

IN THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA  
Case No. [New Case]  
L.T. Case No. 08-015176

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ELECTED COUNTY MAYOR POLITICAL COMMITTEE, INC.,

*Appellant,*

v.

JAMES E. SHIRK, and BUDDY JOHNSON, Supervisor of Elections,  
Hillsborough County, Florida, in his official capacity,

*Appellees.*

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APPELLANT'S INITIAL BRIEF

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ON APPEAL FROM A FINAL ORDER ENTERED IN THE THIRTEENTH  
JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

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## STATEMENT OF THE CASE AND FACTS

This is an appeal from a Final Declaratory Judgment, dated August 1, 2008, striking a proposed amendment to the Hillsborough County Charter from the 2008 general election ballot. A. 1 (“Judgment”).<sup>1</sup>

### *A. The Citizen’s Initiative Petition at Issue*

On April 11, 2006 the Hillsborough County Supervisor of Elections (“Supervisor”) approved the format of a citizen’s initiative petition to amend the Hillsborough County Charter (“Charter”) submitted by appellant Elected County Mayor Political Committee, Inc. (“Sponsor”) and designated it Charter Amendment Petition No. 06-5. A. 2 (Compl. ¶ 10; Ex. A). At that time, and in accordance with the Charter, the Sponsor began a petition drive to gather voters’ signatures in support of placing the amendment on the general election ballot. A. 2 (Compl. ¶ 10). The amendment calls for replacing the position of the Hillsborough County Administrator, which is currently appointed by the Hillsborough County Board of Commissioners (“Board”), with a non-partisan County Mayor elected by popular vote

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<sup>1</sup> Citations to the *Appendix to Appellant’s Initial Brief* are as follows: “A. [Tab #] (document description, page or paragraph #).”

("Elected County Mayor Amendment" or "Amendment"). A. 2 (Compl. ¶ 10; Ex. A).<sup>2</sup> The ballot title and summary state:

**BALLOT TITLE:** REPLACING THE CURRENT APPOINTED ADMINISTRATOR WITH A NONPARTISAN ELECTED COUNTY MAYOR.

**BALLOT SUMMARY:** Shall the Hillsborough County Charter be revised to replace the office of an appointed County Administrator for a nonpartisan elected County Mayor; limited to two consecutive terms; specifying executive functions, powers and duties; specifying that the County Mayor will not be a member of the Board.

*Id.*

In accordance with the six-month petition drive period provided in Charter Section 8.03(1), the sponsor collected more than 39,000 signatures of verified registered voters in support of the Amendment. A. 2 (Compl. ¶ 14; Ex. B, p. 2). Accordingly, on October 31, 2006, the Supervisor certified the Elected County Mayor Amendment for placement on the 2008 general election ballot. A. 2 (Compl. ¶¶ 13-14; Ex. B). A companion amendment, Charter Amendment Petition No. 06-4, providing the elected county mayor with veto power and providing the Board with veto override power was also certified by the Supervisor and will appear on the 2008 general election

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<sup>2</sup> Charter Amendment Petition No. 06-5, containing the ballot title, summary and full text of the amendment, is attached to the Complaint as Exhibit A (*see* A. 2); for ease of reading, a more legible copy is provided at Appendix, Tab 3.

ballot (“Veto and Override Amendment”).<sup>3</sup> Neither appellant Shirk nor anyone else has challenged placement of the Veto and Override Amendment on the ballot.

*B. The Complaint and Proceedings Below*

Shirk originally signed the petition in support of the Amendment. A. 2 (Compl. ¶ 11). Approximately two years later Shirk commenced the action below and filed a motion for temporary injunction to prevent the Elected County Mayor Amendment from being placed on the 2008 general election ballot.<sup>4</sup> Shirk raises two primary arguments as to why the Elected County Mayor Amendment should be struck from the ballot.

In Count I Shirk claims that the Amendment “by its own language restricts placement of the initiative solely to the November 2006 general election ballot” because of alleged “self-limiting” language requesting that Amendment be placed “on the ballot in the next general election.” A. 2 (Compl. ¶¶ 24-25). Thus, he asserts, the Amendment was “null and void

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<sup>3</sup> Approved for petition drive March 30, 2006 and available at: <http://tampabay.com/specials/2008/PDFs/countymayor030208/with%20veto%20final%203%2031%2006%20-%20Veto%20powers%20by%20Mayor%20over%20Commission.pdf>.

<sup>4</sup> The parties stipulated that the material facts were not in dispute and agreed to proceed directly to hearing on final declaratory judgment. A. 4 (Hrg. Trans. 5:2-9).

and may not be lawfully placed on the ballot for the November 2008 general election.” *Id.* (Compl. ¶ 26).

In Count II Shirk alleges that the ballot title and summary were misleading because they (i) “fail to inform the voter that the true effect of the charter amendment is to expand the powers of the County Mayor, move such powers into the Charter, and remove powers from the Board of County Commissioners”; and (ii) “fail to inform the voter that implementation of the amendment as written is impossible since the vote for the amendment is to occur at the same election the amendment calls for a vote on the County Mayor.” A. 2 (Compl. ¶¶ 30-31).<sup>5</sup>

At the conclusion of the hearing on August 1, 2008, the trial court announced a partial ruling as follows:

**With the issue of the ballot [title] and summary, the court finds they’re clear and not misleading.** With respect to the limiting words on the first page, “ballot in the next general election,” the Court finds that’s sufficient and is not limiting which would exclude it from the ballot. **With respect to the language in the summary under 5.03, “beginning with the general election held in the year 2008,”** Court’s going to reserve ruling on that issue. I would like an opportunity to review these cases.

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<sup>5</sup> The Complaint is misnumbered; reference here is to the first paragraphs designated “30” and “31”

A. 4 (Hrg. Trans. 49:17-50-2) (emphasis added). Later that afternoon the trial court issued its written Final Declaratory Judgment, finding:

1. The language on the Charter Amendment Petition Form stating ‘...the ballot in the next general election’ does not constitute a limitation that would prevent the Charter Amendment from the 2008 ballot.
2. The language in the Charter Amendment Summary is not misleading.
3. The language in the Charter Amendment Summary<sup>6</sup> stating ‘...election of the County Mayor shall be held in even number years beginning with the general election held in the year 2008’, is a self-imposed limiting condition that cannot occur in 2008.

A. 1 (Judgment ¶¶ 1-3).

Thus, the trial court rejected Shirk’s claim (under Count II) that the ballot title and summary are misleading. It also rejected the claim (under Count I) that the amendment was void after the November 2006 general election based upon the language identified in that Count A. 2 (Compl. ¶¶ 24-25) and quoted in finding 1, above. The trial court, however, invalidated the amendment and entered the Final Declaratory Judgment on the sole ground that “[t]he language in the Charter Amendment Summary stating ‘...election of the County Mayor shall be held in even number years

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<sup>6</sup> Factually this is incorrect as the language appears in the amendment’s text and not in the summary.

beginning with the general election held in the year 2008', is a self-imposed limiting condition that cannot occur in 2008." A. 1 (Judgment ¶ 3). The complete provision referred to in the Judgment states:

**The non-partisan primary and general** election of the County Mayor shall be held in even number years, beginning with the general election held in the year 2008.

A. 3 (Charter Amendment Petition 06-5, proposed section 5.03(1))(emphasis added to highlight the lower court's omissions).

The Sponsor took this immediate appeal and, due to the nature of this action and timing of preparations for the general election, sought expedited treatment. The Sponsor appeals from that portion of the Judgment that invalidated the Amendment on the grounds that "The language in the Charter Amendment Summary stating '...election of the County Mayor shall be held in even number years beginning with the general election held in the year 2008', is a self-imposed limiting condition that cannot occur in 2008." A. 1 (Judgment ¶ 3).

### **SUMMARY OF THE ARGUMENT**

The Judgment should be reversed because the trial court violated controlling statutory and case law governing the determination of a proposed amendment's placement on the ballot. The lower court removed the Amendment from the people's vote by constructing a purported "self-

limiting” condition that “cannot occur in 2008.” The court’s construct, rendered without any analysis, is based upon a selective reading of the Amendment’s text that ignores key words, is contrary to the plain language of the Amendment, and conflicts with law. The court’s interpretation creates a deadline where none exists and eliminates the Amendment’s non-partisan primary election in violation of Florida election law.

Contrary to the trial court’s interpretation, the provision at issue does not create a hard deadline by which election of the County Mayor must occur. Rather, when the entire sentence is read plainly, it is clear that the intent of the provision is to require that the non-partisan primary and general elections for County Mayor be held in even number years after adoption of the Amendment by the voters. The phrase “beginning with the general election held in the year 2008” is merely a means of starting the clock running to conduct the elections; it cannot nor should not be construed as imposing a deadline or condition that, if not met, invalidates the entire Amendment.

The Florida Supreme Court has rejected the notion, proffered by Shirk and assumed by the lower court, that an amendment must be invalidated due to purported self-limiting language that appears to impose an impossible deadline. Instead, it has long recognized that an amendment’s submission to

the voters should not be enjoined where it may, if adopted, conceivably be valid in part or as applied to some conditions. The provision here, partially quoted and improperly parsed by the trial court, can and should reasonably be read in its entirety and given effect. Because the Amendment is valid as applied to conducting the non-partisan primary and general elections for County Mayor in the next even number year following approval by the voters (and in the even years thereafter), its submission to the voters should not be enjoined.

Determining the validity of a citizen's initiative petition is governed by very specific statutory criteria and long-standing Florida Supreme Court precedent. The inquiry here is limited to assessing whether the ballot title and summary comply with Section 101.161(1), Florida Statutes. Accordingly, a court is to determine (i) whether the ballot title and summary, in clear and unambiguous language, give fair notice of the proposed amendment's "chief purpose" so that voters may cast an informed ballot, and (ii) whether the ballot title and summary language is misleading. Because of a ballot's space limitations and the 75 word statutory limit on ballot summaries, it is not necessary to explain every ramification of a proposed amendment, only the chief purpose.

A court may not address the merits or wisdom of the proposed amendment; such an inquiry is only ripe when a challenge to the substance of the amendment is made after adoption by the voters. Because sovereignty resides in the people and the electors have the right to approve or reject amendments, courts must act with “extreme care, caution and restraint” before removing an amendment from the vote of the people. Where citizen initiatives (such as the one here) are concerned, no court has the authority to inject itself into the process nor declare a proposed amendment invalid unless the opponent demonstrates that the proposal is “clearly and conclusively defective.”

The trial court properly found that the ballot title and summary are clear and not misleading, as required under Section 101.161(1). The chief purpose of the Amendment, as reflected in the title and summary, is to replace the office of the appointed County Administrator with a non-partisan elected County Mayor. The trial court erred, however, by invalidating the Amendment on the ill-advised and unfounded construct that it contains a “self-limiting” condition that “cannot occur in 2008.” For this reason, the Judgment should be reversed.

## ARGUMENT

**THE JUDGMENT SHOULD BE REVERSED BECAUSE THE AMENDMENT IS NOT “CLEARLY AND CONCLUSIVELY DEFECTIVE” AND THE BALLOT TITLE AND SUMMARY SATISFY SECTION 101.161(1).**

**A. The Standard of Review is *De Novo*.**

The material facts below are undisputed, thus, the trial court’s conclusions of law in striking the Elected County Mayor Amendment from the ballot are subject to *de novo* review. *Smith v. Coalition to Reduce Class Size*, 827 So.2d 959, 961 (Fla. 2002); *Armstrong v. Harris*, 773 So.2d 7, 11-12 (Fla. 2000); *Citizens for Reform v. Citizens for Open Government, Inc.*, 931 So.2d 977, 979 (Fla. 3d DCA 2006); *Sancho v. Smith*, 830 So.2d 856, 861 (Fla. 1st DCA 2002).

**B. Only “Clear and Conclusive Defect” Will Invalidate the Amendment and Preclude Placement on the Ballot.**

“A court may declare a proposed constitutional amendment invalid **only if the record shows that the proposal is clearly and conclusively defective....**” *Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000) (emphasis added); *see also Florida League of Cities v. Smith*, 607 So.2d 397, 399 (Fla. 1992) (“we first must note that **no relief is possible unless the summary is**

clearly and conclusively defective” (emphasis added).<sup>7</sup> The opponent of a ballot initiative bears this high burden. *Askew v. Firestone*, 421 So.2d 151, 155 (Fla. 1982). Clear and conclusive defect is generally established where the ballot summary fails to specify exactly what was being changed, thereby confusing voters, or for giving the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence. *See, e.g., Florida League of Cities*, 607 So.2d at 399; *Kainen v. Harris*, 769 So.2d 1029, 1034 (Fla. 2000) (Pariente, J., concurring); *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So.2d 1373, 1376 (Fla. 1991) (citing *Askew v. Firestone* and noting: “Typically we have overturned an election because of defective ballot language where the proposal itself failed to specify exactly what was being changed, thereby confusing voters.”); *accord Askew v. Firestone*, 421

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<sup>7</sup> As one District Court of Appeal has noted: “Removing the amendment from the voters’ right to be heard **should require clear and convincing evidence of almost unassailable constitutional or statutory violation.**” *City of Boca Raton v. Palm Beach County*, 546 So.2d 116, 117 (Fla. 4th DCA 1989) (emphasis added) (relying on *Askew v. Firestone*, 421 So.2d 151 (Fla. 1982); *see also Sancho v. Smith*, 830 So.2d 856, 861 (Fla. 1st DCA 2002) (citing *Askew v. Firestone* and holding that challenge to amendment failed to meet this “high standard”). Note, the standards for determining the validity of charter amendments is the same as that for constitutional amendments. *Feldman v. City of North Miami*, 973 So.2d 647, 648 (Fla. 3d DCA 2008) (applying the same clear and conclusive standard to a proposed county charter amendment as is applied to proposed constitutional amendments); *City of Boca Raton v. Palm Beach County*, 546 So.2d at 117 (same).

So.2d at 159 (proposed amendment is valid where “Anyone can read the summary and clearly know what the purpose of the proposed amendment is. There are no hidden meanings or deceptive phrases.”). Here, as detailed below, the ballot title and summary are not misleading nor do they confuse the voters.

**C. The Lower Court Erred In Concluding that the Amendment Created a Self-Limiting Deadline That Could Not Be Met.**

Rather than analyze the title and summary language for a “clear and conclusive defect,” the lower court strayed beyond the analysis required under controlling law. The court’s construct, rendered without any analysis, is based upon a selective reading of the Amendment’s text that ignores key words, is contrary to the plain language of the Amendment, and conflicts with law. Specifically, the court concluded that

The language in the Charter Amendment Summary<sup>8</sup> stating ‘...election of the County Mayor shall be held in even number years beginning with the general election held in the year 2008’, is a **self-imposed limiting condition that cannot occur in 2008.**

A. 1 (Judgment ¶ 3) (emphasis added). This is incorrect. The court’s interpretation creates a deadline where none exists and eliminates the

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<sup>8</sup> Factually this is incorrect as the language appears in the Amendment’s text and not in the summary.

Amendment's non-partisan primary election in violation of Florida election law. The full text of the provision at issue states:

**The non-partisan primary and general** election of the County Mayor shall be held in even number years, beginning with the general election held in the year 2008.

A. 3 (Charter Amendment Petition 06-5, proposed section 5.03(1))(emphasis added to highlight the lower court's omissions). Contrary to trial court's interpretation, the provision at issue does not create a hard deadline by which election of County Mayor must occur. Rather, when the entire sentence is read plainly, it is clear that the intent of the provision is to require that the non-partisan primary and general elections for County Mayor be held in even number years after adoption of the Amendment by the voters. The phrase "beginning with the general election held in the year 2008" is merely a means of starting the clock running to conduct the elections; it cannot nor should not be construed as imposing a deadline or condition that, if not met, invalidates the entire Amendment.<sup>9</sup>

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<sup>9</sup> In fact, such an interpretation is consistent with the trial court's holding with respect to another provision in the Amendment:

The language on the Charter Amendment Petition Form stating '...the ballot in the next general election' does not constitute a limitation that would prevent the Charter Amendment from the 2008 ballot.

A. 1 (Judgment ¶ 1).

Assuming, *arguendo*, that the lower court was correct in finding that the language is “self-limiting”, such a provision will not void the proposal where it does not affect the substance of the amendment. *Florida Locally Approved Gaming*, 656 So.2d 1259, 1263 (Fla. 1995) (finding ballot title and summary not misleading where alleged “self-limiting” provision did not affect the amendment’s substance and the amendment would have to be implemented within a reasonable time after its adoption). In *Florida Locally Approved Gaming*, the Florida Supreme Court rejected the precise interpretation and result presented by the lower court here. The facts of that case are remarkably similar to the instant matter.

There, the sponsor failed to gather the required number of signatures to place the amendment on the 1994 general election ballot. However, the sponsor successfully argued that it had obtained a sufficient number of signatures to entitle it to an advisory opinion from the court with respect to the amendment’s validity. The sponsor also argued that, since the collected signatures were valid for four years pursuant to Section 101.161, the amendment could appear on the 1996 general election ballot should it obtain a sufficient number of signatures and meet all of the other requirements. 656 So.2d at 1260-61.

The plain text of the proposed amendment in *Florida Locally Approved Gaming* created, unlike here, a hard deadline by which compliance must occur: “By general law enacted **no later than July 1, 1995, the legislature shall implement** this section with legislation....” 656 So.2d at 1262. Like here, however, opponents of the amendment argued that the ballot title and summary were misleading for failure to advise voters that the provision could not be implemented as written, *i.e.*, that the amendment required action by a date certain (July 1, 1995) that was to occur before the amendment would appear on the ballot and be voted upon (1996, at the earliest). 656 So.2d at 1261. The Court rejected the argument that the “self-limiting” language caused the ballot title and summary to be misleading and held:

The fact that the Legislature will not be able to exercise that authority by the specific date noted in the proposed amendment does not, in our view, void the amendment. We conclude that, because **the summary includes language that clearly informs the voter** that gaming will be licensed, regulated, and taxed by legislative enactment, the summary is not misleading on this issue.

656 So.2d at 1263 (emphasis added). The result here should be the same because the summary language clearly informs the voter of the substance of the proposed amendment and is not misleading. *See* Part D, below.

Although not germane to, nor dispositive of, its analysis under Section 101.161, the Court further addressed “the unnecessary use of date-specific deadlines [in petition initiatives] when a more general deadline would suffice.” While counseling against the use of such deadlines, the Court rejected the notion, such as that adopted by the trial court, “that the proposed amendment has imposed an impossible deadline.” 656 So.2d at 1264.

Instead, the Court held:

**this deadline for legislative action does not void the proposal because we conclude that it does not affect the substantive provisions of the proposed amendment requiring the Legislature to implement the proposal. The intent is clear that the Legislature must act within a reasonable time...., if adopted, this proposed amendment requires the Legislature to implement this provision within a reasonable time after its adoption.”**

*Id.* (emphasis added).

Here, the Elected County Mayor Amendment’s intent is clear: the appointed County Administrator position will be replaced by that of an elected County Mayor. It is equally clear that the mayor will be elected via a non-partisan primary and general election process held in even numbered years, with said elections recurring into the future. The Amendment’s alleged “self-limiting” provision does not affect the substance of the Amendment, does not provide a deadline by which certain action must occur, nor does it contemplate the occurrence of a one time event that, upon

passage of a deadline, renders compliance impossible.<sup>10</sup> It is merely a means to start the clock running on holding the elections after, and in the event that, the Amendment is approved by the voters. Failure to plainly read the complete provision in this manner eliminates the non-partisan primary. This is significant because it is possible that the non-partisan mayor will be elected in the primary and that no general election need be held. The lower court cannot read this process out of the Amendment's text. Also, failure to read the complete provision and give it full effect also frustrates the chief purpose of the amendment -- replacing an appointed county executive with a non-partisan mayor elected by popular vote.

Any criticism Shirk may have for the Sponsor's use of the purported "self-limiting" language or contention that the Amendment should fail because it is "self-executing" is of no moment. The analysis and result in

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<sup>10</sup> Courts have found proposed amendments invalid due to a self-limiting "deadline" provision in few circumstances and, even then, only where implementation of the amendments would truly be impossible due to the self-limiting language and/or would otherwise defeat a key component of the amendment or frustrate its chief purpose. *See, e.g., Extending Existing Sales Tax*, 953 So.2d at 485. Such a situation does not arise here. The two other circuit court cases relied upon Shirk below are similarly inapplicable here. *Bates v. Raddatz*, 9 Fla. L. Weekly Supp. 171a (Monroe Cnty. 2002) (legally and logistically impossible to comply with 30 day time period specified in amendment because it conflicted with the time period provided under existing law); *Rhodus v. Islamorada Village of Islands*, 6 Fla. L. Weekly Supp. 277a (Monroe Cnty. 1999).

*Florida Locally Approved Gaming* comports with another fundamental principle of Florida jurisprudence equally applicable here:

if a duly proposed amendment to the Constitution may, if adopted, **conceivably be valid in part or as applied to some conditions, its submission to the voters should not be enjoined**, because in such a case the State has a right to the submission and, if it is adopted, to the operation of the amendment as far as it may legally be made effective.

*Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934); *see also Pope v. Gray*, 104 So.2d 841, 842 (Fla. 1958) (“That this amendment, if adopted may conceivably be valid in some respects or under some conditions is manifest on the face of the proposed amendment itself; that is all that is required.... That part of it may be questionable, ambiguous or inoperative is of no importance.”).

Here, the Amendment is valid as applied to conducting the primary and general elections for County Mayor in the next even number year following approval by the voters (and in the even years thereafter). Clearly, then, “its submission to the voters should not be enjoined.” *Gray*; *see also Florida Locally Approved Gaming*, 656 So.2d at 1259 (finding ballot title and summary not misleading where alleged “self-limiting” provision did not affect the amendment’s substance and the amendment could be implemented within a reasonable time after its adoption).

**D. The Amendment Must Be Placed on The Ballot Because The Title And Summary Are Clear, Unambiguous and Not Misleading.**

A court's determination of the validity of a proposed amendment is limited and governed by several longstanding and "fundamental principles":

**First, the Court will not address the merits or wisdom of the proposed amendment.... Second, the Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.... Specifically, where citizen initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws governing the process have been 'clearly and conclusively' violated.**

*Extending Existing Sales Tax*, 953 So.2d 471, 477 (Fla. 2007) (emphasis added, internal citations omitted); *see also Prohibiting State Spending for Experimentation*, 959 So.2d at 212 (stating same principles); *Independent Nonpartisan Commission*, 926 So.2d 1218, 1224 (Fla. 2006).<sup>11</sup>

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<sup>11</sup> *Accord, Prohibiting State Spending for Experimentation*, 959 So.2d 210, 212 (Fla. 2007) ("[t]he Court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement ..., and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes."). Shirk did not challenge the Amendment under (nor did the lower court address) the "single-subject" rule; therefore, it is not discussed here. *Clearwater Key Association-South Beach, Inc. v. Thacker*, 431 So.2d 641, 647 (Fla. 2d DCA 1983) (failure of parties to raise issue at trial level precluded them from raising it on appeal); *see also General Dynamics Corp. v. Paulucci*, 914 So.2d 507, 510 (Fla. 5<sup>th</sup> DCA 2005) (same).

As relevant here, the trial court's task was to determine whether the ballot title and summary satisfy Section 101.161(1), Florida Statutes. That section provides: "Whenever 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." § 101.161(1). The full text of a proposed amendment is not printed on the ballot; instead, only the ballot title (a caption not to exceed 15 words) and summary appear on the ballot. The ballot summary is an explanatory statement, not exceeding 75 words, that states the "chief purpose" of the measure. § 101.161(1).

"The basic purpose of [§ 101.161(1)] 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." *Extending Existing Sales Tax*, 953 So.2d 471, 479 (Fla. 2007) (citations and internal quotations omitted); *see also Armstrong v. Harris*, 773 So.2d 7, 13 (Fla. 2000) (citing *Askew v. Firestone*, 421 So.2d 151, 155 (Fla. 1982) and holding same); *Smith v. American Airlines, Inc.*, 606 So.2d 618, 620 (Fla. 1992) (same); *Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1020 (Fla. 1994) ("The critical issue is whether the public has 'fair notice' of the meaning and effect of the proposed amendment.").

Because of the ballot's limited size, the Florida Supreme Court has long "recognize[d] that the seventy-five word limit on the ballot summaries **prevents the summary from revealing all of the details or ramifications** of the proposed amendment. Accordingly, **we have never required that the summary explain the complete details of a proposal** at great and undue length...." *American Airlines, Inc.*, 606 So.2d at 620 (emphasis added); accord *Florida Hometown Democracy, Inc. v. Cobb*, 953 So.2d 666, 673 (Fla. 1<sup>st</sup> DCA 2007) ("The Florida Supreme Court has stated, "it is not necessary to explain every ramification of a proposed amendment, only the chief purpose.... The '[i]nclusion of all possible effects [of the proposed legislation] is not required in the ballot summary.'" (citations omitted, alterations in original).

To assess compliance with Section 101.161(1), a court must determine: (i) whether the ballot title and summary, through clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment, and (ii) whether the language of the ballot title and summary, as written, is misleading. *Extending Existing Sales Tax*, 953 So.2d at 479; *Independent Nonpartisan Commission*, 926 So.2d 1218, 1224 (Fla. 2006).

In support of his claim that the ballot title and summary are misleading, Shirk listed a handful of alleged aspects of the amendment

omitted from the title and summary: “it abolishes the education and experience requirements of the County Administrator, allows the County Mayor unfettered power to appoint Assistant County Administrators, places the powers and duties of the County Mayor in the Charter, and grants unbridled contractual power to the County Mayor.” A. 5 (*Plaintiff’s Mem.* at 9-10). These subjective interpretations are not accurate statements of what the Amendment actually does; regardless, even if they were accurate, they do not go to the chief purpose of the amendment nor are they required to be set forth in the summary. *See, e.g., American Airlines*, 606 So.2d at 620 (“the summary is not required to explain every detail or ramification of the proposed amendment.”).

In addition to not being accurate, none of the alleged “omissions” were “material” such that the failure to include any of them rendered the summary defective. *See, e.g., Limited Political Terms In Certain Elective Offices*, 592 So.2d 225, 228 (Fla. 1991) (“A ballot summary may be defective if it omits material facts necessary to make the summary not misleading”). Generally, such circumstances arise where the chief effect of the amendment stands in conflict with existing law and the summary fails to apprise the voters of such conflict; *i.e.*, the summary says one thing, but the amendment does another. *See, e.g., Askew v. Firestone*, 421 So.2d 151 (Fla.

1982). *Askew v. Firestone* is the quintessential “omissions” case. There the Court struck the amendment because the summary indicated that the amendment was a restriction on lobbying activities, but the amendment actually relaxed the restrictions by removing an existing two-year ban on lobbying. The Court noted that:

the chief effect is to abolish the present two-year total prohibition. Although the summary indicates that the amendment is a restriction on one’s lobbying activities, the amendment actually gives incumbent office holders, upon filing a financial disclosure statement, a right to immediately commence lobbying before their former agencies which is presently precluded.

421 So.2d at 155-56. Because the summary failed to disclose the existing ban that was to be eliminated, the Court held “[t]he problem, therefore, lies not with what the summary says, but, rather, with what it does not say” and the amendment was struck as misleading. *Id.*, 421 So.2d at 156.<sup>12</sup> None of

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<sup>12</sup> See also, e.g., *Independent Nonpartisan Commission to Apportion Legislative and Congressional District*, 926 So.2d 1218, 1228-29 (Fla. 2006) (striking amendment where title and summary stated that the amendment “[e]stablishes [a] non-partisan method of appointment to [the proposed apportionment] commission” but failed to disclose that appointment method was, in fact, partisan); *Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1021 (Fla. 1994) (ballot title and summary created impression “that the amendment would restrict existing laws when in fact the amendment would restrict the power of governmental entities to enact or adopt any law in the future that protects a group from discrimination, if that group is not mentioned in the summary”); compare *Limited Political Terms In Certain Elective Offices*, 592 So.2d at 228 (citing *Askew v. Firestone* and approving term limit amendment where there was

the “omissions” claimed by Shirk rise to this level. Indeed, the chief purpose of the Elected County Mayor Amendment is to replace the appointed County Administrator with a non-partisan elected County Mayor; this is precisely what the summary says. A. 3.

In the context of Section 101.161(1), the trial court properly rejected Shirk’s claims and found that the ballot title and summary were clear and not misleading. See A. 1 (Judgment ¶ 2); see also A. 4 (Hrg. Trans. 49:17-18) (“With the issue of the ballot and summary, the Court finds they’re clear and not misleading.”).<sup>13</sup> Under the Florida Supreme Court’s well-established and controlling precedent, discussed above, this should have ended the inquiry. The amendment should have been left on the ballot because the sole task of the trial court was to determine whether the ballot title and summary were clear and not misleading; the trial court had no authority to go beyond that narrow task and inject itself in the citizen initiative process, unless the

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“no existing constitutional provision imposing a different limitation on terms of office” and the proposed amendment “in effect ... writes on a clean slate”).

<sup>13</sup> In doing so, the trial court also properly rejected the argument that the summary was misleading because it failed to disclose that the Amendment created, in Shirk’s subjective opinion, a “strong” elected county mayor. A. 4 (Hrg. Trans. 14:2-4). Regardless of Shirk’s opinion -- and even assuming he is correct -- the Amendment is not invalid because “the summary is not required to explain every detail or ramification of the proposed amendment.” *American Airlines*, 606 So.2d at 620.

laws governing the process -- *i.e.*, Section 101.161(1) -- had been “clearly and conclusively violated.” *See, e.g.*, cases above, *Prohibiting State Spending for Experimentation*, 959 So.2d at 212; *Extending Existing Sales Tax*, 953 So.2d at 477; *Independent Nonpartisan Commission*, 926 So.2d at 1224. Despite this, the trial court concluded, without any analysis, that:

The language in the Charter Amendment Summary stating “...election of the County Mayor shall be held in even number years beginning with the general election held in the year 2008”, is a **self-imposed limiting condition that cannot occur in 2008.**

Tab 4 (Judgment ¶ 3) (emphasis added). This ruling was not based upon nor directed to a stand alone count in the Complaint; rather, it was raised as part of the rejected claim that the ballot title and summary were misleading. *Compare* A. 1 (Judgment ¶ 2, “The language in the Charter Amendment Summary is not misleading.”) *with* A. 2 (Compl. ¶¶ 31, alleging that the ballot title and summary are misleading because they “also fail to inform the voter that implementation of the amendment as written is impossible since the vote for the amendment is to occur at the same election the amendment calls for a vote on the County Mayor”). Thus, despite having held that the ballot title and summary were clear and not misleading as required under Section 101.161(1), the trial court found the amendment invalid. *Id.*

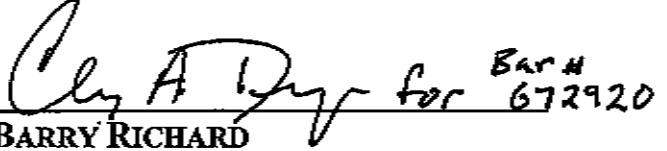
The trial court erroneously invalidated the Elected County Mayor Amendment in violation of the Florida Supreme Court's longstanding admonishment that "[a] court may declare a proposed constitutional amendment invalid **only if the record shows that the proposal is clearly and conclusively defective....**" *Armstrong v. Harris*, 773 So.2d 7, 11 (Fla. 2000) (emphasis added); *see also City of Boca Raton v. Palm Beach County*, 546 So.2d 116, 117 (Fla. 4th DCA 1989) (requiring "clear and convincing evidence of almost unassailable constitutional or statutory violation" before removing amendment from the ballot). Accordingly, the Judgment should be reversed.

### CONCLUSION

The appellee did not and cannot sustain his burden of proving that the ballot language at issue is "clearly and conclusively defective." The Amendment's text does not create a hard deadline for which failure to comply renders it invalid. Instead, the provision and Amendment can and should reasonably be read to give effect to the "chief purpose" of electing a County Mayor via primary and general elections in the next even number year following adoption by the voters, *e.g.*, 2010. Adopting the lower court's formulation eliminates the requirement of a non-partisan primary and therefore violates the plain language of the proposed language, conflicts with

the election code, and frustrates the Amendment's chief purpose. Furthermore, the language of the ballot title and summary satisfies Section 101.161(1) and the well-established case law governing the analysis thereunder. The language clearly and unambiguously provides voters with fair notice of the "chief purpose" of the Amendment and is not misleading. Accordingly, the Final Declaratory Judgment below should be reversed and the Elected County Mayor Amendment should be placed on the 2008 general election ballot.

Respectfully submitted,

  
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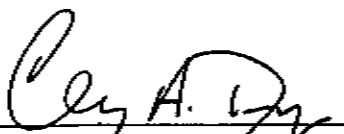
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by HAND DELIVERY this 8th day of August, 2008 to the following:

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I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Rule 9.100(1). This document is submitted in Times New Roman 14-point font.

  
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