

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.

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Case No. _____

08 - 015176

DIVISION J

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR A TEMPORARY INJUNCTION**

The Hillsborough County Charter authorizes the citizens of the County to amend the Charter through an initiative petition process. Section 8.03 of the Hillsborough County Charter states:

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 (8) per cent of the votes cast in each of such districts and the county as a 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 (6) months after the 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.

(a) 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.

(b) 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.

Taking Back Hillsborough County Political Committee, Inc. ("TBHC") invoked this petition process in April 2006, by filing a petition with Defendant Buddy Johnson, the Hillsborough County Supervisor of Elections. The petition was designated Charter Amendment Petition Form 06-5 and was approved on April 11, 2006. The petition sought to amend Article V of the Hillsborough County Charter and included the following ballot title and ballot summary:

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.

The petition also included the following statement: "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."

In or around April 2006, TBHC began collecting signatures on the petition. However, by August 2006, the deadline for placement on the 2006 general election ballot, it had failed to collect the required number of signatures. TBHC continued to collect signatures, and on October

31, 2006, Defendant Buddy Johnson certified the signatures for the petition and directed that the charter amendment be placed on the general election ballot in November 2008.

ARGUMENT

In determining whether to issue an injunction, this Court must address “(1) [t]he likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest.” *Thompson v. Planning Comm’n*, 464 So. 2d 1231, 1236 (Fla. 1st DCA 1985); *see also Milin v. Northwest Fla. Land L.C.*, 870 So. 2d 135, 136 (Fla. 1st DCA 2003) (applying *Thompson*). As shown below, all of these factors support the plaintiff’s request for a temporary injunction.

I. **PLAINTIFF IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS**

Plaintiff’s first claim for relief in this litigation is based on the contention that Charter Amendment Petition 06-5 through its own language was limited to placement on the general election ballot in November 2006, and may not be validly placed on the general election ballot in November 2008. In addition, the ballot title and summary are misleading and inadequate to meet the requirements of Section 101.161, Florida Statutes, providing a second, alternative, ground for enjoining the placement of charter amendment on the ballot.

A. **THE LANGUAGE IN CHARTER AMENDMENT PETITION 06-5 LIMITED ITS PLACEMENT SOLELY TO THE GENERAL ELECTION BALLOT IN NOVEMBER 2006**

The petition form signed by the electors of Hillsborough County, Charter Amendment Petition 06-5, begins with the statement “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.” (emphasis added). TBHC collected all signatures for the petition prior to the 2006 general

election. Hence, by the self-limiting language contained on the petition form, the charter amendment is invalid for any election except the 2006 general election.

A similar situation arose in *Eight Is Enough in Pinellas v. Ruggles*, 678 So. 2d 898 (Fla. 2d DCA 1996). In *Ruggles*, a political committee entitled Eight is Enough in Pinellas circulated, in the summer of 1994, a petition to amend the Pinellas County Charter to include term limits for several elective offices. *Id.* at 899. The petition that was circulated contained the following statement: "I am a registered voter of Pinellas County, Florida, and hereby petition the Pinellas County Board of County Commissioners to place the following amendment to the Pinellas County Home Rule Charter on the ballot of the next scheduled countywide election." *Id.* at 900. The next scheduled countywide election was in November 1994. Eight is Enough failed to collect sufficient signatures to be placed on that ballot, but continued to submit signatures to the Supervisor of Elections who accepted the signatures.

In June 1995, concerned with the validity of the petition, the Supervisor requested an opinion from the County Attorney. The County Attorney found that the petitions dated prior to the November 1994 election were no longer valid. In so holding, the County Attorney "reasoned that the petitions were self-limiting to that election and were no longer valid . . . [and] the Supervisor could not merely assume that the signatories would want the initiative on any subsequent ballot when they had expressly asked that it be presented at a particular election." *Id.*

After receiving the County Attorney's opinion, the Supervisor invalidated the petitions signed prior to November 1994. Eight is Enough filed a declaratory judgement action to challenge the Supervisor's actions. The circuit court upheld the Supervisor's actions, and Eight is Enough appealed to the Second District Court of Appeal. The Second District upheld the

circuit court's decision and found that the Supervisor's actions were not unreasonable. *Id.* at 901.

The same defect present in *Ruggles* is present in this case. Charter Amendment Petition 06-5 stated that the charter amendment would be placed on the next general election ballot, i.e. the November 2006 ballot, and all those who signed the petition did so prior to November 2006. Thus, by signing the petition, the electors expressly indicated their desire to place the charter amendment on the November 2006 general election ballot and not on some future ballot. As the Court in *Ruggles* explained, the fact that some electors may not object to the charter amendment's placement on a subsequent ballot does not save the amendment because the petition failed to include such a choice. Accordingly, the utilization of self-limiting language that led electors, like Plaintiff, to believe that the charter amendment would only be placed on the November 2006 precludes Charter Amendment Petition 06-5 from being placed on the November 2008 ballot. It is invalid and is not entitled to ballot placement.

B. CHARTER AMENDMENT PETITION 06-5 ALSO IS UNLAWFUL BECAUSE THE BALLOT TITLE AND SUMMARY LANGUAGE PROPOSED BY THE TBHC IS MISLEADING AS TO THE TRUE EFFECT OF THE PROPOSED AMENDMENT

While the foregoing is sufficient to warrant enjoining the placement of Charter Amendment Petition 06-5 on the ballot for the November 2008 general election, that result is required for a second reason as well.

Section 101.161, Florida Statutes requires all public measures that are submitted to the vote of the people to contain a ballot title and summary. The statute requires the ballot title to "consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." §101.161(1), Fla. Stat. (2007). It further requires the ballot summary to include an explanatory statement of not more than 75 words that informs the voter of "the

chief purpose of the measure.” §101.161(1), Fla. Stat. (2007). Section 101.161 applies equally to amendments to the Florida Constitution and to local public measures to amend city and county charters. *See Wadhams v. Board of County Commissioners of Sarasota County*, 567 So. 2d 414 (Fla. 1990). Accordingly, the Florida Supreme Court’s many opinions interpreting the statute as applied to constitutional amendments apply to local amendments as well.

The Florida Supreme Court has held that public measures that are submitted to the vote of the people must be “*accurately* represented on the ballot; otherwise, voter approval would be a nullity.” *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000)(emphasis in original); *see also* § 101.161, Fla. Stat. (2007). This requirement mandates that the ballot title and summary of a proposed amendment appearing on the general election ballot express the substance of the amendment in clear and unambiguous terms. *Armstrong*, 773 So. 2d at 12; *Smith v. American Airlines*, 606 So. 2d 617 at 620 (striking a proposed initiative from the general election ballot due to a defective ballot summary). “[T]he gist of [this] ... requirement is simple: A ballot title and summary cannot either ‘fly under false colors’ or ‘hide the ball’ as to the amendment’s true effect.” *Armstrong*, 773 So. 2d at 16. Instead, the ballot title and summary are there to provide “truth in packaging.” *Armstrong*, 773 So. 2d at 13; *see also Florida Ass’n of Realtors, Inc. v. Smith*, 825 So. 2d 532, 536 (Fla. 1st DCA 2002). Accordingly, in order to achieve ballot placement a ballot title and summary must “state in clear and unambiguous language the chief purpose of the measure,” *Advisory Op. to Att’y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994), so that the voters “will not be misled as to its purpose.” *Id.*

In this case, 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.

The article of the Hillsborough County Charter affected by the proposed amendment is Article V. The proposed charter amendment seeks to incorporate the following changes to Article V (additions are underlined and deletions are delineated by strike through):

V. Executive Branch: Elected County Mayor ~~Administrator~~

Section 5.01. Elected County Mayor Administrator.

The executive responsibilities and powers of local self government of the county not inconsistent with this Charter shall be assigned to and vested in the an elected County Mayor administrator. ~~The Executive Branch shall be composed of an elected County Mayor, the officers and employees of the administrative offices and executive divisions established by this Charter or created by the Board.~~ One or more assistant county administrators may be appointed by the County Mayor administrator ~~with the advice and consent of the board~~ and shall serve at the pleasure of the County Mayor administrator.

Section 5.02. Administrative Organization.

All functions of the executive branch shall be allotted among not more than ten divisions or offices. Each division or office shall be administered by a division or office head in accordance with the administrative code. Each division or office head shall be appointed by the County Mayor administrator with the advice and consent of the board and shall serve at the pleasure of the County Mayor administrator. Each division or office head shall report to and be responsible to the County Mayor administrator or designated assistant county administrator. The County Mayor administrator may, as allowed by ordinance, require one division or office to undertake a task of another division or office on a temporary basis ~~or until the board provides otherwise.~~

Section 5.03. County Mayor Administrator: Qualifications, Election, Appointment, Term of Office; Compensation.

(1) The County Mayor administrator shall be a full-time position combining both the duties of ceremonial head and operational head of the county. ~~officer who holds a masters degree in public administration, management, or related field shall have three years of executive or management experience in public administration.~~ The County Mayor county administrator shall be elected at large and shall not be a member of the board of county commissioners. ~~The term of office shall be for a term of four years not to exceed two consecutive terms and will commence on the second Tuesday of January in the year following the election.~~ appointed by an affirmative vote of not less than five members of the board of county commissioners and may be removed at any time by an affirmative vote of not less than five members of the board or upon the affirmative vote of four (4) members at each of two (2) regular meetings not less than thirteen (13) days

~~apart and no more than twenty-eight (28) days apart. The County Mayor shall be administrator need not be a registered voter and a resident of the county at the time of election to office and throughout the term of office. appointment, but shall within a reasonable time become and remain while in office a resident of the county. 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. The County Mayor administrator shall not engage in any other business or occupation.~~

~~(2) The compensation of the Mayor administrator shall be fixed by the board of county commissioners by ordinance at a level which is commensurate with the requirements of the position. The county administrator's compensation, including severance pay, may be set by contract if allowed by and pursuant to ordinance.~~

~~(3) The office of County Mayor administrator shall be deemed vacant if the incumbent: takes up residence outside the county; is by death, illness, resignation, refusal of the Mayor to serve, removal, or other casualty or reason unable to continue to perform the duties of his office; or resigns. or is removed by the board of county commissioners in the manner prescribed in Section 5.03(1). A vacancy in the office shall be filled in accordance with state law, the same manner as the original appointment. The board of county commissioners may appoint an interim administrator in the case of vacancy, temporary absence, or disability of the present administrator until a successor has been appointed and qualified or the administrator returns.~~

~~Section 5.04. Political Activity by Administrator Duties. The County Mayor shall have the following powers and duties:~~

~~(1) Manage the operation of all elements of County government under the jurisdiction of the Board, consistent with the policies, ordinances and resolutions enacted by the Board;~~

~~(2) Be responsible for the execution of all contracts and legal documents, but may delegate this authority;~~

~~(3) Appoint and dismiss heads of County departments and divisions, which appointments shall be subject to confirmation by the Board;~~

~~(4) Assure the faithful execution of all ordinances, resolutions and orders of the Board and all laws of the State which are subject to enforcement by the County Mayor, or by officers who are subject under this Charter to the Mayor's discretion and supervision;~~

~~(5) Present annually at a time designated by the Board, a "State of the County" message, setting forth programs and recommendations to the Board;~~

~~(6) Supervise the daily activities of employees;~~

~~(7) Serve as the chief administrative official of the county, official representative and ceremonial dignitary for the government of Hillsborough County with prerogative to issue proclamations; and,~~

~~(8) Carry out other powers and duties as required by this Charter or may be prescribed by the Board.~~

~~The county administrator shall not hold any political office nor take part in any political activity other than voting.~~

~~Section 5.05. Performance Bond.~~

~~The county administrator shall be required to post a performance bond in accordance with general law.~~

The ballot title and summary of the proposed amendment are clearly misleading in that they do not state the true effect of the changes to Article V. The misleading nature of the ballot title and summary is not only in what they state, but in what they fail to state. 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 County Commissioners. The title and summary also fail to inform the voter that the implementation of the amendment is impossible as written since the vote on the amendment is to occur at the same election that the amendment calls for the election of the County Mayor.

The current charter provides for an appointed County Administrator who must hold a masters degree in public administration, management or related field and who has at least three years of experience in public administration. See Section 5.03, Hillsborough County Charter. The County Administrator is accountable to the Board, and may appoint Assistant County Administrators only upon the advice and consent of the Board. The powers and duties of the County Administrator are not included in Article V of the Hillsborough County Charter. Instead, the powers and duties of the County Administrator are listed in the Code of Ordinances of the County, specifically in the Administrative Code, Chapter 2 ¼, Hillsborough County Code of Ordinances. Under this chapter, the County Administrator is granted the power to negotiate contracts for the County, subject to approval by the Board. See Chapter 2 ¼, Sec. 2 ¼-21, Hillsborough County Code of Ordinances.

The proposed charter amendment does not merely substitute an elected County Mayor for the appointed County Administrator as indicated by the ballot title. Rather, 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. The ballot title erroneously implies that the only change sought by the amendment is in the switch from an appointed County Administrator to an elected County Mayor without any indication the County Mayor will gain power at the expense of the Board. Such a title cannot stand. *See In re Advisory Opinion to the Attorney General Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994).

While the ballot summary informs the voter that the County Administrator will be replaced by an elected nonpartisan County Mayor and that the amendment specifies the executive functions, power and duties of the County Mayor, it fails to inform the voter that the true effect of the proposed amendment is to remove major checks and balances between the legislative (County Commission) and executive (County Administrator/County Mayor) branches of the County government. In Section 5.01, it abolishes the Board's right to approve the Assistant County Administrators and it rests sole responsibility to execute contracts and bind the County in the County Mayor without any accountability to the Board. Moreover, the Board would have no authority on its own to amend the powers and duties of the County Mayor as the proposed charter amendment places such powers and duties in Section 5.04 of the Charter which may only be amended through a vote of the electorate. The result is a ballot title that is affirmatively deceptive and a ballot summary that is misleading. *See Armstrong; Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982); *Volusia Citizens' Alliance v. Volusia Home Builders Ass'n*, 887 So. 2d 430 (Fla. 5th DCA 2004).

Additionally, the ballot summary is misleading because it fails to inform the voter that the proposed charter amendment cannot be enacted as written since it calls for the election of the County Mayor in November 2008, i.e. at the same time that the voter is considering the proposed

charter amendment. Section 5.03(1) of the proposed charter amendment states that 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 year 2008.”

In *Advisory Opinion to the Attorney General re Extending Existing Sales Tax*, 953 So. 2d 471, 482 (Fla. 2007), the Supreme Court noted that when examining whether a ballot summary is misleading, a court “must also review the summary through the lens of the critical dates the amendment contemplates to determine whether the summary may be misleading or confusing.” The constitutional amendment at issue in that case required that the Legislature review sales tax exemptions prior to July 1, 2008, and after the completion of such review, make all services not exempted subject to sales tax on January 1, 2009. Because the proposed amendment was scheduled for the November 2008 election, the review contemplated by it could not be completed. Moreover, because the proposed amendment was self-executing, the Legislature was without authority to extend the dates contained therein. Consequently, the Supreme Court concluded that “the ballot summary cannot be approved because of the confusion it will present to the voter as to the effectiveness and operation of the proposal in view of the conflicting deadlines.” *Id.* at 485.

Similarly, in this case, the proposed amendment requires the election of the County Mayor in November 2008. The proposed amendment is self-executing and does not authorize the Board to alter the date for the election of the County Mayor. Given the confusion to the voter as to the effectiveness and operation of the proposal in light of the impossibility of its implementation, the proposed amendment should not be placed on the ballot.

II. ALL OF THE REMAINING FACTORS IN THE TEMPORARY INJUNCTION INQUIRY FAVOR GRANTING THE REQUESTED INJUNCTION TO ENJOIN THE PLACEMENT OF CHARTER AMENDMENT PETITION 06-5 ON THE GENERAL ELECTION BALLOT

For the reasons set forth above, Plaintiff has a “substantial likelihood” of prevailing on the merits of his claims that the petition form is defective and that the proposed charter amendment’s ballot title and summary language is misleading. The issues briefed here are pure questions of law, and it is submitted that it would be appropriate, upon completion of briefing and argument, for the Court to treat the instant motion for temporary injunction as a motion for summary judgment, and enter a final judgment permanently enjoining Defendant Buddy Johnson from placing this amendment on the general election ballot.

Assuming, however, that the Court will treat this as a motion for temporary relief, we now address briefly the remaining factors – other than the likelihood of success on the merits – that are relevant to the temporary injunction analysis.

A. PLAINTIFF WILL BE IRREPARABLY HARMED ABSENT A TEMPORARY INJUNCTION

Plaintiff will suffer irreparable harm if this Court does not promptly issue an injunction prohibiting Charter Amendment Petition 06-5 from being placed on the ballot for the November 2008 general election.

The irreparable harm that Plaintiff and other Hillsborough County citizens and voters would suffer if this proposed charter amendment is placed on the general election ballot is obvious. Few rights are as fundamental as those that guarantee the integrity of elections. *See, e.g., Smith v. Coalition to Reduce Class Size*, 827 So. 2d 959, 963 (Fla. 2002) (finding “[b]allot integrity . . . necessary to ensure the effectiveness of the constitutionally provided initiative

process”); *Advisory Op. to the Att’y Gen. re Pub. Prot. from Repeated Med. Malpractice*, 880 So. 2d 686, 687-88 (Fla. 2004) (construing *Coalition to Reduce Class Size*).

Even though several months remain before the general election, Plaintiff will suffer irreparable injury if the proposed amendment is not promptly disqualified from placement on the general election ballot. If the proposal is placed on the general election ballot Plaintiff, like other groups and individuals, will find it necessary to devote significant resources to an election campaign aimed at defeating the amendment. Plaintiff will not be able to recoup the funds that will have to be devoted to this campaign if the proposed amendment is removed from the general election ballot only a short time before (or even retroactively after) the election. Accordingly, Plaintiff will suffer irreparable injury if Defendant Buddy Johnson is not promptly enjoined from placing Charter Amendment Petition 06-5 on the general election ballot.

B. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW

Plaintiff has no adequate remedy at law, inasmuch as money damages obviously could not remedy the legal violation that will result if this unlawful amendment is placed on the general election ballot – and there is no legal action through which Plaintiff could recoup funds spent on an election campaign aimed at defeating these unlawful amendments. Nor is there any administrative process by which Plaintiff could obtain this relief. The Florida Supreme Court has repeatedly held, in the context of challenges to ballot initiatives, that declaratory and injunctive relief is the proper avenue for seeking to strike ballot initiatives from a general election ballot. *See, e.g., Smith*, 606 So. 2d at 621-622 (upholding trial court decision to grant injunctive relief and strike TBRC-proposed initiative from ballot); *Askew*, 421 So. 2d at 156 (reversing trial court’s denial of injunctive relief and ordering ballot initiative removed from ballot); *Florida Ass’n of Realtors v. Smith*, 825 So. 2d 532 (Fla. 1st DCA 2002) (same).

C. INJUNCTIVE RELIEF WILL SERVE THE PUBLIC INTEREST

There can be no question that a temporary injunction in this case will serve the public interest. "It is the people – the inherent source of all political power under our State Constitution" who maintain the authority to vote on amendments to their governing documents. *Coalition to Reduce Class Size*, 2002 WL 1809005, at *2 (citing Art. I, § 1, Fla. Const.). By granting an injunction, the Court assures the public that the right of the people to amend local charters is maintained through a lawful process. It protects the public's belief in the electoral system and provides integrity to a system that in recent years has lost the confidence of those it is intended to serve.

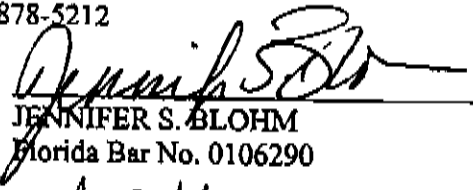
CONCLUSION

For the reasons stated herein, this Court should enter a temporary injunction prohibiting the Defendant from placing Charter Amendment Petition 06-5 on the ballot for the November 4, 2008 general election.


Respectfully submitted,

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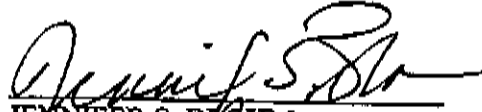
By:


RONALD G. MEYER
Florida Bar No. 0148248

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by facsimile on this 17th day of July, 2008, to: Buddy Johnson, Hillsborough County Supervisor of Elections, County Center, 601 East Kennedy Boulevard, 16th Floor, Tampa, Florida 33602 and by process server along with complaint.


JENNIFER S. BLOHM