

**THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

JAMES E. SHIRK,

Plaintiff,

v,

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

Defendant.

Case No. 08-015176

Division: J

**SPONSOR'S MEMORANDUM OF LAW IN OPPOSITION
TO MOTION FOR PRELIMINARY INJUNCTION¹**

I.

**THE AMENDMENT PETITION SATISFIES SECTION 101.161(1)
BECAUSE IT CLEARLY AND UNAMBIGUOUSLY INFORMS
VOTERS OF ITS CHIEF PURPOSE AND IS NOT MISLEADING**

Governing Legal Standards

“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), Fla. Stat. Under Section 101.61, the

¹ On Friday July 25, 2008, Elected County Mayor Political Committee, Inc. (the “Sponsor”) filed a motion to intervene, which is pending. Because the hearing on this matter is scheduled for Friday August 1, 2008, the Sponsor files this opposition while the motion to intervene is pending. The Sponsor agrees with Plaintiff and the Supervisor that the material facts are not in dispute and that this matter can proceed to a hearing on final judgment. Therefore, this memorandum will only address the substantive merits of the action and will not address whether Plaintiff has satisfied the requisites for temporary injunctive relief.

full text of the amendment is not provided 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. *Id.* “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 space limitations, 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. 1st 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), the Court must determine the following: (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). The Florida Supreme Court, in addressing whether a proposed amendment's ballot title and summary satisfy Section 101.161, has long held that,

the Court's inquiry is governed by several 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 Independent Nonpartisan Commission*, 926 So. 2d 1218, 1224 (Fla. 2006) (stating same principles); *Armstrong*, 773 So. 2d at 11 ("A court may declare a proposed constitutional amendment invalid only if the record shows that the proposal is clearly and conclusively defective....").

The Amendment Petition at Issue

The petition here states as follows:

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.

Here, there can be no genuine dispute that the ballot title and summary satisfy the requirements of Section 101.161 because they clearly and unambiguously state the chief purpose of the amendment and are not misleading. The chief purpose of the amendment is to replace the office of the County Administrator, who is appointed by vote of the Board of Commissioners.

with a popularly elected non-partisan County Mayor. In connection with that chief purpose, the summary advises voters of the most salient parts of the amendment, *i.e.*, that it (i) limits the County Mayor to serving two consecutive terms, (ii) specifies the “executive functions, powers and duties” of the elected County Mayor, and (iii) specifies “that the County Mayor will not be a member of the Board.”

Plaintiff claims that the ballot title and summary are misleading because “they fail to inform the voter that the amendment expands the powers of the County Mayor beyond those granted the County Administrator and removes powers from the Board of Commissioners.” *Plaintiff’s Mem.* at 9. In support of this, Plaintiff lists a handful of alleged aspects of the amendment not revealed by 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.” *Id.* at 9-10. None of these 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.”). The alleged failure to include any of them in the summary does not cause the amendment to “hide the ball” or “fly under false colors.”

A petition impermissibly “hides the ball” or “flies under false colors” where it conceals the most significant component, or “chief purpose”, of the proposed amendment. *See, e.g., Right of Citizens to Choose Health Care Provider*, 705 So. 2d 563 (Fla. 1998) (striking amendment where summary “create[d] an illusory right to choose a health care provider when in fact [the amendment] would severely limit an individual’s ability to enter into a health care contract.”);

Florida Ass'n of Realtors, Inc. v. Smith, 825 So. 2d 532, 537-38 (Fla. 1st DCA 2002) (ballot title and summary created impression that voters were being asked to approve creation of a committee to study and report to the legislature on the advisability of continuing various tax exemptions, rather than granting a committee of twelve legislators largely independent law-making authority to amend tax law by eliminating exemptions and exclusions existing under Florida law); *compare Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982) (ballot summary and title were not misleading where there were no hidden meanings or deceptive phrases, and the summary expressed exactly what the amendment purported to do). The chief purpose of the amendment here has not been concealed but, instead, has been stated clearly and unambiguously.

While an omission from the ballot summary may render the petition defective, the omission must be of material fact, *i.e.*, inclusion of the fact is necessary to make the summary not misleading. *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. *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) is the quintessential “omission” 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 156.² None of the “omissions” claimed by Plaintiff rise to this level.

First, Plaintiff contends that the amendment “abolishes the education and experience requirements of the County Administrator.” *Plaintiff’s Mem.* at 9. Because the amendment calls for eliminating the appointed office of County Administrator in favor of an elected County Mayor, it is difficult to see how this “omission” is material nor misleading. Logically, elimination of the education and experience requirements for the County Administrator is subsumed by the elimination of the office. Such requirements, however desirable they may be, are not required in order to hold elected office in Hillsborough County. Regardless, Plaintiff apparently questions the merits of eliminating the education and experience requirements of the administrator in favor of a popular vote for mayor. In determining whether Section 101.161(1) has been satisfied, however, the “Court will not address the merits or wisdom of the proposed amendment.” *Extending Existing Sales Tax*, 953 So. 2d at 477.

Second, Plaintiff argues that the ballot title and summary are misleading because they fail to state that the amendment allows the County Mayor “unfettered” power to appoint assistant

² 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 “no existing constitutional provision imposing a different limitation on terms of office” and the proposed amendment “in effect ... writes on a clean slate”).

County Administrators without the advice and consent of the Board. The ability to appoint assistant administrators is not material to the chief purpose of the amendment (elimination of the appointed administrator in favor of an elected mayor). Further, as noted above, the summary is not required to explain every ramification or detail of the amendment. Moreover, the Commission does not have an inalienable right to provide “advice and consent” for the appointment of assistant county administrators (who currently serve at the pleasure of the appointed County Administrator, Charter § 5.01). The amendment does not disturb the Board’s role in confirming the County Mayor’s appointments for department heads. Compl. Ex. A (proposed Charter § 5.04(3)).

Third, Plaintiff asserts that the title and summary are misleading for failing to state that the amendment places the powers and duties of the County Mayor in the Charter. *Plaintiff’s Mem.* at 9-10. The summary expressly notes that the amendment “specif[ies] the executive functions, powers and duties” of the elected County Mayor; such statement is in keeping with the chief purpose and gives clear notice to the voters that the amendment will specify the “executive functions, powers and duties” of the elected County Mayor. The question of “where” the duties must be “placed” or “listed” is not material nor is such an omission misleading -- particularly where the “location” of the listing of those duties is already governed by law. *See* § 125.83(1) (“A county charter ... shall clearly define the responsibility for the legislative and executive functions....”). It would be impractical, if not nonsensical, to require the ballot summary to state all of the mechanical or technical requisites implicated by the amendment. *See, e.g., American Airlines*, above.

Fourth, Plaintiff claims that the ballot title and summary are misleading for failing to state that the amendment grants “unbridled” contractual power to the County Mayor. Not only is

this not material to the chief purpose of the amendment, but it is also a mischaracterization of the amendment's language, which merely delegates responsibility for executing contracts. *See* Compl. Ex. A (proposed Charter § 5.03(3)(2)). The amendment is completely silent, as it should be, as to the Board's powers and duties with respect to approving contracts. Plaintiff implies that the amendment's silence as to the Board's contract approval authority operates as some taking of power from the Board, which is not the case. Regardless, Plaintiff's characterization of a supposed or potential ramification is not sufficient to defeat placement on the ballot. *See, e.g., American Airlines, above.*

Lastly, Plaintiff claims that the summary fails to inform voters that the implementation of the amendment is impossible as written because the vote on the amendment is to occur at the same election that the amendment calls for the election of the County Mayor. Plaintiff's "interpretation" of the amendment is irrelevant, of no merit and belied by the plain language of the amendment -- which provides a beginning point for such elections to occur and continue into the future. The amendment does not create a deadline to hold the election nor require that the election must occur only in 2008. Common sense dictates that voters will not be confused because (i) there cannot be an election for County Mayor unless and until the position is created by adoption of the amendment, and (ii) no such race will appear on the 2008 general election ballot. The single case relied upon by Plaintiff illustrates why he is incorrect. In *Extending Existing Sales Tax*, the Court addressed a deadline set by the amendment that would render compliance impossible as follows:

We conclude that, based on the express terms of the initiative, the time in which the Legislature has to enact exemptions will have run by the time the proposal would appear on the ballot in November 2008, and thereafter become operative. Accordingly, there will be no time for the legislative review expressly contemplated in the proposal and summary which, as both parties agree, is a key component of the initiative.

953 So. 2d at 485 (emphasis added). Such is not the case here as the election (assuming adoption of the amendment) can be held at the next general election held in an even numbered year.

Because the ballot title and summary clearly and unambiguously state the chief purpose of the amendment and are not misleading, the amendment should not be struck from the ballot.

II.

THE PETITION AMENDMENT IS NOT “SELF-LIMITING” NOR VOID BECAUSE IT WAS NOT PLACED ON THE 2006 GENERAL ELECTION BALLOT

The Hillsborough County Charter (“Charter”) provides citizens sponsoring a petition drive six months to gather enough signatures in support of the petition to be certified by the Supervisor of Elections for inclusion on the ballot. *Charter* § 8.03(1) (“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.”). “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.**” *Charter* § 8.03(2)(2) (emphasis added). Once placed on the ballot, “initiative amendments shall be voted on at the next regular general election.” *Charter* § 8.04.

Plaintiff contends that the petition is self-limiting to (and void after) the 2006 general election because it was circulated in 2006 and contained the following petition 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.**” Compl. Ex. A (emphasis added). Plaintiff ignores the plain language of Section 8.03 providing for a six month window within which to obtain the required amount of signatures and, instead, seeks to arbitrarily insert the deadline for inclusion on the 2006 ballot as the cut-off for gathering signatures. *See, e.g., Esposito v. State*, 891 So. 2d 525, 528 (Fla. 2004)

(“In construing this statute, this Court must give the ‘statutory language its plain and ordinary meaning,’ and is not ‘at liberty to add words ... that were not placed there by the Legislature’”). Plaintiff implicitly argues that the Sponsor only be entitled to four months to gather signatures because the drive commenced in April 2006 and the requisite number of signatures were not gathered prior to the August deadline for inclusion on the 2006 general election ballot.³ Such an interpretation is not only in direct conflict with the six month window expressly provided by Section 8.03(1), but also renders it a nullity. *See, e.g., Advisory Opinion to Atty. Gen. re Referenda Required for Adoption*, 963 So. 2d 210, 214 (Fla. 2007) (rejecting a construction under which “entire provision [became] a nullity”).⁴

The argument that the petition is void after the 2006 general election because it requests that the Supervisor place the amendment “on the ballot in the next general election” also defies common sense. An amendment cannot be placed on the ballot and voted upon unless and until it is certified by the Supervisor. Here, once the required number of signatures were gathered within the six month window (but after the deadline for the 2006 general election), the Supervisor certified the amendment for inclusion on the ballot in the next general election, *i.e.*, 2008. *See* Compl. Ex. B.

The Supervisor has rejected the Plaintiff’s strained interpretation and, instead, has given the Sponsor and the thousands of Hillsborough County electors who support the amendment the benefit of the six month window specified by Section 8.03(1). Because the Supervisor is the duly designated government official charged with construing and applying the relevant Charter

³ Under this reasoning, had the Sponsor commenced the petition drive in July, only one month would have been allotted to collect enough signatures by the deadline for the 2006 general election.

⁴ Under Florida law the signatures shall be valid for a period of four years. § 100.371, Fla. Stat.

and statutory provisions in certifying the petitions in this initiative process, his interpretations and actions with respect to same are entitled to deference as presumptively correct and should not be disturbed. *See Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 845 (Fla. 1993).

CONCLUSION

For all of the foregoing reasons, the Plaintiff's claims should be denied and final judgment should be entered in favor of the defendants directing that the amendment appear 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 30th day of July, 2008, to the following counsel of record:

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