

IN THE SUPREME COURT OF FLORIDA

JIM SMITH, as Secretary of State
of the State of Florida,

Appellant,

vs .

Case No. 80,438

AMERICAN AIRLINES, INC.; DELTA
AIRLINES, INC.; FLAGSHIP AIRLINES,
INC.; NORTHWEST AIRLINES, INC.;
UNITED AIR LINES, INC.; USAIR,
INC.; FLORIDA PORTS COUNCIL, INC.;
PANAMA CITY PORT AUTHORITY; PORT
EVERGLADES AUTHORITY; GATX
TERMINALS CORPORATION, and HVIDE
SHIPPING, INCORPORATED,

Appellees.

ANSWER BRIEF OF APPELLEES,
AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.;
FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.
UNITED AIR LINES, INC.; USAIR, INC.

On certified appeal from the Circuit Court
for the Second Judicial Circuit

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SUMMARY OF ARGUMENT

A valid ballot summary must include a clear and unambiguous explanation of the measure's chief purpose and material changes in the law, must not include language which is affirmatively misleading, and must not omit material facts necessary to make the summary not misleading. The trial Court correctly found that the ballot summary on Proposition 7 failed to meet all of the essential requirements for validity and was defective in four separate respects.

The summary fails to notify the voter that Proposition 7 would change the tax rate on leaseholds and government owned property which is used for commercial and residential purposes from the intangible personal property rate, at a maximum of 2 mills, to the real property rate, at a maximum of 30 mills. The proposal itself specifies taxation as "real property," whereas the summary never mentions real property and refers only to "ad valorem" taxation, a term which refers to both real and personal property.

Proposition 7 imposes the real property rate on all leaseholds and government owned property created after November 5, 1968, but preserves the intangible personal property rate for such leaseholds created prior to November 5, 1968. The wording of the ballot summary creates the impression that leaseholds created prior to 1968 will be taxed for the first time and fails to inform the voter that leaseholds prior to November 5, 1968 are actually receiving a substantial tax benefit.

The ballot summary refers only to leaseholds "entered into since 1968" and those "entered into prior to 1968". It thus fails to inform the voter that such leaseholds entered into during the last two months of 1968 will be taxed as real property and those entered into during the first ten months of 1968 will be preserved at the intangible personal property rate.

It appears that Proposition 7 is not intended to eliminate the historic exemptions for educational, literary, scientific, religious, charitable and public purpose uses. However, the ballot summary indicates that all leaseholds would be taxed by virtue of Proposition 7.

While it is not necessary for a ballot summary to explain every detail and all possible effects of a proposition, it must give notice of all material changes in existing law. A summary can easily be written which clearly, unambiguously and accurately summarizes Proposition 7 in only **54** words.

This Court has recognized that the availability of information regarding a proposed constitutional amendment from public sources is not an acceptable alternative to a complete and accurate ballot summary.

The lower Court did not deny the people the right to vote on Proposition 7, **but** insisted that the proponents of the proposition adequately inform the voters of what they were being asked to vote upon.

ARGUMENT

This Court has set forth the essential elements of a valid ballot summary:

1. It must include a clear and unambiguous explanation of the measure's "chief purpose" and material changes in the law. Askew v. Firestone, 421 So. 2d 151 (Fla. 1982); Wadhams v. Board of County Comm'rs, 567 So. 2d 414 (Fla. 1990), Section 101.161 Fla. Stat.'
2. It may not include language which is affirmatively misleading. Evans v. Firestone, 457 So.2d 1351 (Fla. 1984).
3. It may not omit material facts necessary to make the summary not misleading. Advisory Opinion to the Atty. Gen., 592 So.2d 225 (Fla. 1991); Askew v. Firestone, supra.

The trial Court found that the ballot summary for Proposition 7 failed to meet all of the foregoing requirements. The Court grouped the defects which it found in the summary into four separate categories as discussed below.

I

The trial Court correctly found that the ballot summary fails to notify the voter that Proposition 7 would change the tax rate on leaseholds in government owned property used for commercial and residential purposes from the intangible personal property rate to the real property rate.

The appellant Secretary of State ["the Secretary"] states that, "The chief purpose of Proposition 7 is to constitutionalize

¹ Section 101.161 refers to "chief purpose" in the singular. However, logic and this Court's opinions dictate that the summary must give notice of all material changes in existing law.

taxation of leaseholds in government property." [Brief of Appellant, p. 13] The statement suggests that Proposition 7 simply elevates existing law from statutory to constitutional status. Such a conclusion can indeed reasonably be inferred from the ballot summary, a fact which will be discussed further below. It is, however, clearly erroneous.

The very first sentence of Proposition 7 provides that leaseholds in government owned property entered into after November 5, 1968, "shall be taxed as real property for ad valorem tax purposes." [emphasis supplied] The provision would effectuate a major change in the longstanding tax policy of this state. It would have a substantial impact upon a targeted group of taxpayers and, indirectly, consumers purchasing goods **and** services from such taxpayers.

Leaseholds in government owned property, to the extent that they are used for residential and commercial purposes, are currently subject to ad valorem taxation as intangible personal property. §196.199(2)(b), Fla. Stat. Effective January 1, 1993, the intangible tax rate in Florida will be 2 mills, the constitutional maximum pursuant to Article IV, Section 2 of the Florida Constitution. As the trial Court noted, Proposition 7 would require that such leaseholds be taxed as real property at a rate of up to 30 mills as provided in Article VII, Section 9(b), Florida Constitution. Hence, adoption of Proposition 7 would result in a potential increase to such taxpayers of up to fifteen times the current rate.

While Proposition 7 expressly requires that taxation of such entities, "shall be taxed as real property for **ad valorem tax purposes,**" the ballot summary makes no reference whatever to "real property." Instead, it states that the proposed amendment "subjects leaseholds in government owned property entered into since 1968 to ad valorem taxation." [emphasis supplied] The term "ad valorem" tells the voter nothing about the actual change to be effected because it applies to both real and personal property. "Ad valorem" is defined by Section 192.001, Florida Statutes, as "a tax based upon assessed value of property". The context of the statutory provision clearly indicates that it applies to personal, tangible and intangible property. The statutory definition of ad valorem is consistent with its general dictionary definition: "imposed at a rate percent of value," Webster's Ninth New Collegiate Dictionary (1988); "a tax levied according to the value of the property, merchandise, etc. being taxed," The Random House Dictionary of the English Language, (2d Ed. 1987).

Amicus provides the Court with a partial citation to the Black's Law Dictionary definition of ad valorem, deleting the important part shown below in shaded text:

AD VALOREM...According to value. A tax imposed on the value of property. The more common ad valorem tax is that imposed by ~~st tes counties, and cities~~ on real estate....Ad valorem taxes, can, however, be imposed upon personal property; e.g. a motor vehicle tax may be imposed upon the value of an automobile and is therefore deductible as a tax. A tax levied on property or an article of commerce in proportion to its value, as determined by assessment or appraisal.

Even the abbreviated Black's definition cited by Amicus simply states that real property tax is the more common form of ad valorem taxation, not the more common use of the term ad valorem. The undeniable fact is that by any definition, statutory, legal or English language, ad valorem taxation is not limited to real property.

Amicus argues that the public is given sufficient notice of the fact that the phrase "ad valorem taxation" in the first sentence of the summary really means real property taxation when it is read in conjunction with the use of the phrase "taxed as intangible personal property" in the second sentence of the summary. However, such a conclusion does not necessarily follow. **As** noted above, the Secretary has asserted that the "chief purpose" of the proposition is to "constitutionalize taxation of leasehold and government property," and this is precisely the danger of the summary as worded. **A** voter reading the summary could rationally conclude from the first sentence that the purpose of Proposition 7 is simply to constitutionalize current law requiring that government owned leaseholds entered into after 1968 be taxed at an ad valorem rate, and that the discretion to tax them **as** real or personal property continues to be left to the Legislature. The same voter could rationally conclude from the second sentence of the summary that Proposition 7 limits the Legislature's discretion with regard to leaseholds entered into prior to 1968 and mandates that they be taxed **as** intangible personal property. While such a conclusion logically flows from the ballot summary, it is patently and significantly inaccurate. In any case, the summary is at best

ambiguous. The drafter of the summary could easily have avoided the problem by simply using the term "real property" just as it was used in Proposition 7 itself.

The Secretary states that the trial Court's chief concern "seems to be that voters are not told the exact tax rate that will be imposed on post-1968 leases" and that to do so would be impossible because of the substantial variance in tax rates from one area to another. The statement misses entirely the trial Court's point. The problem is not the failure of **the** summary to advise the voter of the "exact tax rate" that would be imposed under Proposition 7, but **the** failure to inform the voter that the maximum tax rate would be increased by more than 15 times for commercial and residential property.

Finally, Amicus asserts that this entire issue is simply one of "semantics" and "form over substance". It is quite unlikely that Amicus could locate many taxpayers who would consider the difference in **the** terms "2 mills" and "30 mills" to be simply a matter of semantics or who would consider an increase in taxes of up to fifteen times the current rate to be **a** matter of form over substance.

II

The trial Court correctly found that the ballot summary is misleading because it creates the impression that leaseholds in government owned property entered into before 1968 would be taxed for the first time, and fails to inform the voter that such leaseholds would actually be granted a significant tax privilege.

As previously noted, leaseholds in government owned property which are used for commercial or residential purposes are currently taxed at the intangible personal property rate. The ballot summary states, "All leaseholds in government owned property entered into prior to 1968 . . . shall be taxed as intangible personal property." The trial court found that the statement is misleading because the phrase "shall be **taxed**" creates the impression that such leaseholds are to be taxed for the first time. The Court further found that the summary was misleading because it, "fails to inform the voter that the real purpose of the provision is to exempt a select class of taxpayers from the newly imposed and substantially higher real property rate." [Final Judgment, p. 4] In fact, testimony before the Commission indicated that the major impetus to the provision was to exempt a specific group of taxpayers, primarily the Daytona Beach Speedway in Valusia County. [Pl. Exh. 5, Tr. 5/6/92, pp. 35, 36, 44, 47] While the ballot summary certainly does not have to inform the voters of which entities would be exempted, it surely must give them reasonable notice that the purpose of the **second** provision is to grant a major exemption to a select class of taxpayers.

The Secretary's only response is that the subject sentence "precisely states the tax treatment accorded pre-1968 leases." [App. Brf., p. 18] This Court has held on two separate occasions that the fact that a ballot provision is technically accurate does not render the provision valid if it fails to inform the voter of its actual purpose. Askew v. Firestone, supra; Wadhams v. Board of County Com'xs, supra. In Askew the ballot summary was a completely accurate statement which appeared to impose a new obligation on public officers when, in fact, it weakened an existing obligation. In Wadhams the entire proposal was included in the ballot rather than an explanatory statement. This Court struck the provision from the ballot stating:

Similar to the ballot summary at issue in Askew, the present ballot "is deceptive, because although it contains an absolutely true statement, it omits to state a material fact necessary in order to make the statement made not misleading." Askew, 421 So.2d 158 (Ehrlich, J., concurring). The only way a voter would know what changes were being effected by an affirmative vote on the ballot would be to know what section 2.11 of the county charter provided prior to the amendment.

Wadhams, supra at 416.

Unlike Askew and Wadhams, the ballot summary on Proposition 7 is not even an entirely accurate statement of what the proposal does. However, it clearly fails to inform the voter that the singular purpose of the reference to pre-November 5, 1968 leaseholds is to create an exemption for a limited few. Indeed, it not only exempts a select class from the real property rate that Proposition 7 would newly impose upon all other similarly situated taxpayers,

but it creates a new constitutionally protected right to the intangible personal property rate for such class. Currently, the Legislature possesses the discretion to impose either rate on such taxpayers.

III

The trial Court correctly found that the ballot summary fails to inform the voter that leaseholds in government owned property created during the first ten months of 1968 would be taxed as intangible personal property and leaseholds created during the last two months of 1968 would be taxed as real property.

Proposition 7 subjects leaseholds in government owned property created after November 5, 1968 to the real property tax rate and preserves the intangible personal property rate for such leaseholds created prior to November 5, 1968. The ballot summary, however, states that Proposition 7 subjects leaseholds in governmental owned property "entered into since 1968 to ad valorem taxation" and that such leaseholds in government owned property "entered into prior to 1968" shall be taxed at the intangible personal property rate. Read literally, the summary indicates that such leaseholds entered into during the entire year 1968 are not taxed at all. The trial court found that the summary was defective because it specifically failed to inform the voter that leaseholds created during the last two months of 1968 would be subjected to tax as real property and that those created during the first 10 months of 1968 could not be taxed at a rate higher than intangible personal property. The court noted that, "at best . . . the

language falls far short of the statutory requirement that it be 'Clear and unambiguous' in stating **the** purpose of **the** proposed amendment.' [Final Judgment, p. 5]

It cannot be denied, **and** appellants **make no** attempt to deny, that the language of the ballot summary is clearly and unnecessarily misleading with respect to the year 1968. The Secretary's only defense is that there was **no** proof **that** any leases **were** actually entered into in the year 1968. Counsel makes **the** statement **that** "a proposed amendment should not be removed from the ballot because of a problem that is strictly hypothetical," citing Justice Overton's concurring opinion in Askew v. Firestone, supra at 157. [Brief of Appellant, p. 18] A careful scrutiny of Justice Overton's opinion and, for that matter, the entire opinion of the Court fails to disclose any such statement. More importantly, the concept should not be adopted by this Court.

The premise of the Secretary's statement is that a ballot summary, even though indisputably misleading on its face **as** to a material fact, should be upheld unless opponents **can** factually prove that there would be an actual impact in connection with the subject of the misleading statement in the event of passage. Such **a** burden would **be** unworkable. **It** would often **be** difficult, **if not** impossible for the opponents of a measure to obtain such information, particularly in the limited time frame available for a timely challenge to a ballot provision. Furthermore, as a matter of public policy as well as practicability, the burden should be upon the drafters of **the** ballot summary **to be** certain **that it is** **accur-**

ate, not upon the opponents of the proposition to prove what the effect of a misleading summary would be.

IV

The trial Court correctly found that the ballot summary is misleading because it erroneously indicates that exemptions for educational, literary, scientific, religious, charitable and public purpose uses would be eliminated.

It is undisputed that leaseholds in government property used for educational, literary, scientific, religious, charitable and public purposes, and government-to-government leases have long been exempt from property taxes. An elimination of those exemptions would be a major change in the historic tax policy of this state. Proposition 7 itself, as noted by the trial court, is unclear as to whether or not an elimination of such exemptions is intended. Comments by the Commission indicate that it was not its intention to eliminate such exemptions. [Pl. Exh. 5, Tr. 5/6/92, pp. 12-14, 29, 30, 59, 65, 97, 137] Referring to whether or not Proposition 7 is intended to eliminate such exemptions, the trial Court stated:

If it is intended to do so, then the ballot summary should more clearly alert the voter to this major change. If, on the other hand, it is not intended to eliminate such exemptions, then the ballot summary is clearly misleading when it states that the proposed amendment "Subjects leaseholds in government owned property" entered into since 1968 to taxation and that "all leaseholds in government owned property" entered into prior to 1968 "shall be taxed". Whatever construction the amendment itself might receive, the ballot summary surely does not

clearly and unambiguously inform the voter of the impact of the amendment on these important and longstanding public policies.

[Final Judgment, p. 6]

The Secretary advances two arguments in response to the trial court's finding. First, the Secretary states that the failure of the summary to tell the voter that a certain change is not being made "is hardly misleading." The point might be well taken were it not for the fact that the ballot summary includes affirmative language that misleadingly tells the voter that such changes are being made. Second, the Secretary argues:

. . . the summary is absolutely true because ~~all~~ are constitutionally subject to taxation unless the Legislature, pursuant to [article VII, section] 3(a), creates exemptions by law for this narrow class. The operative word "subjects" as used in the summary, does not mean that there can be no exceptions. "Subject", as a verb, means "to expose to."

[App. Brf., p. 20] Undoubtedly, section 101.161 and this Court have required that ballot summaries be "clear and unambiguous" in order to avoid subjecting the voter to the necessity of engaging in just this type of attenuated analysis. Furthermore, the Secretary's argument ignores the second sentence of the summary which does not use the word "subjects," but states that "all leaseholds in government owned property entered into prior to 1968 * . . . shall be taxed as intangible personal property." [emphasis supplied]

The defect is not, **as** characterized by the Secretary, a "rather minor ramification." It is not unreasonable to assume that the language would lead some voters who believe in such exemptions to vote against the measure and others who are opposed to such

exemptions to vote for the measure solely because of the misleading wording of the ballot summary.

* * * * *

Appellants cite this Court's statements that the ballot summary "need not explain every detail or ramification of the proposed amendment," In Re Advisory Opinion to the Atty. Gen., 592 So.2d 225, **228** (Fla. 1991) and, "inclusion of all possible effects . . . is not required in the ballot summary." Grose v. Firestone, supra. This Court has drawn a clear distinction between the type of information referred to in the above cases and, on the other hand, information which informs the voter of material changes a proposal would make in existing law, as reflected in Askew, supra, Evans, supra and Wadhams, supra. A review of the holdings in the above cases suggests that a ballot summary can effectively be tested as to whether or not it meets minimum requirements by posing the following question:

Would a voter who is knowledgeable about the subject of the proposal be able to discern from the ballot summary alone what material changes in existing law would be effected by the proposal.

If the answer is no, the summary is defective. If the answer is yes, the summary is sufficient even if the voter would have to resort to extrinsic information to appreciate all of the potential ramifications of the proposal's adoption.

In the case of Proposition 7, the answer is necessarily no. Even a voter well versed in Florida ad valorem tax law would not be able to determine from a reading alone of the ballot summary that

Proposition 7 shifts taxation of leaseholds entered into after November 5, 1968 from the intangible personal property rate to the real property rate, that leaseholds entered prior to November 5, 1968 are granted an exemption from this change, and that the exemptions of property used for educational, literary, scientific, religious and charitable purposes would be retained.

Both the Secretary and Amicus assert that it would be "virtually impossible" to write a 75-word ballot summary that would eliminate the defects identified by the trial Court. The assertion is simply wrong. The following 54-word summary clearly, unambiguously and accurately summarizes Proposition 7:

Subjects leaseholds in government owned property entered into since November 5, 1968, which are currently taxed as intangible personal property, to real property tax rates. Such leaseholds entered into prior to November 5, 1968, and subsequent renewal options and extensions provided in the initial lease, shall continue to be taxed as intangible personal property.

The Secretary advances two arguments that have previously been attempted and have been rejected by this Court. First, the Secretary alleges that this Court has "repeatedly" stated that the voters have a duty to learn the details of a proposal before entering the voting booth. [Brief of Appellant, p. 6] The only authority cited for this is the District Court of Appeal opinion in Metropolitan Dade County v. Shiver, 365 So. 2d 210 (3d DCA 1978). Even in that opinion, the Court's comments were made within the context of its statement that, "There is no requirement that the referendum question set forth the ordinance verbatim nor explain

its complete terms at great and undue length." Id at 213. In fact, this Court has "repeatedly" and specifically rejected the suggestion that availability of the details of a proposition from public sources can be an acceptable substitute for a complete **and** accurate ballot summary. In Askew v. Firestone, supra at 156, the Court stated:

The burden of informing the public should not fall only on the press and opponents of the measure--the ballot title and summary must do this.

In Wadhams v. Board of County Comm'rs, supra at 417, this Court echoed its earlier statement:

The Board argues that the majority in the decision below correctly concluded that there was no reason to invalidate the amendments based on voter confusion because the voters were afforded ample opportunity to become informed on the issue before the election by public hearings, advance publication of the proposal, and media publicity. We reject this argument. **As** this Court stated in Askew, "the burden of informing the public should not fall only on the press and opponents of the measure--the ballot...summary must do this."

[Emphasis by Court].

It is not surprising that this Court has consistently rejected the last argument since it could be advanced to justify virtually any ballot summary, regardless of how misleading or incomplete. The same is true of the Secretary's argument that the Court should not "deny the people of Florida the right to vote on a proposed amendment". [Brief of Appellant, p. 6] The Court is not, of course, denying the people the right to vote, but insisting

that the proponents of a constitutional amendment adequately inform the voters of what they are being asked to vote upon. The point was highlighted by this Court in Wadhams, supra, where the challenge to the ballot summary was not made until after the election in which the measure had passed. This Court stated:


We also reject the Board's argument that the favorable vote cured any defects in the form of the submission. This defect was more than form; it went to the very heart of what section 101.161(1) seeks to preclude. Moreover, it is untenable to state that the defect was cured because a majority of the voters voted in the affirmative on a proposed amendment when the defect is that the ballot did not adequately inform the electorate of the purpose and effect of the measure upon which they were casting their votes. No one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the statute, and had been told "the chief purpose of the measure,"

Id.

CONCLUSION

The Court is respectfully urged to affirm the decision of the lower Court.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery upon Louis Hubener, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1603, Tallahassee, Florida 32399-1050; Cass Vickers, Esquire, Messer, Vickers Law Firm, P.O. Box 1876, Tallahassee, Florida 32302; and by U. S. Mail upon S. LaRue Williams, Esquire, 150 S. Palmetto Avenue, Box A, Daytona Beach, Florida 32114 and John R. LaCapra, Esquire, Florida Ports Council, 2701 Ponce de Leon Blvd., Suite 203, Coral Gables, Florida 33134 on this 22nd day of September, 1992.



BARRY RICHARD

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