

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

JAMES E. SHIRK,

Plaintiff,

v.

BUDDY JOHNSON, Supervisor of Elections,
Hillsborough County, Florida, in his official
capacity,

Defendant.

Case No. 2008-015176
Division J

DEFENDANT'S RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

Defendant Buddy Johnson, in his official capacity as Supervisor of Elections for Hillsborough County (the "Supervisor"), respectfully submits this Response to Plaintiff's Motion for a Temporary Injunction (the "Motion").

Introduction

Plaintiff James E. Shirk initiated this action to oppose a ballot initiative sponsored by Taking Back Hillsborough County Political Committee, Inc., a registered political committee ("Taking Back Hillsborough"). Plaintiff seeks declaratory relief and an order enjoining the Supervisor from placing the initiative on the November 2008 general election ballot. This case is plainly a dispute between Plaintiff (as an opponent of the initiative) and Taking Back Hillsborough (as its sponsor).¹ The Supervisor, as the elections administrator for Hillsborough County, is neither an advocate nor an opponent of the initiative, and he therefore has no interest

¹ It is the Supervisor's understanding that Taking Back Hillsborough will seek to intervene in this case as a defendant.

in the merits of that dispute. Instead, the Supervisor's obligation is to carry out his ministerial and administrative duties consistent with the County Charter and Florida law. He has done just that. The Supervisor does not have the discretion or authority to determine the wisdom, merits, clarity, or value of any particular initiative, or to weigh its impact. Those are decisions for the electorate or the Court.² But the Supervisor opposes Plaintiff's Motion to the extent Plaintiff seeks a declaration that the Supervisor's actions were not consistent with the law.

Factual Background

The Hillsborough County Charter vests in its citizens the right to amend the Charter by initiative. Hillsborough County Charter § 8.03.³ In 2006, Taking Back Hillsborough sponsored such an amendment. It circulated a petition to replace the appointed County Administrator with a nonpartisan elected County Mayor. *See* Compl., Exh. A. After Taking Back Hillsborough collected its signatures, it submitted them to the Supervisor for verification. Carrying out his ministerial duties dictated by the Charter, the Supervisor determined that the petition contained the required number of valid signatures. *See* Charter, § 8.03(2). He then certified his findings to the board of county commissioners and has prepared to place the amendment on the November 2008 ballot—all consistent with his ministerial duties under the Charter. *Id.* § 8.03(2)(2).

² Although this case is properly characterized as a dispute between the initiative's proponents and opponents, the Supervisor recognizes that he is an appropriate party to the extent his participation could be necessary to effect any order issued by this Court. *See Blue Dolphin Fiberglass Pools of Florida, Inc. v. Swim Industries Corp.*, 597 So. 2d 808, 809 (Fla. 2d DCA 1992) (person whose actions are to be controlled by decree is a necessary party to action); *see also* Fla. R. Civ. P. 1.210(a) ("Any person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause.").

³ Section 8.03 of the Charter, which governs the citizen initiative process, is attached to this Response as Exhibit A. The Charter in its entirety is available at <http://www.hillsboroughcounty.org/countycharter/>.

Although the amendment is slated for the 2008 ballot, the facts giving rise to this litigation occurred nearly two years ago. Taking Back Hillsborough began collecting petitions in 2006 but submitted an insufficient number by the deadline for verification for the 2006 general election ballot.⁴ By October 31, 2006, however, Taking Back Hillsborough had collected a sufficient number of petitions,⁵ and the Supervisor certified the initiative for the next general election—set for November, 2008. *See* Compl. Exh. B (Supervisor’s Letter Regarding Certification). For reasons unknown, Plaintiff waited nearly two years before bringing this action.

Plaintiff presents two separate claims in support of his request for declaratory and injunctive relief. First, he alleges that the petitions collected were “self-limiting” to the 2006 general election because the petition sought to place the amendment “on the ballot in the next general election.” Because the 2006 general election passed after the petitions were gathered, Plaintiff argues that they became invalid for the 2008 ballot. Second, Plaintiff argues that the ballot title and summary are misleading and therefore violate Section 101.161(1), Florida Statutes. Even if Plaintiff’s claims have merit, the Supervisor is without discretion as an administrative officer to effect the relief Plaintiff seeks.

⁴ That issue, too, was the subject of litigation. Taking Back Hillsborough filed suit in 2006 against the Supervisor, alleging that his office’s deadline for processing petitions was not consistent with the law. *See Taking Back Hillsborough County Political Committee, Inc. v. Johnson*, Case No. 06-CA-005933 (Thirteenth Judicial Circuit, Hillsborough County). Judge Pendino denied Taking Back Hillsborough’s motion for immediate injunctive relief, and the Court subsequently dismissed the case. The issue of whether Taking Back Hillsborough timely collected a sufficient number of petitions for certification is not before this Court. Plaintiff challenges only the legal effect of the petition language and the ballot summary.

⁵ Among these petitions was one signed by Plaintiff Shirk, who apparently once supported the initiative amendment he now challenges. *See* Motion, Exh.

I. **Under the Circumstances at Hand, the Supervisor Did Not Have Discretion to Determine That the Initiative Petitions Were “Self-Limiting” as to the Timing of Their Submission.**

The petitions at issue included this language: “I am a registered voter of Florida and hereby petition the Supervisor of Elections Hillsborough County to place the following amendment to the Hillsborough County Charter on the ballot in the next general election.” *See* Compl., Exh. A. Plaintiff argues that this introductory line precludes the amendment from appearing on the 2008 general election ballot because the petitions were initially targeted toward the 2006 general election.

A. **The Law Provides for the Validity of the Petitions.**

Plaintiff relies primarily on *Eight is Enough in Pinellas v. Ruggles*, 678 So. 2d 898 (Fla. 2d DCA 1996). In that case, the Pinellas County Supervisor of Elections invalidated initiative petitions that specifically directed placement of an “amendment to the Pinellas County Home Rule Charter on the ballot of the next scheduled countywide election.” *Id.* at 900 (emphasis added). The Court upheld the Supervisor’s decision, noting that two aspects of Pinellas County’s Charter were “particularly important.” *Id.* at 899. First, the Pinellas County Charter contained no express length of time that a signature remains valid on a petition for initiative. Second, the Charter permitted the Board of County Commissioners to set any initiative for a special election—as opposed to a countywide general election. *Id.* These features of the Pinellas Charter are inconsistent with the Hillsborough Charter, and *Ruggles* is therefore easily distinguishable.

The Florida Constitution is subject to amendment by initiative petition, just as the Hillsborough County Charter is. *See* Art. XI, §§ 3, 5, Fla. Const. By statute, the Florida Legislature has established procedures for the amendment process. *See, e.g.*, §§ 100.371;

101.161, Fla. Stat. Those procedures state that each petition signature “shall be dated when made and shall be valid for a period of 4 years following such date.” § 100.371(3), Fla. Stat. Although this statutory provision does not expressly apply to county charter amendments, the Hillsborough County Charter incorporates it. After enumerating specific requirements for ballot initiatives, the Charter incorporates Florida Statutes relating to constitutional amendments. “All other procedures shall be as provided by general law for constitutional amendments with the supervisor of elections performing the duties of the secretary of state.” Charter § 8.03(2). Therefore, petition signatures are valid for a period of four years. This is unlike Pinellas County, whose Charter is “*in contrast* to the state statute, . . . which limits the validity of signatures on such petitions to four years.” *Ruggles*, 678 So. 2d at 899 (emphasis added).⁶

Plaintiff suggests that some petition signers may not have wanted the initiative to appear on any ballot other than the 2006 ballot. But the law makes the signatures valid for four years, and “[a]ll citizens are presumed to know the law,” *Hart v. Hart*, 377 So. 2d 51, 52 (Fla. 2d DCA 1979) (quoting *Parramore v. Parramore*, 368 So. 2d 1308, 1310 (Fla. 1st DCA 1978)). The Supervisor is without discretion to invalidate signatures that the Charter declares valid.

The second feature of the Pinellas County Charter that the Second District found “particularly important” was that it permitted the Board of County Commissioners to call a special referendum to consider an initiative amendment. *Ruggles*, 678 So. 2d at 900. The petition, by contrast, expressly requested placement of the amendment on the ballot of the “next

⁶ State law regarding constitutional amendments is incorporated by the Charter only to the extent it is not inconsistent with it. For example, unlike state law, the Charter requires all petitions to be gathered in a six-month period. “In the event sufficient signatures are not acquired during that six-month period, the petition drive shall be rendered null and void and none of the signatures may be carried over onto another identical or similar petition.” Charter § 8.03(2). Plaintiff has not alleged that Taking Back Hillsborough did not collect sufficient

scheduled countywide election.” *Id.* Thus, “the language actually attempts to circumvent the county commissioners’ option to place the amendment on a separate special referendum election.” *Id.* No such issue exists in this case. Although the Hillsborough County Charter permits amendments by ordinance to be considered at special elections or regular elections “as the board of county commissioners chooses,” initiative amendments (like the one at issue in this case) “shall be voted on at the *next regular general election.*” Charter § 8.04 (emphasis added). Because of these differences between the Pinellas and Hillsborough County Charters, *Ruggles* is distinguishable.

B. The Supervisor Acted Properly in Certifying the Number of Petitions Collected.

Even absent the clear distinctions addressed above, the *Ruggles* decision would not control. It did not hold that the Supervisor must disregard petitions he deems “self-limiting.” Instead, it simply upheld the Supervisor’s decision in that case as reasonable. Thus, even if the Supervisor in this case had discretion to reach the same decision the Pinellas Supervisor did, his decision to do otherwise is permissible.

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties . . . [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate.

Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 845 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259 (Fla.1975), *cert. denied*, 425 U.S. 967 (1976)) (providing latitude to election officials’ judgment in the “process of validating signature petitions”) (ellipsis and alterations in original); *accord Cobb v. Thurman*, 957 So. 2d 638, 642 (Fla. 1st DCA 2006)

petitions within a six-month period.

("Recognizing the unique nature of the election process, Florida courts have traditionally shown deference to the judgment of election officials."); *Ruggles*, 678 So. 2d at 900-01 ("It is well established that the courts must treat such a decision as presumptively correct and must uphold it if the decision is rational and not clearly outside the applicable legal requirements.").

By certifying the signatures, the Supervisor's actions were "not clearly outside legal requirements." His actions were consistent with the Charter and consistent with the policy behind the petition process. The purpose of requiring the collection of a large number of petitions is to ensure that there is broad and substantial support for the amendment before it is submitted to the electors. *Cf. Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (states may require persons to demonstrate "a significant modicum of support" before allowing them access to the general-election ballot, lest it become unmanageable). Putting aside Plaintiff's formalistic interpretation of the petitions' prefatory language, the collection of the sufficient number of petitions demonstrates the level of support required by the Charter.

The prefatory language mimics language from the Charter, which requires initiative amendments to be "voted on at the next regular general election." Charter § 8.04. Logically, the "next" election referred to by the Charter in this context is the next election *following certification* of the petitions. This logical interpretation applies equally to the language on the petition itself. Indeed, if the petition sought to limit its validity to the 2006 election, it certainly could have clearly so stated. At any rate, it would be inconsistent with the Supervisor's duties if he were to construe ambiguous petition language to the detriment of the voters signing them.⁷ *Cf. Krivanek*, 625 So. 2d at 844 ("[E]lection laws should generally be liberally construed in favor

⁷ Moreover, the Supervisor's duties do not include interpreting the petition language at all. As discussed in the next section, the Supervisor's review is limited to the petition's format.

of an elector . . .”). The Supervisor’s actions were consistent with his administrative duties and with the law.

II. The Supervisor Does Not Have Discretion to Determine the Appropriateness of the Ballot Title and Summary.

Plaintiff’s second claim is that the ballot title and summary are misleading as to the amendment’s true effect. Section 101.161(1), Florida Statutes, requires that “[w]henver a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot.” *Id.* The purpose is to accurately inform voters regarding the amendment on which they will vote. “A ballot title and summary cannot either ‘fly under false colors’ or ‘hide the ball’ as to the amendment’s true effect.” *Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000).⁸ Plaintiff alleges that the ballot title and summary in this case do not comply with the law.

The Supervisor may not evaluate petition amendments for their clarity or wisdom, and he does not have discretion to invalidate a petition based on the substance of its title or summary. The Supervisor’s ministerial duties are established by the Charter and state law. Under the Charter, the Supervisor must certify a “date certain . . . as the beginning date of any petition drive.” Charter § 8.03(1). After the petition’s sponsor files the petition, the Supervisor must “determine whether the petition contains the required valid signatures.” *Id.* § 8.03(2). Then,

⁸ In *Armstrong*, the Florida Supreme Court invalidated a citizen initiative *after* it was adopted by a vote of the people. *Id.* at 9-10. This post-election invalidation demonstrates that Plaintiff in this case cannot demonstrate irreparable harm on his request for temporary injunctive relief. Nevertheless, the Secretary agrees with the Plaintiff that there are no material issues of fact to be tried, and he is amenable to a prompt final determination on the merits. (Plaintiff accurately lists the factors to be weighed on a temporary injunction: irreparable harm, unavailability of adequate remedy at law; substantial likelihood of success on the merits, and considerations of the public interest.)

“[i]f it is determined that the petition has the required signatures, the supervisor shall so certify to the board of county commissioners and place the amendment on the ballot.” *Id.*⁹ The Supervisor has complied with these administrative requirements.

Plaintiff notes that the Supervisor “approved the charter petition.” Compl. ¶ 10. But the Supervisor’s review—and approval—is expressly limited to formatting issues. As explained above, the Charter incorporates Florida law regarding constitutional amendments. And Florida law requires the Division of Elections to “review the initiative petition form *solely for sufficiency of the format.*” Fla. Admin. Code. R. 1S-2009(s) (emphasis added). “The Division shall not review the petition form for legal sufficiency.” *Id.* The Rule goes on to provide very specific formatting requirements. It establishes, for example, the minimum and maximum size of the petition; it provides that there must be space for the collection of the voter’s name, address, and other information; and requires that it be marked as paid political advertisement and identify the sponsor. *Id.* The Supervisor’s sole duty is to review the petition for compliance with the specific formatting requirements.

In evaluating the sufficiency of petitions, there is a clear separation of duties between the executive and judicial branches. Indeed, with constitutional amendments, the Attorney General must “request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated.” Fla. Const. Art. IV § 10. The Supreme Court then must “permit interested persons to be heard.” *Id.* Thus, the determination of a petition’s ultimate validity is a judicial one—with participation of the interested parties. The decision is not the Supervisor’s.

⁹ The Supervisor’s statutory duties for initiative petitions to amend the Florida Constitution are similar. For example, “[t]he supervisor shall promptly verify the signatures within 30 days of receipt of the petition forms . . .” § 100.371(3), Fla. Stat.

CONCLUSION

The Supervisor has complied with his legal obligations. This dispute between the initiative petition's proponents and opponents cannot be resolved without this Court's involvement. The Supervisor has no interest in the outcome of that dispute but will comply with any Order issued by this Court.

This 23 day of July, 2008.



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EXHIBIT A

HILLSBOROUGH COUNTY CHARTER

Section 8.03. Initiative.


The power to propose amendments to this Charter by initiative is vested in the people:

1. The power may be invoked by filing with the supervisor of elections a petition containing a copy of the proposed Charter amendment. Each petition must be circulated in each numbered board district and must be signed by a number of electors in each of one-half of districts 1 through 4 and of the county as a whole equal to eight percent of the votes cast in each of such districts and the county as whole in the last preceding election in which a president or presidential electors were chosen. The address of each signer, and date of each signature, must appear on the petition. Each petition shall embrace but one subject and matter properly connected therewith. A date certain must be designated to and certified by the supervisor of elections as the beginning date of any petition drive, and said drive shall terminate six months after that date. In the event sufficient signatures are not acquired during that six-month period, the petition drive shall be rendered null and void and none of the signatures may be carried over onto another identical or similar petition.
2. The petition shall be filed with the supervisor of elections who shall, within a period of not more than thirty (30) days, determine whether the petition contains the required valid signatures. The supervisor shall be paid the sum specified by general law by the persons or committee seeking verification.
 1. if it is determined that the petition does not contain the required signatures, the supervisor shall so certify to the board of county commissioners and the petition drive shall be at an end. No additional names may be added to the petition, and the petition shall not be used in any other proceeding.
 2. If it is determined that the petition has the required signatures, the supervisor shall so certify to the board of county commissioners and place the amendment on the ballot.
 3. All other procedures shall be as provided by general law for constitutional amendments with the supervisor of elections performing the duties of the secretary of state.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 25th day of July, 2008, by electronic transmission and United States mail to the individuals listed below.

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