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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.; PATRICIA BRIGHAM, individually, and as President of the League of Women Voters of Florida, Inc.; and SHAWN BARTLET, individually, and as Second Vice President of the League of Women Voters of Florida, Inc.,

Plaintiffs,

v. Case No. 2018-CA-1523

KEN DETZNER, in his official capacity as Secretary of State for the State of Florida,

Defendant.

_____/

AMENDED NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant Ken Detzner, in his official capacity as Secretary of State for the State of Florida, ("Defendant") appeals to the First District Court of Appeal the order of this Court rendered August 20, 2018. The nature of the order is final order on a non-jury trial granting summary final judgment in favor of Plaintiffs. A conformed copy of the order is attached **(Exhibit A)**.

This timely filing of this notice of appeal automatically operates as a stay of the final judgment pending appellate review. Fla. R. App. P. 9.310(b)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of August, 2018, a copy of the foregoing was served by notice of electronic filing via the Court's electronic filing system and by U.S. Mail upon all counsel of record:

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., PATRICIA BRIGHAM, individually, and as President of the League of Women Voters of Florida, Inc., and **SHAWN BARTELT,** individually, and as Second Vice President of the League of Women Voters of Florida, Inc.,

Plaintiffs,

vs.

Case No. 2018-CA-001523

KEN DETZNER, in his official capacity as Florida Secretary of State,

Defendant.

_____/

SUMMARY FINAL JUDGMENT FOR PLAINTIFFS

In this action, Plaintiffs contend that a revision to the Florida Constitution proposed by the Florida Constitutional Revision Commission, designated by the Secretary of State as Revision 8, must be stricken from the ballot for the upcoming 2018 general election because its ballot title and summary fail to comply with the accuracy requirement imposed by Article XI, Section 5 of the Florida Constitution and section 101.161(1), Florida Statutes.

The parties agreed to an expedited procedure for resolving this matter through cross motions for summary judgment. The Plaintiffs have standing and this Court has jurisdiction.

The Court, having reviewed the respective motions for summary judgment and supporting memoranda, heard argument on August 17, 2018, and finding no genuine issue of material fact, finds for the reasons set forth below that Plaintiffs' Motion for Summary Judgment should be granted and Defendant's Motion for Summary Judgment should be denied.

BACKGROUND

Article XI, Section 2 of the Florida Constitution establishes a 37-member Constitution Revision Commission which convenes every 20 years to debate and propose revisions to the Florida Constitution. A vote of sixty percent of the general electorate is required for any such revision to be effective. Art. XI, § 5(e), Fla. Const. The most recent CRC concluded its work on May 9, 2018, proposing eight revisions for the November 2018 ballot.

On March 21, 2018, the CRC approved Proposal 71, which, as then drafted, would have made the following revision to Article IX, Section 4(b) (proposed language appears in underlined type; words stricken are proposed deletions):

> (b) The school board shall operate, control, and supervise all free public schools established by ~~within~~ the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

During debates over Proposal 71, its sponsor stated that the proposed revision was intended to overrule *Duval County School Board v. State, Bd. of Education*, 998 So 2d 641 (Fla. 1st DCA 2008), and allow the power to authorize new charter schools to be assigned to any of a variety of potential public or private entities. The sponsor specifically listed a broad range of charter school authorizers that had been successful in other states, including a non-profit organization, a state university, a state board of education, a local school district, and a charter board.

The CRC combined Proposal 71 with two other unrelated changes to the Florida Constitution's education article. The language from Proposal 71 was reworded slightly to provide: "The school board shall operate, control, and supervise all free public schools established by the district school board within the school district . . . ." This language was combined with CRC-approved Proposals 43 and 10 to create a single omnibus education

amendment, referred to by the CRC as "Revision 3." The portions of Revision 3 that were derived from Proposals 43 and 10 would, respectively, impose term limits for school board members and constitutionally-required civics education in Florida public schools. The revision will appear on the November 2018 as Revision 8.

Commissioner Donalds, who also sponsored 43 regarding term limits, emphasized that term limits were extremely popular with the public. The sponsor of Proposal 10 regarding civic literacy explained that he supported bundling his proposal with other education provisions because it would help some of the other education issues pass. However, a number of CRC members expressed concern that bundling the proposals would cause problems for voters. Nevertheless, a motion to "unbundle" proposals 10, 43, and 71 failed.

The CRC-drafted and approved title and summary for Revision 8 read as follows:

CONSTITUTIONAL AMENDMENT
ARTICLE IX, SECTION 4, NEW SECTION
ARTICLE XII, NEW SECTION

SCHOOL BOARD TERM LIMITS AND DUTIES; PUBLIC SCHOOLS.—Creates a term limit of eight consecutive years for school board members and requires the legislature to provide for the promotion of civic literacy in public schools. Currently, district school boards have a constitutional duty to operate, control, and supervise all public schools. The amendment maintains a school board's duties to public schools it establishes, but permits the state to operate, control, and supervise public schools not established by the school board.

CURRENT LAW

Florida's system of public schools is governed by local and state officials, each with related but independent duties to educate all children in the state. Since 1968, the Florida Constitution has conferred upon local elected school boards certain exclusive authority over the public schools within their respective school districts:

> The school board *shall operate, control, and supervise all free public schools within the school district* and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

Art. IX, § 4(b), Fla. Const. (emphasis added). This delegation of constitutional authority includes both traditional public schools and charter schools, both of which are "free public schools" as that term is used in the constitution. § 1002.33, Fla. Stat. ("All charter schools in Florida are public schools and shall be part of the state's program of public education."). Also, since 1998, the Florida Constitution has obligated the State of Florida, including all branches of state government, to provide a uniform, high quality system of free public schools:

> Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allow students to obtain a high quality education . . . .

Art. IX, § 1(a), Fla. Const.

These constitutional provisions do not explicitly address the "establishment" of public schools, the term used in the ballot summary. But Florida courts have held that the constitution prohibits the state from enacting measures authorizing new charter schools at the state level if such measures would limit local school districts to merely "ministerial" functions. *See Duval Cty. Sch. Bd. v. State, Bd. of Educ.*, 998 So. 2d 641, 644 (Fla. 1st DCA 2008). The current constitutional and statutory scheme permits the state to play an active role in reviewing districts' decisions concerning charter authorization and supervision, but only after local school boards have made authorization decisions in the first instance. *See Sch. Bd. of Palm Beach Cty. v. Fla. Charter Educ. Found., Inc.*, 213 So. 3d 356, 360 (Fla. 4th DCA 2017) (appeals process for district denials of charter authorization complies with Florida Constitution).

LEGAL ANALYSIS

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (citing *Menendez v. Palms West Condominium Ass'n*, 736 So. 2d 58, 60 (Fla. 1st DCA 1999)). Courts view cases that center on the "construction of a written instrument and the legal effect to be drawn therefrom" as being questions of law rather than questions of fact. *Id.* at 131 (quoting *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999) (internal citation omitted)). The only relevant facts in this case—the text of the proposed revision, its supporting ballot title and summary, and the debates of the CRC—are undisputed. Summary judgment is therefore appropriate because this case presents pure questions of law. *Volusia Cty.*, 760 So. 2d at 130-31.

In reviewing a challenge to a proposed ballot amendment, courts look only at whether the language of the proposal meets the state constitutional and statutory requirements enumerated below. Courts do not review the merits of the proposed amendment. *See Advisory Op. to Atty. Gen. ex rel. Amendment to Bar Government from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 891 (Fla. 2000). At the ballot amendment stage, courts lack "the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments." *Advisory Op. to the Atty. Gen. re Tax Limitation,* 644 So. 2d 486, 489 (Fla. 1994).

Only accurate ballot titles and summaries are constitutionally permissible. "Although the constitution does not expressly authorize judicial review of amendments proposed by the Legislature . . . the courts are the proper forum in which to litigate the validity of such amendments." *Roberts v. Doyle*, 43 So. 3d 654, 657 (Fla. 2010). The Florida Supreme Court has extended the accuracy requirement to applies to "all proposed constitutional amendments," not merely those proposed by the Legislature. *Id.* Specifically, the courts have the power to

determine whether proposed constitutional amendments comply with Article IX, Section 5(a) of the Florida Constitution, which requires that they be "*accurately* represented on the ballot; otherwise, voter approval would be a nullity." *Id.* (quoting *Armstrong*, 773 So. 2d at 12) (emphasis in original).

To be accurate, a ballot title and summary must avoid both (1) misleading language and (2) material omissions; the Court has described the accuracy requirement as a type of "'truth in packaging' law for the ballot." *Id.* To avoid being misleading, a ballot title and summary must provide a "clear and unambiguous" explanation of the measure's chief purpose. *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982). It must disclose substantial impacts to the Florida Constitution. *Advisory Op. to the Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 803-04 (Fla. 1998). Ballot titles and summaries can be misleading if they do not properly inform voters of the legal significance of the terminology used. *Amendment to Bar Government from Treating People Differently*, 778 So. 2d at 897. To avoid material omissions, the ballot title and summary must explain both the meaning and the effect of the proposed amendment. *In re Advisory Op. to the Atty. Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994). These requirements are necessary to give the voter "an opportunity to know and be on notice as to the proposition on which he is to cast his vote." *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954).

The legislature has further codified the accuracy requirement:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot . . . The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

Section 101.161(1), Fla. Stat.

The Supreme Court has explained that "[t]he purpose of these requirements 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.'" *Advisory Op. to the Atty. General Re: Voting Restoration Amendment*, 215 So. 3d 1202, 1207 (Fla. 2017) (quoting *Advisory Op. to Atty. Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998)). They are also intended to deter "advantageous but misleading 'wordsmithing.'" *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). The sanction for such efforts is removal of the proposal from the ballot:

> When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot—regardless of the substantive merit of the proposed changes. Indeed, the use or omission of words and phrases by sponsors, which become misleading, in an attempt to enhance the chance of passage, may actually cause the demise of proposed changes that might otherwise be of substantive merit. If a sponsor . . . wishes to guard a proposed amendment from such a fate, it need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous.

Id. (emphasis added); *see also Roberts*, 43 So. 3d at 661 (enjoining secretary of state from placing misleadingly-described amendment on the ballot).

COUNT I – FAILURE TO INFORM OF CHIEF PURPOSE AND EFFECT

During the CRC debates, the sponsor of Proposal 71, Commissioner Donalds, was clear about its purpose and goal:

> The goal of this amendment, to be clear, is to clarify the intent of the constitutional language that was misinterpreted by the First DCA in the case of Duval County School Board versus the State Board of Education. This is in regards to the Florida Schools of Excellence Commission, which was an independent state-level entity, *with the ability to authorize charter schools* throughout the state of Florida, passed under Governor Jeb Bush.
>
> Currently 43 states *have charter schools*. Of those, 34 have a statewide charter authorizer, similar to the Schools of Excellence Commission. …

Indeed, the initial draft of Proposal 71 explicitly used the term "charter school" in its proposed language:

> The school board shall operate, control, and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs. Nothing herein may be construed to limit the legislature from creating alternative processes to authorize the establishment of charter schools within the state by general law.

Yet the language that became Revision 8 does not mention charter schools. Commissioner Donalds explained that she omitted the word "charter" from the final text of her amendment "because we don't know what innovations are to occur in education over the next 20 years or over the next generation." Instead, Revision 8 invents a category of school—those "not established by the school board"—but this phrase is undefined in Florida law. As a result, both the text and the summary are entirely unclear as to which schools will be affected by the revision.

The failure to use the term voters would understand, "charter schools," as well as the use of a phrase that has no established meaning under Florida law, fails to inform voters of the chief purpose and effect of this proposal. *See Amendment to Bar Government from Treating People Differently*, 778 So. 2d 888, 898-899 (Fla. 2000) (summary defective for use of term "bona fide qualifications based on sex," which did not adequately explain what the proposed amendment provided and left voters to rely on their own conceptions of its meaning); *Advisory Op. to the Atty. General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1309, 1308-1309 (Fla. 1997) (summary defective for failure to define terms "owner" and "common law nuisance," causing summary to be confusing, unclear, and not sufficiently informative to voters).

Although it is not clear under Florida law which schools are "established by the school board," it can be gleaned from the text of Revision 8 and debate of the CRC that the intention of the revision is to exclude district school boards from any role in establishing (as well as operating, controlling, and supervising) at least certain public schools going forward. This is a significant change in the role of local school boards which is not explained in the ballot summary. The current constitution and implementing laws provide district school boards the exclusive right to make the initial determination of whether new schools, charter or not, are needed and desirable in their counties. Without understanding the current role of school boards in approving new schools, voters cannot understand the important change they are making to local democratic control of education. Moreover, by framing boards' rights as "duties," the ballot summary also incorrectly implies that it is strengthening, or at least maintaining, the role of school boards by removing a burden, instead of weakening it by removing a power.

These deficiencies are similar to those identified in *Florida Dep't of State v. Florida State Conference of NAACP Branches*, 43 So. 3d 662 (Fla. 2010). There, the proposed amendment would have eliminated the constitutional requirement that redrawn legislative districts be "contiguous," and subordinated this consideration to other new discretionary standards. The Court struck the proposed amendment from the ballot, finding "[n]owhere does the ballot language inform the voter that there is currently a mandatory contiguity requirement in article III, and nowhere does the language inform the voter that the contiguity requirement could be diluted by Amendment 7." *Id.* at 668-69. So too here, nowhere does the ballot summary inform the voter of the essential role school boards play in authorizing new schools, and nowhere does the language inform the voter that this role is intended to be diluted by Revision 8.

The title of Revision 8 is also misleading through omission. That title is: "SCHOOL BOARD TERM LIMITS AND DUTIES; PUBLIC SCHOOLS." While the vague reference to "school board ... duties" is presumably intended to allude to Proposal 71, a voter could easily believe from the title of Revision 8 that it consists solely of a proposal to limit the term limits for school boards.

Moreover, Proposal 71 could have been its own standalone revision, had it not been bundled with two other unrelated proposals. Thus voters could have had a clearer choice. There was no need to describe three separate proposals in a 15-word title and 75-word summary. There is no limit on the number of proposals the CRC can advance. It chose to bundle the three proposals together to increase, in its view, their chances of passage. But this court can only permit it to do so if it fully and accurately described all three proposals in the ballot title and description. That it failed to do.

COUNT II – AFFIRMATIVELY MISLEADING

The ballot summary for Revision 8 states that it "permits the state to operate, control, and supervise public schools not established by the school board." But Revision 8 is conspicuously silent about who or what would undertake these responsibilities for schools not established by the school board. And the CRC debates reveal an intention for the legislature to give this authority to a variety of entities. This is not communicated in the summary. Instead, voters would expect the ballot summary to do what it says—grant "the state," the only entity mentioned, the authority to authorize new schools. This distinction is important. Voters may want to preserve public control to ensure that schools not authorized by their local democratically-elected school boards are nonetheless subject to some form of direct democratic supervision. Contrary to the

language of the ballot summary, the amendment was intended to permit that power to be given to a wide variety of third parties, potentially including private entities.

This discrepancy between the summary and the text renders the ballot summary materially misleading. *Advisory Op. re Term Limits*, 718 So. 2d at 803 (language was materially misleading where it stated that it would "affect[] the powers of the Secretary of State" when it would have in fact "substantially impact[ed] article IV of the Florida Constitution regarding the Secretary of State's powers and duties" by providing him with significant new non-ministerial duties); *In re Advisory Op. to the Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 652 (Fla. 2004) (where "amendment's chief purpose [wa]s to provide an additional homestead exemption for some homeowners" ballot summary which said that it "'provide[d] property tax relief" to all Florida homeowners" was misleading because "[w]hether the amendment would ultimately result in 'tax relief,' ... [d]epend[ed] on a variety of factors independent of the amendment.").

CONCLUSION

"The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution . . . ." *Slough*, 992 So. 2d at 149. Because the ballot summary for Revision 8 clearly and conclusively fails to adequately inform the voter of the chief purposes and effects of the revision, and is affirmatively misleading, placement of Revision 8 on the ballot would violate Article XI, Section 5, Florida Constitution, and Section 101.161(1), Florida Statutes.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Summary Judgment is **GRANTED**, Defendant's Cross Motion for Summary Judgment is **DENIED**, and **SUMMARY FINAL JUDGMENT** is entered in favor of Plaintiffs.

The Court hereby **DECLARES** that the ballot title and summary language accompanying Revision 8 does not accurately inform Florida voters of the true effect of the proposed amendment, in violation of Article XI, section 5, of the Florida Constitution, and Section 101.161(1), Fla. Stat.

The Court permanently **ENJOINS** Defendant Detzner, and all persons and entities acting under his direction or in concert with him, from placing Revision 8 on the ballot for the November 2018 general election.

Done and ordered in Tallahassee, Leon County, Florida, this 20th day of August, 2018.

JOHN C. COOPER
Circuit Judge

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