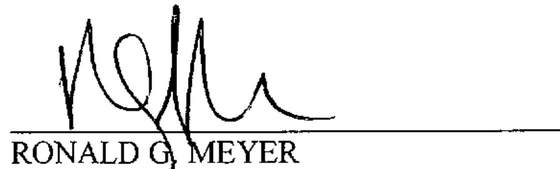

RONALD G. MEYER

ENROLLED
CS/HJR 1471 2011 Legislature

1 House Joint Resolution
2 A joint resolution proposing an amendment to Section 3 of
3 Article I of the State Constitution to eradicate remnants
4 of anti-religious bigotry from the State Constitution and
5 to end exclusionary funding practices that discriminate on
6 the basis of religious belief or identity.
7
8 WHEREAS, Floridians highly value tolerance and liberty in
9 all forms, and
10 WHEREAS, Floridians strongly support the right of each
11 person to practice religion according to the dictates of his or
12 her own conscience, and
13 WHEREAS, Florida is a religiously diverse state with over a
14 quarter of its population identifying as Roman Catholic and with
15 the largest Jewish population in the Southern United States, and
16 WHEREAS, the public policy of the State of Florida is to
17 support the protection and advancement of religious liberty, and
18 WHEREAS, Florida's Blaine Amendment language, the last
19 sentence of Article I, Section 3, of the current State
20 Constitution, was originally adopted in 1885 following a failed
21 attempt to adopt similar language in the United States
22 Constitution, and
23 WHEREAS, Florida's Blaine Amendment language was borne in
24 an atmosphere of, and exists as a result of, anti-Catholic
25 bigotry and animus, and
26 WHEREAS, the genesis of Florida's Blaine Amendment language
27 reflects an attempt to stifle and disrupt the constitutional

EXHIBIT A

28 rights and development of the emerging Catholic minority
29 community in America, and
30 WHEREAS, the Constitutional Convention that adopted the
31 Constitution of 1885 created a more religiously and racially
32 discriminatory document than its predecessor, with the first
33 inclusion of the Blaine Amendment language alongside the racist
34 separate-but-equal doctrine, and
35 WHEREAS, the racist separate-but-equal doctrine has been
36 duly abolished and all vestiges thereof rightfully removed from
37 the State Constitution, and the people of Florida should now be
38 given the opportunity to remove the discriminatory Blaine
39 Amendment language, a lasting stain upon the state's history
40 that stands in opposition to the people's will and counter to
41 our time-honored traditions of religious liberty and freedom,
42 and
43 WHEREAS, religiously affiliated hospitals, schools,
44 adoption agencies, and other benevolent institutions have been
45 of longstanding service to the people of Florida and have
46 provided numerous services to those in need, and
47 WHEREAS, until 2004, no Florida court had ever applied the
48 State Constitution in a reported case in a manner more
49 restrictive of the use of state funds than have federal courts
50 applying the Establishment Clause of the First Amendment to the
51 United States Constitution, and
52 WHEREAS, Florida's Blaine Amendment is currently being
53 enforced against religious groups and organizations of all
54 denominations, stifling their development and inhibiting the
55 free exercise of religious liberty, and

56 WHEREAS, courts have prohibited religiously affiliated
57 schools from participating in state-funded education programs
58 and religious organizations from participating in state-funded
59 services to incarcerated persons, and
60 WHEREAS, such application of the Blaine Amendment language
61 jeopardizes the participation of religiously affiliated
62 hospitals and other benevolent institutions in Medicaid and
63 other public programs, and
64 WHEREAS, those institutionalized in hospitals and prisons
65 are among those most in need of spiritual nurture and
66 encouragement as well as being often dependent on state-
67 subsidized human services, and
68 WHEREAS, the enforcement of the Blaine Amendment language,
69 barring religious organizations access to state funding and
70 state-funded business on an equal basis with nonreligious
71 organizations, violates the founding principles of the United
72 States and this state as contained in the Declaration of
73 Independence and the Preamble to the State Constitution, and
74 WHEREAS, the Establishment Clause of the First Amendment to
75 the United States Constitution does not require any such
76 absolute restrictions on the use of public funds, and
77 WHEREAS, the Establishment Clause permits the use of public
78 funds in religious hospitals, schools, and other benevolent
79 institutions, and
80 WHEREAS, the Establishment Clause and the religion clauses
81 of the State Constitution, other than the Blaine Amendment, are
82 intended to protect the religious liberties and sentiments of
83 Floridians without inhibiting the free exercise of religion, and

84 WHEREAS, their religious convictions motivate some
85 Floridians to establish religiously affiliated schools,
86 hospitals, adoption agencies, and other benevolent institutions
87 that provide valuable services to society and to receive or
88 utilize such valuable services from these benevolent providers,
89 which could be subsidized by the state through public programs,
90 and
91 WHEREAS, it is not necessary to prohibit all economic
92 relations with religious organizations and providers in order to
93 prevent an establishment of religion that would infringe on the
94 religious liberties of Floridians, and
95 WHEREAS, in 2000, a plurality of the United States Supreme
96 Court acknowledged that this "doctrine, born of bigotry, should
97 be buried now," and
98 WHEREAS, it is necessary to amend the State Constitution to
99 correct the aforementioned disconnect between the true
100 sentiments and principles of Floridians and the discriminatory
101 origins, intentions, and present application of the Blaine
102 Amendment, in furtherance of a deeply rooted commitment to
103 freedom and liberty, where rights and restrictions ought to be
104 based on the merits of one's words and actions rather than on
105 religious affiliation or identity, NOW, THEREFORE,
106
107 Be It Resolved by the Legislature of the State of Florida:
108
109 That the following amendment to Section 3 of Article I of
110 the State Constitution is agreed to and shall be submitted to
111 the electors of this state for approval or rejection at the next

112 general election or at an earlier special election specifically
113 authorized by law for that purpose:

114 ARTICLE I

115 DECLARATION OF RIGHTS

116 SECTION 3. Religious freedom.—There shall be no law
117 respecting the establishment of religion or prohibiting or
118 penalizing the free exercise thereof. Religious freedom shall
119 not justify practices inconsistent with public morals, peace, or
120 safety. Except to the extent required by the First Amendment to
121 the United States Constitution, neither the government nor any
122 agent of the government may deny to any individual or entity the
123 benefits of any program, funding, or other support on the basis
124 of religious identity or belief. ~~No revenue of the state or any~~
125 ~~political subdivision or agency thereof shall ever be taken from~~
126 ~~the public treasury directly or indirectly in aid of any church,~~
127 ~~sect, or religious denomination or in aid of any sectarian~~
128 ~~institution.~~

129 BE IT FURTHER RESOLVED that the following statement be
130 placed on the ballot:

131 CONSTITUTIONAL AMENDMENT

132 ARTICLE I, SECTION 3

133 RELIGIOUS FREEDOM.—Proposing an amendment to the State
134 Constitution to provide, consistent with the United States
135 Constitution, that no individual or entity may be denied, on the
136 basis of religious identity or belief, governmental benefits,
137 funding, or other support and to delete the prohibition against
138 using revenues from the public treasury directly or indirectly
139 in aid of any church, sect, or religious denomination or in aid

140 of any sectarian institution.