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' MOTION FOR SUMMARY JUDGMENT

Defendant, Kurt S. Browning, Secretary of State, and Defendant-Intervenor, the State of Florida, (Defendants), move for summary final judgment and submit this memorandum of law in support. Rule 1.510, Fla. R. Civ. P. Judgment in favor of the Defendants should be entered to allow voters to decide for themselves whether the proposed constitutional amendment, Amendment 7, should become part of the State's constitution.

BACKGROUND

> "If Floridians wish to remove or lessen the restrictions of the no-aid provision [in article I, section 3, of the Florida Constitution], they can do so by constitutional amendment."[1]

At issue is the ballot statement of a legislatively-proposed amendment to article I, section 3, of the Florida Constitution, entitled "Religious freedom." If adopted, the proposed amendment, Amendment 7, would remove the current prohibition in article I, section 3 that

[1] Bush v. Holmes, 886 So.2d 340, 367 (Fla. 1st DCA 2004) (en banc).

singles out sectarian groups and individuals and restricts their eligibility for government benefits including the opportunity to contract with the state to provide secular services. *See, e.g.,* Bush v. Holmes, 886 So. 2d 340, 366-67 (Fla. 1st DCA 2004) (en banc); Council for Secular Humanism v. McNeil, 44 So. 3d 112, 121 (Fla. 1st DCA 2010). Amendment 7 would also insert a simple declarative sentence making clear that no individual or entity may be denied governmental benefits based on their religious identity or beliefs. Also at issue is a recently enacted statutory provision, which the Florida Supreme Court has strongly encouraged, that provides a mechanism for the Attorney General to rewrite a ballot statement that a court has deemed deficient, and for final judicial review before placement on the ballot. The attorney general rewrite process would allow voters to vote upon duly proposed constitutional amendments that would otherwise be stricken from the ballot due to a deficient, but correctable, ballot statement. Plaintiffs have challenged both the ballot statement and the attorney general rewrite provision.

Amendment 7

A. Overview of the Florida Constitution's Religious Freedom Provisions

For more than 170 years, religious freedom has been explicitly protected by the Florida Constitution. Constitutional safeguards on religious liberty pre-date Florida's admission to the Union[2] and have continued through each of Florida's six constitutions.[3] The Florida Constitution currently contains these protections in article I, section 3, entitled "Religious freedom."

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[2] *See* Fla. Const. of 1838, Art. I, § 3 (declaring "[t]hat all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; and that no preference shall ever be given by law, to any religious establishment or mode of worship in this state"). *See also* Treaty of Amity, Settlement, and Limits of 1819 ("Adams-Onis Treaty"), Art. V (providing that "[t]he inhabitants of the ceded territories [of East and West Florida] shall be secured in the free exercise of their religion, without any restriction").

Florida's religious freedom provisions largely mirror those in the First Amendment to the United States Constitution. Each constitution contains an Establishment Clause prohibiting laws respecting the "establishment of religion" and a Free Exercise Clause barring laws that prohibit "the free exercise thereof." The Florida and federal Establishment and Free Exercise Clauses have been interpreted to be coextensive. *See* Holmes, 886 So. 2d at 359 n.14, 365. Indeed, "[r]esolution of a challenge under Florida's Establishment Clause ... essentially mirrors the resolution of a federal Establishment Clause challenge" and "Florida courts have generally interpreted Florida's Free Exercise Clause as coequal to the federal clause." Id.

The last sentence of article I, section 3, however, contains a "no-aid" provision that is not present in the United States Constitution, stating: "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.

Because of the restrictive language in its no-aid clause, article I, section 3 goes beyond the text and judicial precedent of the federal Establishment Clause. Indeed, the no-aid provision has been interpreted as imposing restrictions "beyond what is restricted by the federal Establishment Clause." Holmes, 886 So. 2d at 351. This interpretation puts the no-aid close in conflict with federal constitutional principles. As noted thirty years ago, the United States Supreme Court has "consistent[ly] reject[ed] . . . the argument that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause." Mueller v. Allen, 463 U.S. 388, 393 (1983) (internal quotations omitted). In contrast to the restrictive

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[3] *See* Fla. Const. of 1861, Art. I, § 3; Fla. Const. of 1865, Art. I, § 3; Fla. Const. of 1868, Decl. of Rts, §§ 4, 23; Fla. Const. of 1885, Decl. of Rts, §§ 5, 6; Fla. Const. of 1968, Art. I, § 3.

nature of the no-aid clause, the Supreme Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

This incongruity between the no-aid clause and federal law was highlighted in two recent judicial opinions. In both, the courts interpreted the no-aid provision to restrict the ability of sectarian groups—unlike any other group—to participate and provide religiously neutral benefits within a publically funded program. *See* Holmes, 886 So. 2d at 359, 366 (noting that the religiously-neutral purpose and private choice involved in Opportunity Scholarship Program "would be dispositive factors" in an Establishment Clause challenge, but invalidating statute on no-aid grounds because the Program "uses state revenues to aid sectarian schools"); Council for Secular Humanism, 44 So. 3d at 121 (concluding that the no-aid provision imposes further restrictions on the state's involvement with religious institutions than that imposed by the federal Establishment Clause). Each of these decisions prompted lengthy dissenting opinions that criticized the far-reaching impact the majority's interpretation of the no-aid provision. *See* Holmes, 886 So. 2d at 376 (Polston, J., dissenting); Council for Secular Humanism, 44 So. 3d at 123 (Thomas, J., dissenting from denial of rehearing en banc) (finding that "a wide range of governmental social welfare programs" are "potentially jeopardiz[ed]"). Notably, the majority opinion in Holmes explained that "[i]f Floridians wish to remove or lessen the restrictions of the no-aid provision, they can do so by constitutional amendment." Holmes, 886 So. 2d at 367.

B. Amendment 7 proposes to eliminate the no-aid provision and add a prohibition on religious discrimination by the government.

In response to court decisions restrictively interpreting the no-aid provision, the Florida Legislature passed CS/HB 1471, a joint resolution proposing an amendment to article I, section 3. Upon filing with the Secretary of State, CS/HB 1471 was designated as Amendment 7 for the 2012 general election ballot. Amendment 7 proposes two changes to the "Religious freedom" section of the Florida Constitution: (1) repeal of the "no aid" provision; and (2) enactment of a new provision expressly prohibiting the government from "deny[ing] to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief."

Amendment 7 would amend article I, section 3, entitled "Religious Freedom," 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 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.~~

As indicated, the addition of the new sentence, regarding religious discrimination, is expressly made subject to the requirements of the First Amendment to the United States Constitution. The ballot statement explains these two changes in plain and simple language:

> 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.

C. Chapter 2011-40, Laws of Florida: Attorney General Rewrite/Judicial Review

For decades, Florida voters, sponsors of proposed constitutional amendments, the Florida Legislature, and the courts of this state have experienced frustration when duly proposed constitutional amendments, where the only deficiency was some technical wording of a ballot title or summary, have been stricken from the ballot on the eve of an election (or even after an election) depriving voters of the opportunity to vote on the proposals (or nullifying their vote). The frustration exists, in large measure, due to the lack of a means for correcting judicially-identified deficiencies prior to Election Day.

For almost thirty years, and as recently as last year, the Florida Supreme Court has encouraged the Legislature to enact an expeditious process for correcting deficiencies in legislatively-proposed ballot titles and summaries, giving voters the opportunity to vote upon proposed amendments at the scheduled election versus courts simply striking them from consideration by the electorate.[4] The Legislature, in its 2011 session, ultimately passed a law that does what the Florida Supreme Court has suggested. Chapter 2011-40, Laws of Florida, establishes a process that allows the Attorney General to revise a defective ballot title or

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[4] *See, e.g.,* Fla. Dep't of State v. Mangat, 43 So. 3d 642, 651 (Fla. 2010) (noting repeated requests for "the Legislative to establish a procedure"); Smith v. Am. Airlines, Inc., 606 So. 2d 618, 622 (Fla. 1992) ("we urge the legislature to consider amending the statute to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by … the legislature"); Armstrong v. Harris, 773 So. 2d 7, 25-26 (Fla. 2000) (Pariente, J. specially concurring) ("the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language"); Kainen v. Harris, 769 So. 2d 1029, 1035 (Fla. 2000) (Pariente, J. concurring, joined by Harding & Anstead, JJ.) (same); Askew v. Firestone, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J. concurring) ("the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal").

summary, which is thereafter subject to potential review and approval by the judiciary. The new process, set forth in section 101.161(b)2., Florida Statutes, provides:

> (b)2. *** 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.

Ch. 2011-40, § 29, Laws of Fla. As indicated, if a court identifies a deficiency in a ballot title or summary, and if appeals are not pursued or are exhausted, the Attorney General must, within 10 days, submit a revised ballot statement that corrects the identified deficiencies. Id. The corrected ballot statement is then submitted to the Secretary of State for placement on the ballot. Id. The court retains jurisdiction, however, to entertain further challenges by the original parties to the revised ballot title or summary, which must be filed within ten days after the corrected ballot title or summary is submitted to the Secretary. Id.

LEGAL ARGUMENT

I. Amendment 7's Ballot Statement Gives Fair Notice to the Voters.[5]

All that the ballot statement must do is state the chief purpose of the proposed amendment in clear and unambiguous language and not be misleading. Armstrong v. Harris, 773 So. 2d 7, 15-16 (Fla. 2000). Amendment 7 does both. Its ballot statement gives fair notice to the voters by clearly and unambiguously describing the amendment's chief purpose: the repeal of the "no aid" provision currently in the Florida Constitution and the addition of a new provision prohibiting the denial of government benefits on the basis of religious identity or belief. It cannot be considered in any way misleading as to this chief purpose.

Plaintiffs do not challenge the ballot statement's accurate disclosure that the amendment will repeal the no-aid provision. Nor could they. The ballot summary accurately states that Amendment 7 would "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." Plaintiffs claim, however, that the ballot statement is misleading. They claim Amendment 7's "true effect" is a constitutional requirement that the government fund

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[5] *Standard of Review*: Plaintiffs bear a substantial burden to remove a proposed constitutional amendment from the ballot because the amendment process is "the most sanctified area in which a court can exercise power." Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958) ("[s]overeignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the organic law"); *see also* 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) (ballot summary violation must be "clearly and conclusively" shown to justify removal). Consequently, courts must act with "extreme care, caution, and restraint" before removing a proposal from the ballot. Adv. Op. to the Att'y Gen. re: Fla. Marriage Protection Amendment, 926 So. 2d 1229, 1233 (Fla. 2006) (quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)). Judicial review is extremely deferential: if "any reasonable theory" exists for approving an amendment for ballot placement, it should be upheld. Armstrong v. Harris, 773 So. 2d 7, 14 (Fla. 2000) (quoting Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956)).

religious institutions. *See* Compl. ¶¶ 1, 18, 21, 28. This argument rests on a strained and unnatural interpretation of the ballot statement, ultimately grounded in Plaintiffs' misconstruction of and opposition to the merits and wisdom, which are left solely for the voters to decide. *See* Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986) (the "wisdom of adopting the amendment" is for the voters to decide). As the next sections explain, Amendment 7's ballot statement accurately frames and communicates the proposal's chief purpose and is not misleading.

A. Amendment 7's ballot summary clearly and unambiguously informs voters of the amendment's chief purpose and is not misleading.

As recently amended, section 101.161(3)(a), Florida Statutes, provides statutory requirements for legislatively-proposed amendments to the constitution. Legislatively-proposed constitutional amendments must include at least one "ballot statement" that consists of a ballot title and ballot summary. Fla. Stat. § 101.161(3)(a) (2011). The ballot summary must, if it is not the full text of the amendment, "describe[] the chief purpose of the amendment ... in clear and unambiguous language." Id. A ballot summary "need not explain every detail or ramification" of a proposed amendment, but "only the chief purpose." Carroll, 497 So. 2d at 1206; *see also* Hometown Democracy, Inc. v. Cobb, 953 So. 2d 666, 673 (Fla. 1st DCA 2007) (holding that the wisdom of effectively decreasing the cut-off date for submission of initiative petition signatures by six months "should be left to the public" to decide where the voters were told what the cut-off date was). Finally, a ballot statement is not fatally defective where the true effect is logical to presume and it is not rendered defective for "what 'some voters' might believe." Florida Educ. Ass'n v. Fla. Dep't of State, 48 So. 3d 694, 703-04 (Fla. 2010).

The logical effect of the ballot summary's plain language is that discrimination on the basis of religion will be impermissible as to government "benefits, funding, or other support."

Nothing in the ballot summary can be read to require the government to provide "benefits, funding, or other support" to religious person or entities. Plaintiffs severely misinterpret the ballot language not to just prohibit religious discrimination, but to affirmatively *require* public funding of religious institutions.[6] This misconstruction of the language is apparent. The added prohibition—that government may not "deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief"—cannot be read to *compel* governmental funding of religious persons or institutions in all circumstances as Plaintiffs contend. The only logical effect of this language is to prohibit religious discrimination as to government "benefits, funding or other support" as is clearly stated in the ballot summary. Common sense and logic dictate that just because government benefits *may not* be denied based on a person or entity's religious identity of beliefs, it does not follow that the government *must be* compelled to fund any and all religious entities and activities.

In an analogous situation, the Florida Supreme Court recently upheld the ballot summary for the "Revision of the Class Size Requirements for Public Schools" amendment, which would have increased and expanded the range of class sizes. Florida Educ. Ass'n, 48 So. 3d at 704. Opponents claimed the ballot summary should have told voters that increased class sizes meant lower class size budgets. The Court, however, rejected the claim that "the failure to address the effect [of the amendment] on state class size funding renders the ballot summary defective." Id. at 702-03. Instead, it found that "[a]lthough the logical effect of increasing the maximum number of students will be to reduce the dollar amount of state class size funding, this effect flows

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[6] *See* Compl. ¶ 18 (alleging that "add[ing] a new sentence" "would require the government to extend funding to religious institutions …"), ¶ 21 (alleging the "language proposed to be added … would, in fact, confer upon religious institutions greater entitlement to governmental benefits …"), ¶ 28(b) (alleging that the "actual subject matter" is the "public funding of religious institutions").

naturally from the chief purpose." Id. at 703. It concluded that a "voter would be able to draw [the] common-sense conclusion from a review of the ballot summary" itself. Id. Likewise, voters can draw the "common-sense conclusion" that Amendment 7 will prohibit religious discrimination in government benefits from a review of the ballot summary and that absent religious discrimination, some governmental benefits may "naturally flow" to some persons or entities previously subject to discrimination. But neither Amendment 7, nor its ballot summary, can be read—as Plaintiffs claim—to *compel* the government to require the funding of all religious entities or persons under all circumstances.

Beyond misapprehending Amendment 7's chief purpose, Plaintiffs attempt to create confusion where none exists by equating the concepts of "consistency" and "required." The ballot summary is misleading, they claim, because the phrase "consistent with the United States Constitution" erroneously "suggests to voters" that the proposed amendment is "required by" the United States Constitution. Compl. ¶ 28(a). Stating that the proposed language in Amendment 7 will be "consistent with" the United States Constitution in no way suggests that voter approval of the amendment is "required."[7] The claim that the ballot summary's use of "consistent with" really means "required by" is illogical. Specifically, Plaintiffs argue that the amendment "would give religious institutions a constitutional right to public funding" and "would in fact **require** funding of religious individuals or entities…" Id. (emphasis in original). Removing a discriminatory bar to government benefits in no way compels a religious funding mandate. While the amendment creates the *opportunity* for individuals and institutions (who might otherwise be

[7] Voters will be presented with the ballot statement and asked to vote "yes" or "no" "in such a manner that a 'yes' vote will indicate approval of the amendment…and a 'no' vote will indicate rejection." Fla. Stat. § 101.161(3)(a) (2011). This process ensures that voters will not be confused as to their role to either approve or disapprove the measure.

subject to religious discrimination) to compete for government funding on equal footing, it does not dictate that they *must* be funded. "Consistent with" simply does not equate to a "requirement" or an absolute entitlement.

The phrase "consistent with the United States Constitution" in the ballot statement refers to the clause in 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." This language provides that benefits may be denied on the basis of religion when required by the First Amendment. The ballot statement accurately states this point, albeit in a short-hand way, by using the phrase "consistent with the United States Constitution" to let voters know that Amendment 7 cannot conflict with federal constitutional principles. To say more would be to speculate on ramifications of how possible future litigation defines its scope. But "that fact alone does not preclude [the Court's] approval of the ballot title and summary." Adv. Op. to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient, 880 So. 2d 659, 665 (Fla. 2004).

Indeed, the ramifications of Amendment 7 are not subject to review in this type of proceeding. It is "premature to speculate how the amendment might interact with other portions of the constitution as applied to a given factual situation. It may be that, if passed, the amendment could have broad ramifications." Adv. Op. to the Att'y Gen. re English – the Official Language of Fla., 520 So. 2d 11, 13 (Fla. 1988). But courts may not consider possible ramifications; all that is required is that the chief purpose be accurately disclosed. As an example, in Grose v. Firestone, 422 So. 2d 303, 304 (Fla. 1982), the Court upheld a ballot summary which only told voters that Florida's search and seizure provision would be amended to be construed "in conformity with the 4th Amendment to the United States Constitution." It did so

even though the summary failed to disclose that as a result of the amendment, the "good faith" exception developed by case law would be engrossed onto the exclusionary rule. *See also* Buzzett and Kearney, Commentary to 1982 Amendment, 25A, Fla. Stat. Ann., Art I., § 12, Fla. Const. As in Grose, the ballot summary for Amendment 7 tells voters all that is required in a non-misleading way. Nevertheless, Plaintiffs, like the challengers in Grose, seek to require ballot summary language that goes beyond the proposal's chief purpose and, essentially, force sponsors to engage in speculation. Moreover, Plaintiffs base their assertions on their own view of what constitutes religious freedom, which is not a proper inquiry within the confines of a ballot summary challenge. Here, the principal effect of prohibiting religious discrimination in government benefits "flows naturally" from the chief purpose which is accurately disclosed in the summary, and is expected to be presumed by the voter. *See* Florida Educ. Ass'n, 48 So. 3d 694.

B. Amendment 7's ballot title clearly sets forth the substance of the amendment.

The challenge to the ballot title of Amendment 7 also fails as a matter of law. Under section 101.161(3)(a), Florida Statutes, a legislatively-proposed amendment must include a ballot title "by which the measure is commonly referred to or spoken of" and may not exceed 15 words in length. The ballot title, when read together with the ballot summary, must "accurately portray[] the chief purpose of the amendment." Adv. Op. to Att'y Gen. re Fla. Marriage Protection Amendment, 926 So. 2d 1229, 1240 (Fla. 2006).

Amendment 7's ballot title easily satisfies these standards. The ballot title, "Religious Freedom," is identical to the title of the section of the Florida Constitution that it proposes to amend, does not exceed 15 words, and does not mislead voters regarding the chief purpose of the amendment. *See* Art. I, § 3, Fla. Const. Moreover, the title "Religious Freedom" appropriately

describes the topic of the amendment, which the summary then explains is a prohibition against denials of government benefits on the basis of religion. It thereby sets forth the substantive area addressed by the amendment.

Nevertheless, Plaintiffs argue that the ballot title "Religious Freedom" is "misleading" because it "suggests that the Amendment expands religious freedom, whereas [Plaintiffs allege] the Amendment would in fact harm religious freedom." Compl. ¶ 28(b). They also complain that the amendment does not advance Plaintiffs' view of what constitutes religious freedom. Compl. ¶ 28(b).[8] While freedom to practice one's religion without government interference constitutes religious freedom, so does freedom from religious discrimination. Freedom from discrimination on the basis of religion ***is*** religious freedom. Moreover, adding a prohibition on religious discrimination, where none existed before, is quintessentially an expansion of religious freedom.

Plaintiffs' allegation that Amendment 7 will "promot[e]" either "mandatory, coercive extraction by taxation of funds from Florida taxpayers to support religious institutions" or "religious doctrines to which the taxpayers do not subscribe..." is political rhetoric best left to their campaign against the amendment's merits or wisdom. Compl. ¶ 28(b); *see* Fla. Dep't. of State v. Mangat, 43 So. 3d 642, 648 (Fla. 2010) (collecting cases where political rhetoric was used in ballot summaries). Moreover, Plaintiffs' allegation that Amendment 7 will "inevitably" "foster[] governmental interference with the internal affairs of religious institutions" and therefore "harm" religious freedom is pure speculation. Compl. ¶ 28(b). Prohibiting the denial of government benefits to an institution or individuals on the basis of religious identity or belief

[8] Plaintiffs also argue that the title "fails to communicate the actual subject matter of the Amendment," which Plaintiffs describe as "public funding of religious institutions." Compl. ¶ 28(b). But the subject matter of the challenged language is religious discrimination and the only effect on governmental benefits is the elimination of discrimination in their provision.

does not concern itself with the internal affairs of the institution or the individuals. To the contrary, it facially and principally addresses a matter that concerned and motivated the legislature—as recognized by the First District in Holmes—that article I, section 3, must be amended if its current limitations are to be made consistent with federal constitutional principles and freedom from religious discrimination prohibited.

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The ballot statement clearly and unambiguously informs voters of the proposed amendment's chief purpose and is not misleading. All doubts concerning the validity of Amendment 7 must be resolved in favor of allowing the voters to judge the merits and wisdom of the proposed amendment for themselves. Defendants' motion for summary judgment should therefore be granted.

II. The Attorney General Rewrite Law is a Valid, Court-Recommended, and Common-Sense Mechanism to Expeditiously Amend and Review Ballot Statement Deficiencies Thereby Allowing Voters to Consider Duly Proposed Constitutional Amendments at Scheduled Elections.[9]

The legality, indeed the sensibility, of the ballot statement correction process at issue is unassailable. The attorney general rewrite process is a carefully crafted and judicially-recommended mechanism to alleviate the frustration felt by voters, amendment sponsors, courts, and the legislature arising when a duly proposed constitutional amendment is stricken from the ballot on the eve of an election due to a deficient, but correctable, ballot statement. Ch. 2011-40, § 29, Laws of Fla. Plaintiffs claim, however, that the attorney general rewrite process is

[9] *Standard of Review*. Plaintiffs bear the heavy burden of demonstrating that the challenged statute is unconstitutional "beyond all reasonable doubt." Bonvento v. Bd. of Pub. Instruction of Palm Beach Cnty., 194 So. 2d 605, 606 (Fla. 1967). All statutes are "are presumptively valid and constitutional, and will be given effect if possible." A.B.A. Industries, Inc. v. City of Pinellas Park, 366 So. 2d 761, 763 (Fla. 1979).

unconstitutional under separation of powers principles, asserting that *only* the Legislature has the authority to correct deficient ballot statements, Compl. ¶ 34 (legislature "exclusively" has this authority). Their position is unsupported under principles of Florida constitutional law and is severely undermined due to Florida Supreme Court opinions over the years urging the legislature to enact an expedited process by which an "independent agency," such as the Court or the Attorney General, may correct ballot statements with the ultimate and laudable purpose of allowing voters to decide the wisdom of duly proposed constitutional amendments.

A. Drafting ballot statements, which is not an exclusively legislative function, is a highly constrained process that implicates no separation of powers principles.

The argument that the attorney general rewrite process in chapter 2011-40 violates separation of powers principles fails for a number of reasons, First, a guiding principle under separation of powers is whether the text of the Constitution assigns explicit constitutional authority to one branch to the exclusion of another, or that the powers asserted "are inherent or so recognized by immemorial governmental usage" and "involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the state and federal Constitutions." Fla. House of Representatives v. Crist, 999 So. 2d 601, 611 (Fla. 2008) (quoting State v. Atl. Coast Line R.R. Co., 56 Fla. 617, 47 So. 969, 974 (1908). As the Florida Supreme Court recently noted:

> "[a] branch of government is prohibited from exercising a power *only* when that power has been constitutionally assigned *exclusively* to another branch; and the separation of powers doctrine does not contemplate that every governmental activity must be classified as belonging exclusively to a single branch."

Fla. Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Serv., 7 So. 3d 511, 515 (Fla. 2009) (quoting State v. Palmer, 791 So. 2d 1181, 1183 (Fla. 1st DCA 2001) (emphasis added); *accord* Gray v. State, 791 So. 2d 560, 563 (Fla. 5th DCA 2001) ("Where a power conferred by

statute is not an exclusively held power exercisable by only a single branch of government, the grant of concurrent power does not violate the constitution."); Simms v. State, Dep't of Health & Rehab. Servs., 641 So. 2d 957, 961 (Fla. 3d DCA 1994). Indeed, "[s]eparation of powers does not mean that every governmental activity be classified as belonging exclusively to a single branch of government." State v. Johnson, 345 So. 2d 1069, 1071 (Fla. 1977).

Applying these principles, the Florida Constitution does not mention the assignment of power to draft or correct deficient ballot summaries; in fact, it says nothing about the ballot statement process at all. While certain powers of the legislative branch are specified, no explicit mention or assignment of the power to draft or correct ballot statements is made to any one branch of government; nor does it prohibit any branch from performing this function. Fla. Ass'n of Prof. Lobbyists, 7 So. 3d at 515 ("Florida Constitution does not explicitly prohibit any of the functions set out in the Act."). While the constitution has been construed to contain an implicit ballot *accuracy* requirement, Armstrong, 773 So. 2d at 12, ballot statements themselves are generally creatures of statute. *See* id., at 32 (Lewis, J., dissenting) ("[T]he Florida Constitution does not contain a provision which describes the form in which the proposed amendment must be submitted to Florida citizens for consideration."). Thus, the constitution does not specify *who* must prepare ballot statements or *how*; it contains only the *implicit* requirement that ballot statements be fair and accurate.[10] Because no textual basis exists for concluding that the Legislature has exclusive authority to draft or correct deficient ballot summaries, no separation of powers problem is explicitly present.

[10] The Complaint's reference to joint resolution provisions, Compl. ¶ 25(b), confuses *ballot statement* requirements with article XI, section 1's requirement that legislatively proposed amendments to *the text of the Constitution itself* must be made by joint resolution. Ballot statements merely describe the substance of an amendment without impacting the text of a proposal and are not explicitly addressed by the Constitution.

Second, the power to prepare or correct ballot statements is not inherently or impliedly an exclusive power vested solely in the Legislature; instead, it is much closer to a ministerial or administrative task, subject to a number of strict constraints, that can be exercised by any of the three branches. As the Florida Supreme Court has held, the legislative power is the power to make "fundamental and primary policy decisions." Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978); *accord* Crist, 999 So. 2d at 613 ("[T]he legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." (quoting B.H v. State, 645 So. 2d 987, 993 (Fla. 1994)).

The claim that the correction of a judicially-identified deficiency in a ballot statement is a "fundamental and primary policy decision" is mistaken. A ballot statement cannot establish a state policy, let alone a "fundamental and primary" policy of the state. To the contrary, the role of a ballot statement is an extremely limited and deferential one, which is to state the chief purpose of the text of a proposed constitutional amendment. While a ballot statement is important, it is wholly ancillary and subordinate to the actual language of the proposed constitutional amendment itself, which, if enacted, would become operative law. The ballot statement, by definition, is solely a byproduct of the text of the proposed constitutional amendment it summarizes; it is entirely a derivative of the proposed amendment's language and cannot have any additional "legislative" force separate and apart from the amendment's actual text.

As a counter-example, if the challenged law allowed the Attorney General to alter the text of the proposed constitutional amendment, a separation of powers problem would exist. The reason is that the "legislature may not delegate the power to enact laws or to declare what the

law shall be to any other branch." Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991). But that is not what the attorney general rewrite process at issue does. The Attorney General has no authority to rewrite the language of the proposed amendment, only to rewrite the deficiencies in a ballot summary that a court has identified.

Far from being legislative in character, the task of preparing a revised ballot summary is more akin to a ministerial or administrative task that the legislative, judicial or executive branch can perform. The legal and institutional limits on this task are substantial, virtually eliminating the possibility that an Attorney General could engage in discretion that would offend separation of powers or non-delegation principles. The Florida Supreme Court long ago held that the "administration of legislative programs must be pursuant to some minimal standards and guidelines" to comply with separation of powers principles. Cross Key Waterways, 372 So. 2d at 925. Legislatively-assigned powers to the executive branch are permissible if they are "limited to conditions necessary to effectuate the Legislature's specific policy." Avatar Dev. Corp. v. State, 723 So. 2d 199, 207 (Fla. 1998). In contrast, separation of powers principles are violated where a legislative program "does not delineate any standards or criteria to guide the Department in exercising the authority delegated under the statute." Fla. Dept. of State, Div. of Elections v. Martin, 916 So. 2d 763, 771 (Fla. 2005).

Here, as a practical matter, the text of a proposed amendment severely curtails the Attorney General's discretion in preparing a revised ballot statement; the text itself provides "definite standards" that limit the parameters of the content of a revised ballot statement. In addition, the vast body of ballot summary law significantly constrains the rewrite process. And the Attorney General is charged with correcting the deficiencies a court identifies, thereby limiting the scope of a revised ballot summary to only such matters. Ch. 2011-40 § 29, Laws of

Fla. ("the Attorney General shall [prepare a statement] that corrects the deficiencies identified by the court"). Additionally, the challenged law explicitly makes judicial review available should the revised ballot summary be contested. Id. This 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.

In short, the Attorney General is not given "free reign" to prepare a revised ballot statement; instead, her discretion is very limited and subject to binding standards and guidelines that eliminate any potential for a separation of powers problem.

Third, the history and practice of the Florida legislature over the decades has been to delegate the duty of drafting ballot statements to various entities depending on the source of a proposed amendment. In the case of amendments proposed by initiative, the initiative sponsors prepare the ballot statement. § 101.161(2), Fla. Stat. In cases when amendments are proposed by the constitution revision commission,[11] a constitutional convention,[12] or the taxation and budget reform commission,[13] the entity that prepared the proposed amendment prepares the ballot statement, § 101.161(1), Fla. Stat. This legislative allocation of drafting duties to political committees and *ad hoc* governmental bodies shows that the preparation of ballot statements is not exclusively a legislative function. Indeed, as discussed more thoroughly below, the Florida Supreme Court has suggested that an executive branch official could serve the ballot-writing

[11] Art. XI, § 2, Fla. Const.

[12] Id. § 4.

[13] Id. § 6.

function.[14] Likewise, nothing in the Constitution suggests that the lesser duty of making ministerial corrections of court-identified, deficient ballot language can only be undertaken by the Legislature.

Finally, the wide range of processes used in other states confirms that writing ballot statements is neither an exclusive or inherently legislative function nor one that cannot be delegated. All states allow their legislatures to propose constitutional amendments, but each (mostly by statute) has established different processes for drafting ballot statements. For example, in twelve states the legislature writes the ballot language; in ten states the task is assigned to an executive official; nine states allow the legislature to draft the ballot statement, or, if it does not, executive officials or agencies will do so; four states leave ballot statement drafting to legislative staff or some legislative unit; three states leave drafting responsibilities to an executive official with the approval, or in consultation with, another executive official; and three states use an executive board to draft ballot statements. *See* **Exhibit A** (table of state laws). Accordingly, state legislatures nationally reflect broad discretion to decide what entities may draft ballot statements and how they do so. Florida would virtually be alone nationwide if ballot statement preparation were deemed an exclusively legislative function, as Plaintiffs suggest.

In summary, nothing in the text, history, or precedents underlying Florida's constitution supports the assertion that the attorney general rewrite process violates separation of powers principles. Instead, the process is a highly constrained one that has the laudable purpose of

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[14] *See* Adv. Op. to the Attorney Gen., 656 So. 2d 466, 469-70 (Fla. 1995) (suggesting that an "objective entity, such as the Secretary of State or Attorney General, were authorized by the Legislature to prepare an objective ballot title and summary for all initiative petitions"); Evans v. Firestone, 457 So. 2d 1351, 1358 n. (Fla. 1984) (McDonald, J., concurring) (suggesting that the Legislature charge the Secretary of State with the preparation of ballot statements for initiatives); *id.* at 1361 (Shaw, J., specially concurring) (same).

allowing deficient ballot statements to be rewritten thereby alleviating the frustration that voters, sponsors, courts and the legislature have experienced in the past.

B. For decades, the Florida Supreme Court has pressed the Legislature to establish the type of corrective process that is challenged thereby undermining separation of powers concerns.

Buttressing the limited nature of the challenged attorney general rewrite process, the Florida Supreme Court over the years has called for such a process, severely undermining the claim that only the Legislature has the exclusive authority to correct deficient ballot statements. The Court, for decades, has called upon the Legislature to enact a statutory process like chapter 2011-40, so that deficient ballot statements can be corrected expeditiously. In doing so, the Court has explicitly recommended that members of the judicial and executive branch could perform this corrective role, thereby rendering separation of powers arguments without vitality.

As a threshold matter, the Court has long-recognized the legislature's authority to establish, define, and impose requirements of Florida's ballot statement processes. *See, e.g.,* Wadhams v. Bd. of Cnty. Comm'rs, 567 So. 2d 414, 416 (Fla. 1990) ("[t]he ... provisions of section 101.161(1) are mandatory"); Armstrong, 773 So.2d at 12 (construing section 101.161). Likewise, it has consistently seen the Legislature as having the power to institute such a process directly without a constitutional amendment. *See, e.g.,* Adv. Op. to the Att'y Gen. re Tax Limitation, 644 So. 2d 486, 497 (Fla. 1994) (Overton, J. concurring specially) ("devising such a process [to correct a misleading ballot statement] does not require a constitutional change and necessitates only a statutory enactment").

For almost thirty years, since Justice Overton first called upon the Legislature to enact a speedy corrective mechanism, the Court has repeatedly pressed for a legislatively-drawn solution for correcting deficient ballot statements. Askew v. Firestone, 421 So. 2d 151, 157 (Fla. 1982)

(Overton, J. concurring) ("the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal"); *see also* Smith v. Am. Airlines, Inc., 606 So. 2d 618, 622 (Fla. 1992) ("we urge the legislature to consider amending the statute to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by ... the legislature"); Armstrong, 773 So. 2d at 25-26 ("the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language") (Pariente, J. specially concurring); Kainen v. Harris, 769 So. 2d 1029, 1035 (Fla. 2000) (Pariente, J. concurring, joined by Harding & Anstead, JJ.) (same).

Again, just last year, the Court—after removing a legislatively-proposed amendment from the ballot due to a deficient ballot summary—noted the availability of a legislative solution. Mangat, 43 So. 3d at 651 ("we have previously asked the Legislature to establish a procedure that would avoid this problem [but it] has yet to establish such a process.") (citing Am. Airlines, Askew, and Armstrong).

Never has the Court suggested that the Legislature itself had the exclusive authority to draft or approve corrections to a deficient ballot statement. Instead, when Justice Overton first suggested that the Legislature establish a collaborative process, he specifically pointed to the process in Oregon where—much like the challenged attorney general rewrite process at issue—that state's attorney general prepares the ballot summary:

> With regard to misleading ballot language, ... the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal.... The state of Oregon has such a process which directs the *attorney general* to prepare a ballot summary ... for constitutional proposals from both the legislature and the initiative process. The language can be challenged in the Supreme Court of Oregon whose role is to determine whether the language is "insufficient or unfair." If it so finds, that court has the authority to modify and correct the language to reflect the chief purpose of

> the proposal and then have the constitutional proposal properly presented to the people for their vote. The problem of misleading ballot language which now results in the removal of a constitutional proposal from the ballot is correctable by legislative action and it should be accomplished at the next legislative session.

Evans v. Firestone, 457 So. 2d 1351, 1356-57 (Fla. 1984) (Overton, J. concurring specially) (emphasis added) (citations and quotations omitted); *see also* Adv. Op. (Tax Limitation), 644 So.2d at 497 (Overton, J. concurring specially). He specifically noted that "having an independent entity such as the Attorney General draft the ballot title and summary language, and giving this Court the authority to correct misleading language, would eliminate some of the major problems that result in our having to remove proposals from the ballot." Id.

The recurring suggestions of the Court, that the executive or judicial branches can fix deficient ballot statements if given legislative authority to do so, is surely an authoritative—if not dispositive—indication that it perceives no separation of powers concerns. *See* Mangat, 43 So. 3d at 651 (citing Justice Overton's suggestion approvingly); Am. Airlines, 606 So. 2d at 622 (same); Evans, 457 So. 2d at 1358 n. (McDonald, J., concurring) (suggesting that the Legislature charge the Secretary of State with the preparation of ballot statements for initiatives); *id.* at 1361 (Shaw, J., concurring) (same). For instance, this Court has recognized that *it* could fix ballot statements itself if delegated the authority to do so by statute. *See, e.g.,* Am. Airlines, Inc., 606 So. 2d at 622 ("we urge the legislature to consider amending the statute to empower this Court to fix fatal problems with ballot summaries"); Mangat, 43 So. 3d at 651 (citing Am. Airlines). *See also* Askew, 421 So. 2d at 157 (Overton, J. concurring) ("[t]his Court should do everything possible to co-operate in establishing such a process").

These repeated calls for the Legislature to take action reflect a conclusion rewriting ballot statements is not an exclusive legislative function.[15] Although the Court has recognized that it does not have the inherent authority to rewrite ballot statements, it acknowledges that this authority can be delegated by the Legislature. For separation of powers purposes, if this authority can be delegated to the judicial branch, it can be delegated to the Attorney General subject to judicial review to ensure ballot statement accuracy. Accordingly, the Plaintiffs' position that "the Florida Legislature may not delegate [ballot statement correction] to another branch of government" is not persuasive. Compl. ¶ 34.

* * *

In summary, the Legislature has enacted a lawful process that assigns to the Attorney General the authority to correct ballot statements deficiencies identified by a court, a process that is ultimately subject to judicial review. The attorney general rewrite law is a laudable process designed to produce accurate ballot statements in time for voters to actually vote on proposed amendments. It is a process that the Florida Supreme Court has suggested for decades and it violates no separation of powers principles.

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[15] Of course, courts may not rewrite a *statute* to render it constitutional, *see* Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004), due to separation of powers issues, *see* Fla.. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001); Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355, 357 (Fla. 1st DCA 2008).

CONCLUSION

For the foregoing reasons, Defendants, Secretary Browning and the State of Florida, request that final summary judgment be entered in their favor and against the Plaintiffs on both counts presented in the Complaint.

Respectfully submitted,

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Exhibit A

Table of State Provisions

***Shapiro v. Browning*, Case No. 2011-CA-1892 (Fla. 2d Cir. Ct.)**

State	Ballot Statement Responsibility
Ala. — Historic Practice	Legislature
Alaska Const. Art. 13, § 1	Lieutenant Governor
Ariz. Rev. Stat. § 19-125(D)	Secretary of State and Attorney General
Ark. Code Ann. § 7-9-204	General Assembly
Cal. Elections Code § 9050	Attorney General
Colo. Rev. Stat. § 1-40-106	Title Board (Secretary of State, Attorney General & Legislative Counsel)
Conn. Gen. Stat. § 9-4(7)	Secretary of State
Del. Const. Art. XVI, § 1	No Public Vote
Ga. Const. Art. X, § 1, Par. II	General Assembly (or the Governor)
Haw. Rev. Stat. § 11-118.5	Legislature
Idaho Code § 67-453(1)	Legislative Council (leadership plus 8 other legislators)
10 Ill. Comp. Stat. 5/16-6	General Assembly
Ind. Code § 3-10-3-2	General Assembly (or the Elections Commission)
Iowa Code § 49.44	State Commissioner of Elections
Kan. Const. Art. 14, § 1	Legislature
Ky. Rev. Stat. Ann. § 118.415(2)	General Assembly (or the Attorney General)
La. Rev. Stat. Ann.§ 18:1299.1(A)	Legislature
Me. J. Legis. Rule 312-A	Legislature (wording recommended by Secretary of State)
Md. Code Ann., Election Law,§ 7-103(c)(1)	Secretary of State
Mass. Const. Amend. Art. 48, Gen. Provisions Pt. 3	Attorney General
Minn. Stat. § 204D.15, Subd. 1	Question prepared by Legislature, *see* 723 N.W.2d 633, 636, and title prepared by Secretary of State and Attorney General
Miss. Code Ann.§ 23-15-369(1)(b)	Legislature
Mo. Rev. Stat.§§ 116.155, 116.160, 116.190	General Assembly (if not done, Secretary of State and Attorney General; if invalid, court)
Mont. Code Ann.§§ 13-27-315 & 13-27-312(2), (6)	Attorney General prepares statement of purpose and statement of implication (except that Legislature may prepare statement of implication)
Neb. Rev. Stat.§ 49-202.01(1)	Executive Board of the Legislative Council
Nev. Rev. Stat.§ 218D.810	Chamber of Introduction or Legislative Commission
N.H. Rev. Stat. Ann.§ 663:3	(Full Text of Amendment)
N.J. Stat Ann.§ 19:3-6	Legislature prepares a ballot question (if not clear, and an interpretive statement is not provided by an Legislature, the Attorney General may prepare an interpretive statement, *see*

	438 A.2d 519, 529, and 497 A.2d 890, 896 n.3)
N.M. Stat. Ann.§ 1-16-7	Secretary of State
N.Y. Election Law§ 4-108	State Board of Elections and Attorney General
N.C. Const. Art. XIII,§ 4	General Assembly
N.D. Cent. Code § 16.1-06-09	Full text or Secretary of State and Attorney General
Ohio Const. Art. XVI, § 1	Ballot Board (Secretary of State and 4 other members)
Okla. Stat. tit. 34 § 34-9.C	Secretary of State and Attorney General
Or. Rev. Stat. § 250.075	Legislature (if not done, Attorney General)
Pa. Stat. Ann. (25 P.S. § 2621.1)	Attorney General
R.I. Const. Art. XIV, § 1	General Assembly
S.C. Code Ann.§ 7-13-2120	Ballot Commission (AG, Director of Elections, Director of Legislative Council)
S.D. Codified Laws § 12-13-9	Attorney General
Tenn. Code Ann. § 2-5-208(f)(2)	Attorney General
Tex. Election Code § 274.001(a)	Legislature (if not done, Secretary of State)
Utah Code Ann.§ 20A-7-103(3)(c)	Legislative General Counsel
Vt. Stat. Ann. tit. 17, §§ 1842, 2495	(Standard Caption, in some cases with Full Text of Amendment)
Va. Const. Art. 12, § 1	General Assembly
Wash. Rev. Code § 29A.36.020(3)	Legislature (if not done, Attorney General)
W.Va. Code § 3-11-2	Legislature (if not done, Secretary of State)
Wis. Stat. Ann. § 13.175	Legislature
Wyo. Stat. Ann. § 22-20-102	Legislature (if not done, Secretary of State)