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

RABBI MERRILL SHAPIRO, et al.,

Plaintiffs,

v. CASE NO. 2011-CA-1892

KURT S. BROWNING, in his official capacity as Florida Secretary of State,

Defendant,

and

THE STATE OF FLORIDA,

Defendant-Intervenor.
_____/

SUMMARY FINAL JUDGMENT

This case is before me on cross-motions for summary judgment, stemming from the Plaintiffs' challenge to two measures that passed during the 2011 session of the Florida Legislature. Specifically, they argue that the ballot title and statement, or summary, of a legislatively-proposed constitutional amendment, titled "Religious Freedom" is ambiguous and misleading, in violation of article XI of the Florida Constitution and section 101.161 Fla. Stat. They also argue that an amendment to that statute, which directs the Attorney General to correct court-identified deficiencies in a ballot title or summary, violates the separation of powers doctrine contained in article II, section 3 of the Florida Constitution.

The material facts are not in dispute, and thus summary judgment is appropriate. The attorneys for the parties have done an excellent job of advocating their respective positions, both orally and in writing. I have considered the motions, memoranda, the argument of counsel and the authorities cited. For the reasons set forth below, I find that the ballot summary is ambiguous

and misleading, but that the statutory provision for correcting such deficiencies does not violate the separation of powers doctrine.

BALLOT TITLE AND SUMMARY

The proposed amendment, designated as Amendment 7, reads as follows:

> SECTION 3. Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace, or safety. Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief. ~~No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.~~

The ballot title and statement, or summary, read as follows:

> RELIGIOUS FREEDOM. – Proposing an amendment to the State Constitution to provide, consistent with the United States Constitution, that no individual or entity may be denied, on the basis of religious identity or belief, governmental benefits, funding, or other support and to delete the prohibition against using revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The parties do not disagree as to the legal standard I am to apply in evaluating Plaintiff's challenge to the proposed amendment. The law requires that a ballot summary state the chief purpose of the proposed amendment in clear and unambiguous language and not be misleading. *See Florida Education Ass'n v. Florida Dept. of State*, 48 So. 3d 694 (Fla. 2010). A ballot statement must "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." Id. (quoting *Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d

563, 566 (Fla. 1998). A ballot summary should not "hide the ball" and "fl[y] under false colors" as to the principle effect of the amendment. *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000).

On the other hand, the ballot statement "need not explain every detail or ramification of the proposed amendment." *Florida Education Ass'n*, 48 So.3d at 700 (citing *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986)). I can presume "that the average voter has a certain amount of common understanding and knowledge." *Florida Education Ass'n*, 48 So.3d at 701 (citing *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second–Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002).

Every act of the Legislature, including a proposal to amend our Constitution, is presumed to be lawful, and the burden is on the Plaintiffs to show, clearly and convincingly, that the proposed amendment is legally defective. *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). On the other hand, the deference to the Legislature in such matters is not boundless. A ballot title and summary authored by that body is still required to give "the voter fair notice of the decision he must make." *Id.* at 155; *see also Florida Dep't of State v. Florida State Conference of NAACP Branches*, 43 So. 3d 662 (Fla. 2010).

Two things struck me as I read the numerous cases on the subject cited to me: 1) Ballot titles and summaries, including those for legislatively-proposed amendments, seem to have received fairly close scrutiny from the appellate courts in reviewing the language chosen; and 2) Judging from the sheer number of challenges and the frequency of dissenting opinions, what is "ambiguous" and "misleading" is often in the eye of the beholder.

This latter point is to be expected, of course, in any process of review in which human beings perform the task. It is indeed in the nature of our judicial review. What I must do here, then, is analyze the specific language at issue, comparing it with that reviewed in the appellate

opinions on the subject, and apply the resulting legal principles in a way that seems most consistent with the precedent.

Plaintiffs suggest that the ballot summary is ambiguous or misleading in three respects: 1) the phrase "consistent with the United States Constitution" is misleading because it inaccurately implies that the effect of the Amendment is to conform the Florida Constitution to the United States Constitution; 2) the ballot summary fails to explain to voters the "main effect" of Amendment 7, which they claim is to compel the State to extend benefits to religious institutions even when doing so would not be required under the U.S. Constitution; 3) the ballot title "Religious Freedom" is misleading because it suggests that the Amendment expands religious freedom, when in actuality it contracts religious freedom. I disagree with Plaintiffs as to their second and third arguments, but agree as to the first.

When I first read the amendment and its summary, it seemed rather straightforward and descriptive, not ambiguous or misleading in the least. Having now considered the state of the law relative to the subject, however, and the case law as applied to the review of proposed amendment summaries, I agree that the summary is legally defective. Specifically, I find that the phrase, "consistent with the United States Constitution" is ambiguous and misleading in light of the language of the proposed amendment itself, which uses the phrase "Except to the extent required by the First Amendment to the United States Constitution."

The problem here stems from the interplay between the Florida Constitution and the United States Constitution on the same subject. To understand the effect of the proposed amendment, one must first understand the state of the law relative to religious freedom. The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" The Florida

Constitution has similar language, to wit, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof."

Courts have interpreted the language in the First Amendment as creating a tension between the free exercise portion of the phrase and the establishment portion, and have wrestled with how to balance the two. In recent years the U.S. Supreme Court has held that "there is room for play in the joints" between the Establishment and Free Exercise Clauses of the First Amendment because "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause" *Locke v. Davey,* 540 U.S. 712 (2004), at 719.

At issue in *Locke* was whether the State of Washington could exclude students pursuing a degree in "devotional theology" from an otherwise inclusive college scholarship program. The Court ruled that although the state *could have* extended the scholarship program to such students without violating the Establishment Clause, it was *not required* to do so by the Free Exercise Clause. Courts applying *Locke* have reached the same result with regard to other governmental benefits. See *Eulitt v. Maine, Department of Education,* 386 F.3d 344 (1st Cir. 2004) and *Bowman v. United States*, 564 F.3d 765 (6th Cir. 2008), *cert. denied*, 130 S .Ct. 55 (2009).

Florida's constitution, in addition to the above language, however, contains the following:

> No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

This language, known as the "no-aid" provision, has been interpreted as imposing restrictions beyond the federal Establishment Clause. See *Bush v. Holmes* , 886 So.2d 340 (Fla. 1st DCA 2004). In that case, the Court held that a scholarship program violated this provision to the extent that it allowed state funds to be paid to sectarian schools. In

essence, per *Bush*, there is no "play in the joints" in Florida relative to using public funds in a way that might, even indirectly, aid a church or sectarian institution.

In part in response to this ruling[1], the above quoted language, the no-aid provision, is removed by the proposed amendment. And if that was all the amendment did, it could be persuasively argued that the Florida Constitution would essentially mirror the First Amendment, and one could expect similar interpretations. The proposed amendment, however, goes further. It adds the following language:

> Except to the extent *required* by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief. [Emphasis added]

The use of the word "required" as opposed to "allowed" or "permitted" is significant. The latter would allow the "play in the joints" discussed in *Locke*. The former does not. Only where state funding or aid to sectarian institutions is prohibited by the Establishment Clause of the First Amendment will the State be able to decline to provide benefits, support or funding under the proposed amendment.

In effect, the amendment would tilt the balance from heavy on the Establishment protection to heavy on Free Exercise. Whereas before, the provision was more restrictive than the First Amendment relative to spending public funds that might aid a sectarian institution, if it passes, the provision will be more restrictive as to the withholding of public funds from sectarian institutions. In both situations, the discretion constitutionally permitted to states under the First Amendment is removed.

[1] The House Joint Resolution contains the following clause: "WHEREAS until 2004 no Florida court had ever applied the State Constitution in a reported case in a manner more restrictive of the use of state funds than have federal courts applying the Establishment Clause of the First Amendment to the United States Constitution..."

Given the effect of this phrase, "required by..." and the implied purpose for its inclusion in the amendment itself, and given the case law in this area, the standards that have been applied in challenges of this nature, and the fairly rigorous review one might expect, you have to wonder why the authors chose to use the phrase, "consistent with the United States Constitution" in the ballot summary. There are numerous cases in which summaries were deemed defective because the authors used different terms in the summary which had different meanings than those used in the text itself, e.g., "people" rather than "persons" and "citizens" rather than "natural persons." Similarly, "required by" and "consistent with" do not have the same meaning. "Required" means to demand as necessary or essential, while "consistent" means free from variation or contradiction, compatible. See *Merriam Webster Online*.

Defendants argue that "consistent with the United States Constitution" is simply a shorthand summary of the lengthier clause in the amendment itself: "except to the extent required by the First Amendment to the United States Constitution." This is unpersuasive. "Except to the extent required by" uses only four more words than "consistent with" and still stays within the 75 word limit for the ballot summary. I would note as well that "to the extent" could be replaced by "as" without changing the meaning, and only one additional word would be used.

Defendants also argue that "consistent with" is an accurate descriptive word because the amended provision would not contradict the First Amendment, as interpreted. In that sense, they are correct, but that is only part of the definition or meaning of "consistent" noted above. The new provision will certainly not be "free from variation" with the First Amendment, because it will be more restrictive. One might reasonably infer from the "consistent with" language that the proposed amendment will bring the Florida Constitution in line with the U.S. Constitution, that it

will provide the same benefits and prescriptions. But as discussed above, that is not the case. At best, the "consistent with" language is ambiguous. And whether affirmatively misleading or merely ambiguous as to the meaning and effect of the Amendment, it is in either event defective.

Plaintiffs would go further and require some language in the summary that spells out that the effect of the amendment is a shift in emphasis or preference from protection against the establishment or promotion of religion by government to the protection of the free exercise thereof. It is difficult, however, to see how that could be accomplished and still stay within the 75 word limit. I tried and could come up with some wording, but it seemed cumbersome and was at the expense of other important information.

Nor do I think it is required. A summary need not explain ever nuance or possible ramification or interpretation that might be given. In *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982), the ballot statement stated that the proposed amendment would amend the Florida Constitution to "provide that the right to be free from unreasonable searches and seizures shall be construed in conformity with the 4th Amendment to the United States Constitution." *Id.* at 304. The plaintiffs argued that the ballot statement was defective because it did not "put voters on notice of the total effect" of the amendment, specifically its effect on the exclusionary rule. *Id.* at 304-05. The Court rejected plaintiffs' argument that the law effectively required "an exhaustive explanation reflecting [the plaintiffs'] interpretation of the amendment and its possible future effects." *Id.* at 305.

In this case, the inclusion of the new language, the striking of the no-aid wording, and the choice of the word "required" rather than "allowed" makes clear the primary purpose of the amendment. It naturally flows from the language deleted and the language

added that the primary effect of the amendment will be to make it a lot harder for the State to deny funding or program benefits to a sectarian institution.

Had the authors of the statement simply chosen the same or similar language when making reference to the First Amendment, I would conclude that the summary clearly and unambiguously advises the voter of what he or she is voting on. For example:

RELIGIOUS FREEDOM. – Proposing an amendment to the State Constitution providing that no individual or entity may be denied, on the basis of religious identity or belief, governmental benefits, funding, or other support, except as required by the First Amendment to the United States Constitution, and deleting the prohibition against using revenues from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

I also cannot agree that the title is misleading. The law requires that a proposed amendment be given a ballot title by which the measure is commonly referred to or spoken of and may not exceed 15 words in length. § 101.161(3)(a), Fla. Stat. The section of the constitution sought to be amended is, in fact, titled "Religious Freedom." The subject matter of the proposed amendment clearly deals with this subject. It is a non-political, non-emotional title. Plaintiffs have not suggested a more descriptive title and I can think of none other.

AMENDMENT TO SECTION 101.161(3)(b), FLORIDA STATUTES

Plaintiffs' second claim is a separation of powers challenge to section 101.161(3)(b), Florida Statutes, which allows the Attorney General to correct court-identified deficiencies in a ballot statement. Plaintiffs concede that the Legislature may delegate the task of drafting the ballot statement in the first instance to the Attorney General. Indeed, prior to 1973, in the case of legislatively proposed amendments, the Department of State—an executive branch agency —

was responsible for furnishing the ballot statement that appeared on statewide ballots. *See, e.g.*, § 101.161, Fla. Stat. (1971).

They claim, however, that once the Legislature drafts a ballot statement, only it can modify it. This is unconvincing. If it's okay to delegate the task of writing the entire summary, it doesn't make sense that the task of modification cannot be delegated. And that's because, in either event, the ballot summary, unlike the proposed amendment itself, is not legislation. It does not become law upon the passage of the amendment. The law under review does not, after all, give the Attorney General authority to re-write the amendment itself – only the description of it.

Nothing in Florida's Constitution assigns the responsibility of drafting or correcting ballot statements to the Legislature or any other specific entity or person. Because the Constitution is silent on who may draft or correct ballot statements, section 101.161(3)(b)'s assignment of ballot correction responsibilities to the Attorney General does not implicate Florida's separation of powers doctrine. *See Fla. Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Serv.*, 7 So. 3d 511, 515 (Fla. 2009) (quoting *State v. Palmer,* 791 So. 2d 1181, 1183 (Fla. 1st DCA 2001) ("[a] branch of government is prohibited from exercising a power *only* when that power has been constitutionally assigned *exclusively* to another branch.

Moreover, the Florida Supreme Court, on more than one occasion, has specifically requested that the Legislature come up with some procedure by which ballot statements, found to be defective, can be corrected in sufficient time to allow a vote on the proposal. *See, e.g., Askew v. Firestone,* 421 So. 2d at 157 (Overton, J. concurring); *Evans v. Firestone*, 457 So. 2d 1351, 1358 n. (Fla. 1984) (McDonald, J., concurring) (suggesting that the Legislature charge the Secretary of State with the preparation of ballot statements for initiatives); *id.* at 1361 (Shaw, J., concurring) (same); *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 622 (Fla. 1992) ("we urge the

legislature to consider amending the statute to empower this Court to fix fatal problems with ballot summaries, at least with respect to those amendments proposed by ... the legislature"); *Armstrong v. Harris* 773 So.2d 7 at 25-26 (Fla. 2000) ("the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language") (Pariente, J. specially concurring); *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 651 (Fla. 2010) ("we have previously asked the Legislature to establish a procedure that would avoid this problem [but it] has yet to establish such a process.")

It is doubtful that the Florida Supreme Court, having endorsed the idea, would find this legislative remedy unconstitutional, and nor do I. It seems an imminently practical and legal means to make sure ballot summaries are clear and unambiguous without depriving the voters a chance to pass on the merit of a proposal.

As I have found that preparing and correcting ballot statements is not the exercise of legislative power, I do not discuss at length the alternative argument advanced by the Defendants, i.e., that even if it was a legislative power, it has been properly designated to the Attorney General. Suffice it to say that, for the reasons outline by the Defendants in their motion and response in opposition to Plaintiffs' motion, I find that this power has been lawfully delegated.

The authority to correct ballot statements is constrained within strict statutory and case law parameters, with definite standards that control the contents of a ballot statement and its title. It is constrained by the language of a legislatively proposed amendment itself, with which any modified language would have to be consistent. It is further limited to correcting deficiencies identified by a court, and any such corrections are again subject to judicial review.

CONCLUSION

Accordingly, it is ORDERED and ADJUDGED as follows:

1. The Plaintiffs' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART;
2. The Defendants' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART;
3. The Court ENJOINS the Defendant, Kurt Browning, in his official capacity as Florida Secretary of State, from placing Amendment 7 on the ballot for the November 2012 general election;
4. The Court DECLARES that section 101.161(3)(b)(2) is constitutional.
5. The injunction in paragraph 3 is without prejudice for the attorney General to correct the deficiencies noted in this order and to submit such corrected ballot summary to the court for review, in accord with section 101.161(3)(b)(2), and jurisdiction is specifically reserved for such purpose.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida this 13th day of December, 2011.

TERRY P. LEWIS, Circuit Judge

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All Counsel of Record